

**Supreme Court of Newfoundland and Labrador, Court of Appeal
While v. Woolworth (F.W.) Co.
Date: 1996-04-23**

Michael Crosbie, for the Appellant;

Ian Kelly, for the Respondent.

(1993 No. 148)

April 23, 1996.

[1] MARSHALL, J.A.: This is an appeal by Mr. Thomas White who claims that a decision rendered in the Trial Division, allowing his claim for wrongful dismissal against Woolworth Canada Inc., failed to award adequate compensation to him. For its part, the Woolworth Company is cross-appealing contending the trial judge erred in finding Mr. White had been wrongfully dismissed and in failing to find that his employment contract was frustrated by his disability. Alternatively, the cross-appeal maintains that, if there was a dismissal that should have been accompanied with a notice of termination, the judge erred in concluding that compensation was payable in lieu of such notice in view of Mr. White's inability to work.

**The Circumstances Leading
To The Claim**

[2] On April 17, 1990, Mr. White, who then was 41 years old and had been 22 years in the employ of the Woolworth Company, injured his back whilst lifting a box of blinds at the company's Village Mall premises in St. John's. At the time Mr. White occupied the post of section manager with responsibility for some twelve departments retailing from those premises household fabrics, hardware and accoutrements. As such, he filled a middle management role in this substantial retail outlet of the company at the Village Mall which the overall store manager in his evidence at the trial depicted as an important position. It was initially expected that Mr. White would be absent from work from six to ten weeks. This expectation did not materialize, however.

[3] In January, 1991, still unable to work, Mr. White notified the store manager that he would require surgery in the near future. This apparently precipitated a reference to the company's head office in Toronto. A letter ensued from head office, dated February 4, 1991, pointing out to Mr. White that his recurring back injury seemed to suggest that he would be

unable to assume his responsibilities of section manager and the need of Woolworth to "continue to operate our business and protect our market share". It then advised Mr. White it was serving notice that:

"We expect that Thomas White will assume his duties of Section Manager ... on or before February 21, 1991. Failure to assume that position on or before February 22, 1991, will be taken as your resignation."

[4] Mr. White was unable to comply with this deadline to resume work. Through his solicitors, a reply was directed to his employer by letter dated February 12, 1991, advising that it would be impossible for him to comply with the company's expectation and detailing, by way of explanation, the ongoing medical treatment and rehabilitation programme being followed. The letter ended with a request for reconsideration of the deadline set for Mr. White's return to work. No such forbearance was forthcoming. Although other communications subsequently passed in relation to the matter, the letter of February 4th, 1991, was regarded by Woolworth as effectively signifying the end of its employee relationship with Mr. White upon his failure to report for work on the stipulated date. As will presently be seen, however, the company viewed the letter as notice that it would treat the contract as frustrated if the deadline was not met, while Mr. White depicted it as terminating a subsisting contract of employment. As such, it became a focal point in the wrongful dismissal action.

[5] It should be noted that during his absence from work, Mr. White became entitled to Workers' Compensation Benefits equal to 90% of his salary. At the date of its February 4th letter, Woolworth had been "topping up" his salary. Under this arrangement, the company continued to pay Mr. White's salary and to maintain his employee benefits, receiving from the Workers' Compensation Board the amount that would have been paid to Mr. White directly. Notwithstanding his inability to comply with the demand of February 4th to return to work, Mr. White received his regular salary from the company by direct deposit to his bank account on March 15, 1991. No further remuneration was received from this source, however. Since then, Mr. White has received workers' compensation remittances directly from the Board.

[6] As a result of these events, Mr. White commenced an action against his former employer in November of 1991 for wrongful dismissal without cause or notice. His statement of claim demanded general damages; damages for loss of salary and benefits in lieu of

notice; punitive damages; return of moneys invested in the pension plan; vacation pay; and, judgment interest.

The Trial Judge's Disposition Of The Claim

[7] While acknowledging that the claim raised subsidiary issues, the trial judge identified the main ones to be whether Mr. White had been dismissed with insufficient notice, and, if he was, whether the contract of employment was frustrated, thereby dispensing with any reasonable notice requirement.

[8] After referring to the facts, the judge identifies the difficulty presented by the case to be Mr. White's disability at the time of termination of his contract of employment that was continuing at the date of trial. Taking the letter of February 4th as a letter of termination which became effective when Mr. White did not show up for work the following February 22nd, the judge commences his analysis by first turning to the defence of frustration raised by Woolworth.

[9] The judge begins his treatment of this defence by citing case law to the effect that short illness would not necessarily frustrate a contract of service. In this vein, he then asserts that some legal authorities suggest periods of up to two years have been accepted as temporary; although, he acknowledges, the majority speak of lesser time spans. At this point, he makes the following observations which, as will presently be seen, are drawn directly in issue in this appeal:

"We know from hindsight that the Plaintiff in this case has been disabled for more than three years, and I do not know with any certainty when and if he will be able to return to his former type of work. To determine whether or not there is frustration, I must apply my mind to the circumstances prevailing at the time the notice was given. ... At that time, through communications between the employer and the employee, it was understood that Mr. White was still disabled and would require an operation on his back to remedy that problem. ... There is no evidence to suggest that the employer knew that White would take so long to recover."

[10] The judge then referred to a copy of a memorandum dated February 1, 1991, in Mr. White's personnel file maintained at the employer's head office which was consensually entered into evidence. It represented a note to the file recording the substance of Mr. White's communication to the Village Mall Store Manager in January of 1991 to the effect that the

latter had informed the author of the memo that Mr. White was still in "great pain", was receiving therapy and would possibly be undergoing surgery in the near future. The judge, however, placed particular stress upon a notation in the company records immediately following this memo from Woolworth's Director of Personnel at head office suggesting the company should "layoff Mr. White, if possible.

[11] It was this note of the Director of Personnel, coupled with his view of the relative shortness of Mr. White's absence in the context of all circumstances of his employment, which led the judge to conclude that, considering the facts available to his employer in February of 1991, it was unreasonable to deem the employment contract frustrated and that he was then entitled to twelve months' notice of termination. His judgment expresses his reasoning in the following terms:

"It seems to me from the evidence that the reason for White's dismissal was not only the fact that he was off work, but also other reasons whereby they deemed him dispensable. Further, the time period of ten months from the time of the injury to time of dismissal seems to be a rather short period in order to give him notice of termination, based on long-term or permanent disability. It is my view that a notice of at least twelve months should have been given to him at that time in order to permit him to either get back to work or to prepare for alternative employment."

[12] The judge then turned to the damages. With his salary no longer being "topped up" by his former employer as it was prior to his dismissal, the judge measured the annual loss on this account, being the difference in his base salary and the workers' compensation benefits that he would continue to receive, to total \$433.60. His loss of discount on purchases from Woolworth's to which he would have been entitled as an employee was found by the judge to be worth \$500.00 annually and his loss of yearly bonus for performance was set at \$1,500.00. Accordingly, Mr. White's total losses were set by the trial judge at \$2,433.60. Against this sum was deducted \$1,702.92 representing overpayments, taking into account the earlier mentioned March 15, 1991, remittance to Mr. White's bank account by the company and making allowance for holiday pay due to him. The net amount that the judge found to be payable to Mr. White was \$730.68 which the trial judge describes as "a rather trivial amount" in the circumstances.

[13] Before concluding his judgment, the judge states he did not agree with the position advanced by Mr. White's counsel that his client "would be entitled to Workers' Compensation

and an additional sum for insufficient notice". Citing authority to support this position, he concludes his decision in stating:

"The Workers' Compensation fund is a fund provided by his employer. He does not contribute to it. It is my opinion that the law does not permit him to be paid salary in lieu of notice during a time when he is receiving compensation. For these reasons, the Plaintiff is entitled to recover from the Defendant only \$730.68. In these circumstances, it seems to be that it would not be appropriate to award costs against the Defendant. I therefore make no order as to costs so that each party may bear their own."

Approach To Be Adopted In This Appeal

[14] It will be noted from the foregoing that Mr. White succeeded in ascribing liability to the Woolworth Company for wrongful dismissal. His complaints are essentially directed to the damages awarded. They center primarily upon alleged judicial error in setting too short a notice period; in the deduction of worker' compensation benefits; and, in the failure to award punitive damages.

[15] On the other hand, through the cross-appeal, Woolworth's is attacking the finding of liability itself, claiming the judge erred in finding it unreasonable to consider the employment contract frustrated. The cross-appeal then is directed to the sphere of damages. In this connection, it raises independently the issue whether Mr. White had any entitlement to be paid since he was unable to work or perform his duties within the prescribed twelve month notice period, even if it was required. The residue of the cross-appeal generally addresses issues on damages corresponding to those taken in the appeal, but from an opposite perspective, e.g., it claims the judge was correct in deducting workers' compensation benefits from the award.

[16] Thus, in order to present a sequential discussion of the issues raised in this proceeding, inquiry will first be had into liability as raised through the argument of frustration on the cross-appeal. Then, an evaluation of the positions adopted with respect to the judge's findings on damages will be undertaken. Since those positions often meld, one with the other, albeit from differing perspectives, those aspects of the appeal and cross-appeal will be considered in tandem, once more in the interest of an orderly treatment of all of the issues.

[17] In defining the approach which will be adopted in considering the parties' positions in this appeal, mention needs also to be made of the sense of moral blameworthiness with which many of Mr. White's arguments are interlaced and which his counsel entreats this court to adopt. This tone was set in the opening words of Mr. White's factum where the case is presented as "important to everyone in Canada and particularly employees who risk injury when fulfilling their employment duties". Contending that what is at issue here "is how injured workers can be treated by employers", it goes on to caution that Mr. White "could be someone in your family, or he could be your neighbour or he could be you".

[18] The oral argument of Mr. White's counsel was couched in the same vein. In his opening remarks from the well of the court he stated that this appeal involved not the right to terminate employment, but the unequal position of power enjoyed by employers. Then he expressed the view that the writing of a letter of dismissal to an employee who was in great pain was incapable of justification and underscored a perceived lack of remorse, repentance and apologies in this instance. He suggested an employer is not entitled to be a "brute" with an individual like Mr. White who wanted to work, but could not, and invited consideration of the anxiety his client was experiencing. Like sentiments interspersed his entire argument.

[19] While some reference will be made to this line of moral censure of the employer's actions in discussing the judge's failure to award punitive damages, where it might conceivably have some relevance, it appears important to note, in view of the emphasis laid on it by counsel, that his invitation to treat the other issues raised in this appeal from this standpoint is declined. With respect, such an approach would not aid the required analysis of whether the employment contract was frustrated, or breached, and of the entitlement and adequacy of compensation, other than aggravated or punitive damages, to which Mr. White might be entitled.

[20] On the footing of the foregoing setting, therefore, this decision will now proceed to the first question of frustration.

Basis Of Addressing Frustration Issue

[21] In **Davis Contractors Ltd. v. Fareham U.D.C.**, [1956] 2 All E.R. 145 (H.L.), Lord Radcliffe made the following commentary on the law of frustration, at p. 160:

"... frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

[22] This generally accepted statement of the basis of frustration of contracts clearly distinguishes failure of performance as a result of a party's fault, which creates a breach, and a supervening event which was unforeseen by the parties and whose effect would render the contract's performance radically different from what was undertaken when the contractual obligations were undertaken. Lord Radcliffe went on to emphasize that to invoke frustration a party must be able to show, not hardship or inconvenience or material loss itself, but that the performance demanded would "be a different thing from that contracted for", i.e. not that which the party had promised to do.

[23] The frustrating event, therefore, must have been beyond the contemplation of the parties and go to the very root and foundation of the contractual relationship. In long term employment contracts, such as this appeal presents, absences from work from time to time for illness or injury would certainly be within the parties' contemplation. However, it is temporary absences which would be anticipated, and not protracted ones of such a duration as to strike at the root of the contract rendering the continued performance of the contractual engagement a relationship "radically different" from that envisaged by the parties on entry into the employment agreement. It is necessary to determine in the circumstances prevailing whether Mr. White's absence from work had passed from a temporary one, which the parties must be taken to have anticipated, to a permanent one bringing their reciprocal employment obligations to an end.

[24] Before addressing this question, it is essential to identify the relevant period to which counsel may point in pressing his claim that this contract had been frustrated i.e., whether it is to be the ten month period preceding Woolworth's letter of February 4, 1991, that the trial judge took as a termination, or the more than three year period preceding the trial. As the foregoing resume of his judgment shows, the judge considered solely the circumstances prevailing at the time the letter was sent in arriving at his conclusion that it was unreasonable to deem the employment contract frustrated. Counsel for Woolworth challenges this stance by the trial judge, contending it to be wrong in law and that the subsequent time span also ought to have been taken into consideration in assessing whether the contract was frustrated.

[25] The relevant period is a major issue inasmuch as, if counsel's position is correct, the period of absence against which the frustration argument must be measured would approach thirty-eight, as opposed to ten months. As he points out, no cases whose circumstances may be comparable to those in this appeal have been put forth holding a contract of employment to subsist where the employee had been unable to work for a continuous period in excess of three years. He does offer, however, two cases in support of his premise that the trial judge erred in failing to look at events subsequent to the notice of termination to determine if frustration had occurred, viz: **Dartmouth Ferry Commission v. Marks** (1904) 34 S.C.R. 366; and **Maclellan v. H.B. Contracting Ltd.** (1990) 32 C.C.E.L. 103 (B.C.S.C.).

[26] **Dartmouth** involved an action by a ferry steamer captain's estate for wages during the period of his terminal illness between December 15th and the date of his death on the following July 16th, during which interval he had been absent from work. The Court held that the employer was entitled to point to the facts which developed subsequently to his departure from work, which showed that Captain Marks was suffering from an incurable malady that soon after caused his death, to establish that he was permanently disabled from performing the work he had contracted to do in order to refute liability for wages during that period.

[27] With respect, **Dartmouth** does not aid counsel's argument. In the first place, no issue arose there whether the period of absence as a frustrating event was to be confined to the time away from work at the date of any termination; or could be expanded to include time absent subsequent to it. Indeed, in that case there was no formal act of termination and Captain Marks' executrix based her claim for unpaid wages on the absence of any notice determining the contract of employment. Moreover, there was no provision for sick or disability benefits making it possible to regard the parties in **Dartmouth** as contemplating the employment contract continuing during absence from work on that account. To the contrary, there was a specific rule governing employees of the Commission stipulating that no one would be paid for any time "absent from duty". This second distinction underscores that this case not only related to hiring arrangements different from that presented by this appeal, but to circumstances occurring nearly a century ago when different social, commercial and labour practices prevailed. Whatever weight may still adhere to that authority today because of its source, it lends no support to counsel's efforts to extend the period of relevance to events happening after the date of termination, as that question was not in issue.

[28] **Maclellan** is more on point. In that case, although it was unaware at the time of dismissal that its employee's disability was permanent, the employer argued that it turned out to be so, and the contract of employment must therefore be considered frustrated at the time of dismissal and remained so. The trial judge in **Maclellan** accepted that argument holding that the after-acquired knowledge of the permanency of the disability could be used to justify the dismissal even though the extent of the disability was unknown to both parties at the time. The contract was, accordingly, deemed frustrated and the action for wrongful discharge was dismissed. On the basis of this case, counsel maintains the judge here should have had resort to hindsight and considered all circumstances prior to trial which would have established that Mr. White's continuing inability to report to work had lasted 38 months and given more force to his argument that the contract was frustrated.

[29] A different stance, similar to that taken by the trial judge in this matter, was adopted in the frequently referenced case of **Marshall v. Harland & Wolff Ltd.**, [1972] 2 All E.R. 715. In that case a shipyard fitter had become incapacitated from the effects of angina pectoris in the twenty-third year of his career with his employer. In his judgment Sir John Donaldson made the following relevant commentary at p. 718:

"In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?"

[30] Thus, **Marshall** sets the time and circumstances for judging whether frustration has occurred because of absence from work for sickness or disability as the period "before the purported dismissal" as did the trial judge in this case. **Maclellan**, on the other hand, may be construed as indicating the time between the notice of termination and the trial is also relevant for purposes of that assessment.

[31] The position espoused in **Marshall**, and other authorities following a similar approach, ought to be adopted over the opposing view expressed by the line of cases represented by **Maclellan**. No exception is taken with the premise that after acquired knowledge of conduct or circumstances sufficient to vitiate a contract, which occurred prior to its formal termination, may serve to justify its repudiation, even if the grounds advanced for

ending the relationship had nothing to do with the subsequently discovered facts. However, there is an air of incongruity in allowing a party to an employment contract who has terminated it claiming frustration to argue that the relationship that has been so brought to an end may be justified by subsequently occurring events. Having brought the contract to an end, it cannot rely on it and expect that the employee be treated as having subsequent work obligations. Having asserted that the engagement is at an end because of disability and resultant absence from work, what transpired afterwards would appear irrelevant to such a justification.

[32] Moreover, there is also a ring of unfairness to taking the subsequent situation into account. This is because the notice of termination may have had an effect upon it. In the instance case, for example, the evidence indicated that this employee, finding himself severed from the employment in which he had been engaged for the entire period of his adult life, understandably experienced a depression that required medical attention. The record also revealed that the surgery, which Mr. White had advised his superior in January of 1991 he was slated to undergo, was not performed until the following December. There is no way of knowing if that operation might have been accelerated if, unencumbered by his depressed state and the diminished urgency of returning to work which the notice conveyed to him, additional pressure might have been applied resulting in Mr. White having the procedure earlier. While the employer was entitled to buttress his argument of frustration by referring to Mr. White's incapacity before the dismissal, and the likelihood of it continuing, it would be unfair to base any finding of permanent disability or absence on what subsequently transpired because of the effect of the dismissal on these circumstances.

[33] In the result, the contention of counsel that the time span subsequent to the dismissal should be taken into consideration is not supportable. The trial judge did not err in addressing solely the circumstances prevailing at the time the notice was given. This is not an end to this aspect of the appeal, however, as inquiry must be held as to whether in the circumstances the judge nonetheless erred in holding it unreasonable to regard the 10 month absence from work that preceded the notice as sufficient to frustrate the employment contract.

Review Of Frustration Ruling

[34] It would appear at first glance to be stretching things to regard even the absence from work of six to ten weeks that Mr. White's back injury was originally expected to require as temporary, at least in the everyday understanding of that term. However, in the context of long-term employment contracts, courts have found long absences due to illness or disability insufficiently permanent in law to constitute a frustration of the contract. Examples are afforded by **Marshall**, where the shipyard fitter who was kept off work for eighteen months with chest pains was found not to be permanently disabled, and by **Yeager v. R.J. Hastings Agencies Ltd.** (1984) 5 C.C.E.L. 266 (B.C.S.C.) where a 30 year employee's two year absence as a result of occupational disability was held "not an incapacity of such a nature that it frustrated the contract of employment between these parties and entitled the defendant company to treat that contract as at an end" (per Wood, J. at p. 290). Whether the ten month absence presented by the case at bar can be similarly categorized will depend on the circumstances.

[35] The position of Woolworth was that this absence was sufficiently lengthy to interfere with its legitimate business needs. Contending that Mr. White's position as section manager was very important to the retail outlet's operations, it argues that when he told the store manager after nearly ten months absence that he was going to need surgery from which a further extended absence could be anticipated, the matter could no longer be treated as a brief temporary absence. It will be observed that this was consistent with the position it took in its letter of February 4th, 1991, to Mr. White where it spoke of the need to "continue to operate our business and protect our market share". In these circumstances, its counsel contends that when he could not return to his job by February 22, 1991, after being put on notice to do so, the judge erred in finding it unreasonable to deem the employment contract frustrated.

[36] However, reliance on the importance of Mr. White's position to the company operations provides a two edged sword, inasmuch as it also can be enlisted in arguing the contract was not at an end. Thus, it can be contended with equal facility that the importance of Mr. White's position would heighten Woolworth's interest in continuing the employment relationship during his absence to retain the value of the expertise of this long-time employee. The desire of Woolworth to maintain the employment relationship was manifested by its refraining from appointing a replacement for the ten month period while making necessary accommodations in the operations of his section.

[37] Moreover, this was not the first time that the company showed a preparedness to treat a ten month absence as not going to the root of this employment relationship. In 1987 Mr. White was also incapacitated with back problems following his lifting of carpeting on his employer's premises; was also absent for 10 months; and also received workers' compensation benefits topped up by his employer. On that occasion he was welcomed back to work. This previous absence is significant since, although Mr. White then occupied the less onerous post of departmental manager, it does tend to support the claim that a ten month period was not beyond this contract's tolerance for temporary absence for disability in the context of assessing whether frustration occurred. Indeed, it suggests that normally a longer span would be needed before the absence passed the threshold of permanency and became a frustrating event. This tends to support as reasonable a conclusion that the contract's intent would allow limits for temporary absence to range in the vicinity of the eighteen months to two year periods accepted in **Marshall** and **Yeager** in relation to the kindred long-term contracts respectively addressed in those cases.

[38] However, the precedent of the continuance of Mr. White's employment during the earlier ten month absence, while significant, cannot be regarded as presenting completely similar circumstances to those under review in the instant appeal. This is because both absences do not admit to exact comparison. There is an obvious important distinction in their circumstances. Apart from the difference in his responsibilities, at the end of his ten month absence in 1987, Woolworth would have been aware that Mr. White was ready to resume his duties. In this appeal, the company had knowledge that his return to work was not imminent, but he was facing pending surgery. In fact, this information apparently precipitated the February letter.

[39] It was the effect of this knowledge, therefore, to which the trial judge had to apply his mind in assessing the circumstances prevailing at the time the February letter was written. In doing so, it is reasonable to test his finding that the contract had not been ruptured by resort to the question posed by Sir John Donaldson in the foregoing passage from **Marshall**. In the context of this appeal the question may be paraphrased as:

"Was Mr. White's incapacity, considered at the time of the letter, such that it would have appeared likely to Woolworth to have continued beyond the range of eighteen months to two years which, as the foregoing analysis posits, would not have been a radically different absence from that supported by the contract's intent?"

[40] At the critical time the company's knowledge was not specific as to the likelihood of Mr. White's disability continuing his absence from work beyond that range. It was only aware of a communication from its employee that prospective surgery was imminent, without more. The company possessed no medical reports as to the extent of the proposed surgical intervention; nor as to Mr. White's prognosis following surgery; nor as to further time that he might be expected to be away from work. In short, it was reasonable for the judge to have concluded that insufficient details were available to Woolworth enabling it to form a considered decision as to Mr. White's availability for work. Thus, at the stage of its letter, his employer could reasonably have been considered to have had insufficient solid information upon which to found an informed opinion whether it was probable that his incapacity would continue for another eight months or more.

[41] On the basis of the knowledge available to Woolworth when it wrote that letter, therefore, a reasonable inference could be drawn, in the context of the above stated question, of the insufficiency of evidence to support a conclusion on Woolworth's part of the probability of Mr. White's incapacity continuing beyond the range. In other words, in the circumstances before him, it could not be counted unreasonable for the judge to have drawn the conclusion that Woolworth had inadequate grounds to presume in February of 1991 that the ongoing absence appeared likely to continue beyond the range of temporary, the threshold of which in the circumstances of this case might rationally be set at between eighteen months and two years. This is a key point inasmuch as the law prescribes that frustration should not be lightly invoked to dissolve contracts (see: **Davis**, per Lord Radcliffe at p. 159). Fidelity to this precept dictates that frustration not be made operative where the evidence does not permit an affirmative finding of a likelihood of the disability continuing beyond the range of temporary absence. Since evidence is capable of supporting the view that such is the situation in this appeal, holding that it would be unreasonable to deem the employment contract frustrated is not subject to appellate intervention.

[42] While the foregoing is adequate to sustain the ruling rejecting the claim of frustration, it should be stressed that this stance was further supported by the judge's conclusion that the position adopted by Woolworth was not only influenced by Mr. White's disability, but also by "other reasons whereby they deemed him dispensable". This finding was based on the notation in Mr. White's personnel file stating he should be laid off, if possible. The reason for this note was unexplained. It may have been related to a downsizing

of operations. Be that as it may, no exception can be taken with the judge's regarding that note as signifying there were ulterior motives for Woolworth's severing its relationship with this employee. This supports an inference that the letter was not written because Woolworth's felt events at the time served to frustrate the contract; but because it wished to dispense with Mr. White's services. The right of the employer to do that is not in issue as a contract of employment does not in law have an indefinite existence. However, if it exercises it, notice or remuneration in lieu must be given (see: **Vorvis v. Insurance Corp. of British Columbia**, [1989] 1 S.C.R. 1085; 94 N.R. 321; 58 D.L.R.(4th) 193; [1989] 4 W.W.R. 218; 36 B.C.L.R.(2d) 273; 90 C.L.L.C. 14,035; 25 C.C.E.L. 81, per McIntyre, J., at p. 1096 [S.C.R.]).

[43] For the foregoing reasons, there are no sustainable grounds for appellate intervention in the judge's decision that it was unreasonable to deem this employment contract frustrated at the date of Woolworth's letter to Mr. White of February 4, 1991. That finding is consonant with the applicable law and the circumstances presented in this appeal. With the rejection of this challenge to liability, Woolworth must be considered to have wrongfully dismissed this long-term employee.

[44] There remain for consideration the challenges of both parties relating to the damages awarded in respect of Woolworth's liability for this wrongful dismissal. An assessment of the arguments show that these are essentially nine in number. This decision will now proceed to discuss each one in turn.

The Act Of Termination

[45] The first of the series of complaints registered against the award of damages was advanced by Mr. White's counsel and relates to the judge's treatment of the letter of February 4th, 1991, as the instrument terminating the employment. As the foregoing account of the disposition of this matter shows, the trial judge took Woolworth's letter of February 4th, 1991, as a notice of termination of Mr. White's employment with effect from February 22nd. Mr. White's counsel argues the letter could not serve as a notice of dismissal since it was not couched in sufficiently specific and unequivocal terms. In his view, it did no more than warn of a possible or probable dismissal. Moreover, he contends the receipt by his client of his regular salary the following month gave him "every reason to objectively believe that he had not been dismissed". Counsel maintains that his client could only fairly be imputed with receipt of such notice on April 15, 1991, when his salary was not forthcoming. Through these

arguments counsel is seeking to extend the actual employment period, thereby increasing the overall compensation to which Mr. White is entitled.

[46] There is no doubt that the law requires a notice of termination to be specific, unequivocal and clearly communicated to the employee. This rule has been asserted by a series of cases. Counsel selected the following statement at p. 276 of **Yeager** to illustrate this point:

"Notice of dismissal must be specific and unequivocal and it must be clearly communicated to the employee if it is to be effective in law. The onus of proving that such a notice has been given rests upon the employer who seeks to rate it as a defence to an action for damages for wrongful dismissal."

[47] With due respect to counsel's contrary arguments, the letter of February 4th, 1991, meets these criteria. The statement that Woolworth expected that "Thomas White will assume his duties as Section Manager" or he would be taken as having resigned is a clear, unambiguous and explicit message to its employee that he should consider himself dismissed if he was not on the job within eighteen days. The letter cannot be regarded merely as a warning of a possible or probable dismissal. It constitutes a clear communication to Mr. White that his absence could not continue and he was expected to resume his duties.

[48] The receipt of his March 15, 1991, salary cheque does not detract from this conclusion. While this related to a salary period following the effective date of termination, the letter was in such unequivocal terms as to dispel any impression that this payment, following on the heels of his dismissal, operated to extend the termination date. Moreover, the moneys which that cheque remitted in the main represented what Mr. White was entitled to expect from Workmans' Compensation that he knew Woolworth had been receiving for him. In all of the circumstances this payment does not warrant an inference that the employer had had a change of mind and was recanting on the clear position communicated by the letter.

[49] Therefore, the trial judge did not err, after having rejected Woolworth's depicting of the letter as merely recording the end of the employment relationship when he dismissed the frustration argument, in treating it as a notice of termination that became effective on Mr. White not turning up for work on February 22, 1991.

The Length Of The Notice

[50] The second complaint directed to the damage award relates to the extent of the notice. Counsel for Mr. White maintains the length of twelve months set by the trial judge as appropriate was too short and contends that two years was reasonable in the circumstances. He acknowledges that the authorities indicate one year would normally be reasonable for a middle management employee in his client's position. However, he points out that this statement is qualified, citing in support a case from this court i.e. **McHugh v. City Motors (Nfld.) Ltd.** (1989) 74 Nfld. & P.E.I.R. 263; 231 A.P.R. 263 (C.A.), where Goodridge, C.J.N., endorses at p. 265 that "absent exceptional circumstances, the maximum period of notice should not exceed one year". Counsel contends that such circumstances were present in this case. In his estimation the fact that the disabling injury was incurred at the employer's place of work creates a special circumstance justifying longer than normal notice. In support of this premise, counsel enlists two cases: **Trask v. Terra Nova Motors Ltd.** (1991), 89 Nfld. & P.E.I.R. 130; 278 A.P.R. 130 (Nfld. T.D.), affd. (1995), 127 Nfld. & P.E.I.R. 310; 396 A.P.R. 310 (Nfld. C.A.); and **Wallace v. Union Grain Growers Ltd.** (1993), 87 Man.R.(2d) 161; 49 C.C.E.L. 71 (Q.B.).

[51] In **Trask**, the trial judge found that an allegation of theft against an employee was false and that he had, accordingly, been wrongly dismissed without cause. In considering the notice to which he was entitled, the trial judge stated that in normal circumstances Mr. Trask would have been entitled to nine months notice or pay in lieu of notice. However, eighteen months' wages were awarded in that case because of the false accusation of theft and of his former employer having communicated this damaging information to other prospective employers. On appeal, **Trask** was upheld by this court in a judgment rendered subsequent to the hearing of this matter (see: (1995) 127 Nfld. & P.E.I.R. 310; 396 A.P.R. 310 (Nfld. C.A.)).

[52] **Wallace** involved a dismissal of a 59 year old career commercial printing salesman based on allegations of inability to satisfactorily perform his duties. The employer continued to assert that Mr. Wallace was incompetent until the opening day at trial when it withdrew its defence of dismissal for cause. Taking these facts into account and that the employer's allegations made other employment in Mr. Wallace's field virtually impossible, the court concluded at p. 82 that "an award at the top of the scale" was warranted and fixed twenty four months as the period of reasonable notice.

[53] The attempted equation of **Trask** and **Wallace** to the circumstances in this appeal is inapt. In those cases the former employers of Messrs. Trask and Wallace made unjustified allegations which stigmatized their reputations. The dishonesty and incompetence which were wrongly imputed in those instances would negatively affect, in perhaps the most direct possible manner, the suitability and eligibility of the aggrieved parties in finding any alternate employment. For this reason expansion of the notice periods beyond which would otherwise be considered normal was justified.

[54] In the present case no such shroud was cast by Woolworth's over Mr. White's reputation. The asserted reason for his discharge was disability which would not affect his eligibility for any work for which he was suited. The employer did not compound Mr. White's difficulties in his search for employment by unfounded assertions that would adversely affect his opportunity to secure another position. No analogy can be drawn in this respect between these two cases and the circumstances at bar.

[55] The fact that the disabling injury was sustained on the workplace does not invoke the exceptional circumstances which justified extended notice periods in these referenced cases. Even if the cause of the injury can be attributed to any neglect of Woolworth as counsel firmly maintains, but which will presently be seen is somewhat problematic, there can be no logical equation between fault of that nature and that displayed in **Trask** and **Wallace**.

[56] Hence, the premise that the circumstances of this injury created special circumstances justifying longer than normal notice is unsustainable. As a result, the twelve months set by the judge as the duration for the period of notice must be accepted as reasonable.

The Commencement Of The Notice

[57] In his third criticism of the damage award, counsel for Mr. White directs a second attack against the judge's treatment of the notice period. It relates to its commencement. He contends the judge erred in holding that the notice should run from the date of the letter of dismissal in February of 1991. Instead, he argues the operation of the notice should have been suspended until such time as Mr. White would have been able to conduct a reasonable job search. He presents the evidence as establishing that this was not expected to come to pass until about eight weeks following the trial's commencement in early May of 1993. Hence,

counsel is taking the position that notice should not have started to run until July 1, 1993. Acceptance of the premise that the notice should not commence until Mr. White's recovery from his disability enabled him to conduct a search for alternate employment would increase damages through receipt by him of approximately two and one third years of additional salary.

[58] In support of his proposition that the inability of a person to look for employment postpones the operation of a notice of termination until he or she is able to do so, counsel places substantial reliance upon **McKay v. Cameo Inc.** (1986), 11 O.A.C. 356; 11 C.C.E.L. 256 (C.A.). In that case, Mr. McKay was given eight weeks notice of termination of his employment with Cameo Inc. This notice period was subsequently, during the ensuing proceedings relating to the severance of his employ, ruled inappropriate and, by the time the matter reached appeal, it was generally accepted that five and one half months would have been reasonable. In the meantime, about two weeks after receiving his dismissal notice, Mr. McKay had sustained an eye injury playing racquetball which led to a series of operations and the loss of sight in that eye. For a period of six months following that injury he was paid disability benefits from Cameo's noncontributory disability plan. These payments were received from his employer in the form of a salary cheque in the normal manner with the standard deductions, inasmuch as Cameo was in effect a self-insurer. When payments halted after the expiration of the disability period and no further payments were forthcoming, Mr. McKay launched an action for damages for wrongful dismissal.

[59] The trial judge dismissed the claim holding that, from the time of Mr. McKay's dismissal to the termination of the disability payments, he had received the equivalent of full salary for five and one half months which fulfilled any obligation of Cameo to compensate him for the loss of his employment. Mr. McKay appealed arguing his former employer should not be entitled to deduct the disability benefits from the award of damages. The question before the Court of Appeal was whether the disability receipts could be treated as satisfying the employer's obligation to pay damages in lieu of notice.

[60] The dissenting opinion in **McKay** resolved this question affirmatively, adopting the position that, as a matter of policy, neither should the employer be subject to double payment nor the employee be eligible to obtain double recovery. The majority, however, was of the view that the payments made to Mr. McKay under the disability plan ought not to be deducted

from the damages to which he was entitled for wrongful dismissal. For the majority, Blair, J.A., stated at p. 268 [C.C.E.L.] that the issue before him:

"... involves the relationship between two separate and independent rights of an employee under a contract of employment. The first right arises from the express terms of the contract providing for the payment of disability benefits. The second right arises from the implied term, recognized by the Courts, that an employee be given reasonable notice in the event of dismissal without cause."

[61] This identification of two separate and "qualitatively different" rights vested in Mr. McKay was the rationale of the majority's decision that the disability payments did not fulfill the employer's obligation to pay damages in lieu of notice and that the receipt of them would not amount to double payment or recovery. Relating these damages to the notice period in the circumstances there prevailing it went on at the end of its decision at p. 271 [C.C.E.L.] to explain:

"The notice period of 5½ months includes the period from the notice of dismissal on June 6, 1980 to the appellant's injury on June 22, 1980, interrupted by the period from June 22 to December 22, 1980, when he received disability payments and resuming on December 22, 1980, until the term of 5½ months expired."

[62] Counsel for Mr. White relies on this passage to support his position that the operation of the notice period should have been suspended until July 1, 1993, when his client was sufficiently recovered from his disability to meaningfully search for work, being paid his salary in the interim. To reinforce his reliance on **McKay**, counsel refers to **Datardina v. Royal Trust Corp. of Canada** (1993), 85 B.C.L.R.(2d) 214; 49 C.C.E.L. 255 (B.C.S.C.). In following **McKay**, the trial judge in **Datardina** made the following remark at p. 270 [C.C.E.L.]: "(a)lthough **McKay** does not say so expressly, its effect is that disability postpones the notice period". Mr. White's counsel highlights this statement in **Datardina**, putting it forth as confirming his interpretation of **McKay**.

[63] At the time of the hearing, however, counsel did not have the benefit of the result of **Datardina's** appeal which is reported in (1995), 60 B.C.A.C. 109; 99 W.A.C. 109; 12 C.C.E.L.(2d) 86 (C.A.). In that decision the British Columbia Court of Appeal, in upholding the trial judge's disposition and voicing general agreement with the majority viewpoint in **McKay**, nonetheless expressed at p. 91 [C.C.E.L.] the caveat that it:

"would not regard the notice period as following the disability period, as was suggested in **McKay v. Cameo Inc.** The notice period is merely a measure of damages in a

wrongful dismissal case, and where proper notice is given the notice period should run from the date notice is given."

[64] While full agreement is lent to this appellate rejection of the notion that disability postpones operation of the notice period, with utmost respect, the same accord cannot be extended to **Datardina's** construing the majority judgment in **McKay** as suggesting to the contrary. The court in **McKay** was addressing the effect of the disability benefits on the disabled employee's right to recover damages for, wrongful dismissal, and whether the employee's receipt of the former absolved the employer from paying the latter. It was, therefore, dealing with compensation and appropriately discussed the notice period in the context of the measure of damages. It was neither called upon to, nor did it, decide that disability postpones the operation of a notice of dismissal, as both the foregoing passage from the appellate court's disposition in **Datardina** and counsel in the case at bar interpret it as having done.

[65] It would appear that this misinterpretation stems from regarding the last quoted passage from **McKay**, dealing with the interruption and resumption of the notice of dismissal, as an integral part of the ratio of its decision. Certainly, as already noted, counsel relies on that passage to support his case for suspension of the notice period's operation and, in all likelihood, the same words formed the basis for **Datardina's** similar interpretation of the effect of **McKay**. However, those comments at the conclusion of the majority's decision in **McKay** should be considered in the context of the circumstances that, during the interval from June 22 to December 22, 1980, Cameo paid Mr. McKay in the form of salary cheques which Cameo was regarding as more than acquitting its entire obligation to their former employee. Against the background of the entire decision, therefore, these comments, coming as they did at its end, more properly appear to amount to an explanation to the parties, and to Mr. McKay's employer particularly, that the payments in that interval should rather be considered as disability benefits; and Mr. McKay's entitlement to notice, and his consequential salary in lieu thereof, should be treated as "resuming on December 22, 1980" and continuing to the expiry of its 5 1/2 month term.

[66] The foregoing analysis of the effect of this concluding passage in **McKay** upon which counsel is relying would appear to be consistent with the thrust of the majority's disposition in that case. Thus, the reference to the spreading of the payments was immaterial, substantively speaking. It merely gave an explanation for the additional obligation to pay an

amount equivalent to salary in lieu of notice. It was the right to recovery of these damages that occupied both the majority and the minority of the court in **McKay**. The fact that they were payable, not in installments, but in a single sum witnesses that the remarks in the highlighted final words of the decision dealing with the deemed period of notice were neither essential to it, nor detracted from the notice period being utilized as merely a measure of damages, which the appellate disposition of **Datardina** sanctions as its appropriate use. Therefore, the case law, as represented by both **McKay** and the appellate treatment of **Datardina**, does not support counsel's claim that the notice should be regarded as suspended during the disability period and until the employee had sufficiently recovered to conduct a reasonable job search.

[67] Indeed, such a proposition would be unreasonable. It is recognized that the principal reason for the law requiring reasonable notice of dismissal is to accord fair opportunity to a discharged employee to find new employment and that the disability may impair, if not preclude, full realization of that purpose. These concerns lie at the base of counsel's forceful argument for postponement of the notice's operation. On the other hand, at some point prolonged absence from work as a result of disability will engage the employer's right to treat the employment contract at an end on grounds of frustration. This right may be viewed not only as protecting the employer's legitimate interests, but also as addressing the wider concerns of the general viability of the enterprise upon which may hinge the security of other employees' jobs and, in some instances, even the general economic welfare of the community in which the business is operating.

[68] Each right, therefore, has its own legitimacy and can be foreseen to eventually interact, one on the other with the passage of time. The concern over the employee's disability impairing fair opportunity to seek employment will then have to be balanced against the interests engaged in the business's continuing viability. When this occurs the competing interests which each one protects will fall to be rationalized by weighing what is fair and reasonable according to the contractual terms and the prevailing circumstances. This involves a balancing of interests and will preclude any granting of absolute paramountcy to one over the other or any notion that one right should be subsumed by the other.

[69] Nevertheless, counsel's premise that disability postpones the operation of the notice of termination would have the effect of according absolute priority to the interest of the

employee and of subsuming the employer's right during the period of suspension. It could conceivably result in employment contracts of indefinite duration where the obligation of one of the parties to work had become incapable of performance, but in which the other was, nonetheless, required to fully respond to its bargain and pay the disabled party. Such a consequence is patently unreasonable and underscores why counsel's argument for suspension of the notice period ought not be sustained.

[70] For the foregoing reasons, counsel's proposition that disability postpones operation of the notice period finds no support in law or reason. Accordingly, the trial judge did not err in concluding that Mr. White's notice ran from the date of the letter of dismissal in February of 1991.

Damages In Lieu Of Notice

[71] The fourth complaint against the damage award comes from counsel for Woolworth. He takes the firm position that the judge erred in finding Mr. White had any entitlement to be paid during the notice period since he was unable to work or perform his duties during the entire twelve months.

[72] It is well settled that an employee who is dismissed other than for cause is entitled, in the absence of due notice, to payment for the required notice period (see **Vorvis** per McIntyre, J., at p. 1096 [S.C.R.]). Counsel does not challenge this general principle. However, he contends that its application presupposes the affected employee is capable of working. Arguing that pay and work are "coexistent obligations" and underscoring that the evidence leaves no room to doubt that Mr. White's inability to perform any of his job functions during the prescribed twelve month notice period, he maintains that Woolworth has no liability to Mr. White for damages.

[73] The carriage of that argument necessarily presupposes an absolute rule that incapacity causing absence from work relieves the absentee's employer from its concomitant bargain to pay further remuneration during the period of due notice. It also assumes that the implied obligation which the law exacts from an employer in dismissing without cause is that of reasonable notice only and that liability for damages in lieu of such notice is not absolute; but is contingent on the dismissed employee's capacity to work.

[74] In support of his proposition, Wool-worth's counsel draws from a passage in **Dunlop v. British Columbia Hydro & Power Authority** (1988), 23 C.C.E.L. 96 (B.C.C.A.). Inasmuch as that case deals with the effect of a disability occurring after dismissal on the employee's right to compensation in lieu of notice, **Dunlop** is not comparable to the circumstances of this appeal which involves a disability that preceded the termination. In actuality, **Dunlop's** outcome is directly opposite that which Woolworth's counsel advocates to be the proper result in this case since Mr. Dunlop's subsequent disabling injury was held not to affect his right to damages. It is not for its result, therefore, that counsel is resorting to **Dunlop**, but rather to general comments made in it concerning the right to compensation in wrongful dismissal matters.

[75] This commentary appears at p. 100 of **Dunlop** where Lambert, J.A., speaking for the court, states that the term which the law implies as a general principle into contracts of employment is that each party must give reasonable notice of termination to the other; not "that the employer may give pay in lieu of notice". It is noted that this gives reason to the assumption underlying counsel's argument i.e. the right to damages in lieu of notice for wrongful dismissal is not an absolute one supported by a specific term implied in law to that effect. One of the reasons expressed for concluding that the law does not also imply unconditional obligation to pay such damages was linked to the principle of mitigation. Thus, Lambert, J.A., reasoned at p. 100:

"If the implied term were to be considered to contain a provision for pay in lieu of notice, and if the employer elected to invoke that term and gave no notice of termination, there would be no obligation on the part of the employee to mitigate damages by seeking other employment. ... But the principle of mitigation is consistently applied, even where the employer elects to make a payment in lieu of notice. The reason is that, when an employer gives pay in lieu of notice, he does so as an attempt to compensate for his breach of contract of employment, not as an attempt to comply with an implied term of the contract of employment."

[76] Counsel for Woolworth lays stress on this passage pointing out that it is based on the premise that payments received in lieu of notice must be by way of damages for breach of the contractual obligation to give proper notice, and are not exigible as a result of any implied term to make such payment. Being damages, as the passage's comments underscore, recovery of compensation in lieu of notice is subject to the "consistently applied" duty to mitigate. As mitigation presupposes the employee will make an effort to pursue employment, counsel infers from these comments that no entitlement to damages can ensue where a

dismissed employee such as Mr. White is precluded through incapacity from performing any gainful work as he was unable to acquit his duty to mitigate which is an essential prerequisite to recovery of damages.

[77] This view of incapacity to work presenting a bar to recovery of damages in lieu of notice in respect of a dismissal is flawed because it fails to recognize that a contract may contemplate its subsistence during periods of illness or disability. If the terms of the contract contemplate the relationship continuing in such events, the incapacitated employee will still be considered employed as if on the job and the duty to mitigate will be modified, if not indeed inoperative. By the same token, if the contract contemplates continuance of salary during periods of absences due to sickness or disability, there appears to be no logical reason why the employee should not enjoy the same rights on termination as he or she would if dismissal occurred when working. These rights would include the expectation to be paid for the period of due notice, either when the instalment dates fell due or as damages in lieu of notice. The same considerations of fair opportunity to seek alternative employment with the security of continuing salary would be operative regardless of the former employee's capacity to work. Hence, Mr. White's entitlement to damages in lieu of notice hinges upon the contractual relationship subsisting at the time of the letter of dismissal in February of 1991.

[78] At this juncture mention should be made of the fact that there was a signed contract of employment in effect at the date of dismissal which, arguably, might be construed as limiting Mr. White to fourteen days compensation in lieu of notice if he were no longer capable of carrying out his duties. However, that provision was not invoked in this challenge of the award to Mr. White of damages in lieu of notice. In the circumstances presented by the evidence, the decision not to rely on it is comprehensible. Accordingly, this question of damages in lieu of notice is being addressed in the context of the twelve month period which was considered as a reasonable time in these circumstances.

[79] At this point, it is also important to note that the signed contract leaves the treatment of employee absence to company policy prevailing from time to time. Thus, the agreement stipulates that "if the employee fails to attend to the duties of employment or is absent from the store", the employer in its discretion may adjust the salary and benefits in accordance with "policies then in effect which govern the nature of such failure or absence". This being the case the best objective indicia of the contract's subsistence and the terms of its

continued existence during Mr. White's absence immediately prior to his dismissal can be gleaned from evidence of the actions of the parties in this regard.

[80] That evidence leaves little room for doubt as to the contract's existence at the date of the letter of dismissal, notwithstanding Mr. White's ten month absence. During that period Woolworth received Mr. White's workers' compensation benefits, topped them up to assure his net salary remained the same and issued a regular salary cheque. In his testimony the store manager confirmed that, from the company's viewpoint, Mr. White was considered as receiving his regular salary between the dates of his injury and his dismissal. The manager also testified that Mr. White occupied an important post and was considered a key employee at the time of his injury. He also spoke of the difficulty in "hiring someone from the street" to replace Mr. White. All of this evidence suggests that, up to the date of the letter of termination, the contract with this experienced employee was continuing in effect during his absence, just as it had done a few years earlier when he occupied a lesser position in the company.

[81] In his challenge to the right to payment in lieu of notice in this case, counsel for Woolworth points to comments by the trial judge that the employer had no obligation to add to Mr. White's monthly compensation benefits. Stressing this finding, counsel sounds a note of warning against turning "ex gratia" payments by a generous employer into obligations. There is no doubt that there is some merit in this note of caution. It ought not be pressed, however, to the extent of attributing altruistic motives to all voluntary actions of employers. Measures which are not obligatory are often legitimately taken in commercial relationships with a view to furthering the interests of the institutors of the actions and are no less indicative of the contractual intent of the parties. The fact that the topping up of Mr. White's monthly cheque may not have been strictly obligatory, ab initio, does not detract from the conclusion that this contract was in force and effect at the date of the termination letter. It just means the employer did not attempt to avoid the contract but deemed it in its best interest to have it continue on the modified basis of Mr. White's full net salary being provided by the benefits with the necessary difference being furnished by it.

[82] All of the attendant circumstances, therefore, support a finding that the employment contract in the case at bar contemplated its continuance during periods of illness or disability. The evidence establishes that the agreement was in fact operative when the notice of

termination was given in February of 1991. It depicts a continuing employment relationship with the employee receiving his same net salary during periods of illness or disability. There was no reason why the same arrangement should not govern the notice period, notwithstanding Mr. White's continued disability and inability to work.

[83] In the result, for the foregoing reasons, the trial judge did not err in finding that Mr. White was entitled to damages in lieu of notice, notwithstanding the circumstances of the notice of dismissal being given subsequently to the disabling injury during Mr. White's absence from work and of his inability to perform any work related duties during the entire due notice period of twelve months.

Deductibility Of Compensation Benefits

[84] In the fifth complaint registered in this appeal against the damages, Mr. White's counsel is contending that the judge erred in deducting workers' compensation benefits from the amount awarded as compensation in lieu of notice. This challenge necessitates inquiry whether these payments come within the category of collateral benefits whose receipts are treated as exceptions to the general rule against double recovery of damages.

[85] Over the years certain collateral benefits have been identified whose receipts are treated as exceptions to the basic principle that an aggrieved party should not recover compensation beyond his or her actual loss and which ought not be deductible from damages, despite the resultant ostensible double recovery. The key factor determining whether a collateral benefit comes within the ambit of the exception is whether the party derived the benefit from a scheme to which he or she had been contributing. The rationale for not deducting the benefits received in such instances is related to the sense of injustice and unreasonableness of allowing the wrongdoer to profit from the aggrieved person's independent provision for himself or herself. Examples of collateral benefits held not to be deductible from damages for these reasons are: benefits payable under a private accident policy (**Bradburn v. Great Western Railway Co.**, [1874-80] All E.R. Rep. 195); benefits payable under a contributory employment disability pension (**Parry v. Cleaver**, [1970] A.C. 1 (H.L.)); Canada Pension Plan benefits (**Canadian Pacific Ltd. v. Gill**, [1973] S.C.R. 654); and unemployment insurance benefits (**Jorgensen v. Cewe (Jack) Ltd. v. Jorgensen**, [1980] 1 S.C.R. 812; 32 N.R. 1).

[86] **Ratych v. Bloomer**, [1990] 1 S.C.R. 940; 107 N.R. 335; 39 O.A.C. 103; 69 D.L.R.(4th) 25; 30 C.C.E.L. 161; 3 C.C.L.T.(2d) 1, however, affords an example of collateral benefits that were held to be deductible from damages. In that case, a majority of the Supreme Court of Canada held that an injured party could not expect to recover lost wages from a tortfeasor where the former had received full salary during his or her absence from work pursuant to the collective agreement governing his or her employment. The distinction between **Ratych** and the other cases is the claimant was deemed to have received his full salary without any direct or indirect contribution from him. The others, to the contrary, were instances where the claimants had received the benefits from insurance type contracts to which they had contributed.

[87] This principle of non-deductibility of collateral benefits as an exception to the rule against double recovery of damages has primarily evolved in the context of actions in tort (see **McKay** per Blair, J.A., at p. 269 [C.C.E.L.]). In fact all of the foregoing cases, save **Cewe**, dealt with recovery for tort. However, the principle has been extended to contract and applies to cases of wrongful dismissal, of which **Cewe** is an example. So too is **McKay**.

[88] The trial judge made mention of **Ratych**, which is the only one from the foregoing group of cases to deduct the claimant's collateral benefit from the damage award, in arriving at his impugned conclusion that the workers' compensation benefits should similarly be deducted from Mr. White's damages in lieu of notice. With respect, however, while agreeing with the trial judge's conclusion, neither **Ratych**, nor any of the foregoing cases, provide apt analogy for the circumstances at bar. This is not because **Ratych** deals with the issue of deductibility of collateral benefits in the context of recovery in tort; but because it and all of the foregoing cases deal with disability or unemployment insurance benefits which differ in nature from workers' compensation benefits.

[89] One major difference between the benefits that were held to be non-deductible in all of the foregoing cases, except **Ratych**, and workers' compensation benefits is that the latter require no direct monetary contribution by the employee. The employer is the only contributor to the fund from which the compensation benefits are derived. There is, therefore, no collateral contract supported by identifiable consideration in the form of employee contributions as exist in the instances of the other collateral benefits. Consequently, there is no basis to justify non-deductibility of the compensation benefits on the usual footing that the

wrongdoer should not be permitted to profit from provision which the employee has independently made through prior contributions.

[90] However, perhaps the more salient factor which distinguishes workers' compensation benefits from others, including those received in **Ratych**, can be seen in the origins of these benefits. The genesis of workers' compensation was succinctly described by Goodridge, C.J.N., in **Reference Re Sections 32 and 34 of The Workers' Compensation Act (Nfld.)** (1988), 67 Nfld. & P.E.I.R. 16; 206 A.P.R. 16 (C.A.), where, in the course of tracing the legislation's origins and noting that one of its major purposes was to provide compensation without fault, he remarked at p. 24 that:

"... workers give up their common law rights of action against their own employers in exchange for specific guaranteed benefits as a trade-off for employers shouldering the expense of this new system. ...

"In what has been described as the historic trade-off the employees gave up their right of action and the employers (collectively) agreed to pay compensation regardless of fault. In actual fact, the right of action was taken from the employee and the obligation to pay compensation was imposed on the employer."

[91] Those comments encapsulate why workers' compensation benefits should be deducted from damages for wrongful dismissal. The very purpose of workers' compensation benefits attests to the incompatibility of their non-deductibility from damages for wrongful dismissal. Not to do so would be tantamount to circumventing the entire raison d'être of the system and impose liability for damages which has been foregone in the trade-off in which the worker's right of action was surrendered. It would serve to circumvent the no fault insurance characteristic inherent in the concept of workers' compensation.

[92] Support for the holding that these compensation benefits are deductible from damage awards for wrongful dismissal is afforded by **Salmi v. Greyfriar Developments Ltd.** (1985), 58 A.R. 364; 7 C.C.E.L. 80 (C.A.), at p. 84 [C.C.E.L.]. It is recognized that the majority judgment in **McKay** expressly disagreed with **Salmi**. Although noting that the effect of worker's compensation was not in issue in the appeal, **McKay** expressed the view at p. 271 [C.C.E.L.] that "payments from workers' compensation boards might be compared with unemployment insurance payments which ... are not deductible from damages awarded for wrongful dismissal". As might be expected, counsel for Mr. White enlists this conclusion in **McKay** to his cause.

[93] With respect, however, the position taken in **Salmi** is to be preferred over that adopted in **McKay**. Within the context of damages for wrongful dismissal, the equation drawn in **McKay**'s obiter between workers' compensation and unemployment insurance payments is not sustainable. One difference that stands out conspicuously is the lack of direct monetary contribution exacted from employees eligible to receive compensation benefits. As **Salmi** points out at p. 84, the employer is the only contributor to the workers' compensation plan and payment from it "is in lieu of earnings and to compensate for their loss whilst unable to work because of injury" sustained in the course of employment.

[94] That contribution of the employer, therefore, has an effect that no kindred payment of an employer has in any other collateral benefit plan, including unemployment insurance. It is unique in that it represents the employer's consideration in the "historic trade-off with employees who, in return, surrender their rights of action in respect of injuries suffered in the course of employment. The employees' part of the bargain receives legislative sanction in s. 44(1) of the **Workers' Compensation Act**, R.S.N. 1990, c. W-11, which provides:

"The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment."

[95] It is this immunity from action for compensable injury sustained at the workplace which places workers' compensation benefits on a singular plane and distinguishes them from other collateral benefits, including unemployment insurance, insofar as their deductibility from damage awards is concerned. The unique shield that it provides includes immunity from liability for damages due to loss of income. Where a disabled employee is in receipt of workers' compensation as a result of a work related injury, like Mr. White, to allow recovery against the employer of both salary and benefits would disregard the bargain, sanctioned by statute, which provides the latter is in lieu of the former. This is so whether the double recovery was sought in an action in tort or for wrongful dismissal. The legislation may not be circumvented by arguing the action was for wrongful dismissal rather than "because of injury" as a litigant cannot claim indirectly what may not be claimed directly. The intent to preclude double recovery against an employer is clear and allowing it in wrongful dismissal claims would render inoperative a basic principle of the enactment.

[96] For the foregoing reasons, workers' compensation payments do not come within the exceptions to the rule against double recovery of damages for wrongful dismissal. To allow an individual to recover full salary whilst in receipt of such benefits would violate the whole purpose of the workers' compensation plan. It should be noted that this preclusion against recovery of both applies to actions involving employers and employees. It does not extend to actions against third parties who are not parties to the "historic trade-off (see s. 45(1)).

[97] In the result, the judge did not err in deducting workers' compensation benefits from the damages awarded in this case and was correct in taking the position that the law did not permit Mr. White "to be paid a salary in lieu of notice during a time when he is receiving compensation". It is recognized that this prohibition normally would extend to that part of the salary remitted by Woolworth to Mr. White in "topping-up" his compensation benefits. However, the endorsing of the trial judge's statement as to the law's prohibition against recovery of salary and these benefits does not detract from the earlier finding that Mr. White is entitled to salary in lieu of notice, albeit only a small portion.

[98] A proper view of the circumstances is that Woolworth, although not obliged to do so, treated the topping up as a part of its ongoing obligations in its continued employment of Mr. White. Having done so it effectively created a new modified contract where Mr. White became entitled after his disabling injury to the benefits plus the topping up. In these circumstances, Mr. White was entitled to receive the small portion of his salary, notwithstanding the immunity granted to Woolworth by the law, which it may be considered to have foregone, but not that portion which was represented by the collateral benefits provided through workers' compensation.

The Pension Plan Issue

[99] The sixth criticism of the damage award centers upon the judge's treatment of the pension plan issue. Mr. White had asked in his statement of claim for the "return of monies vested in the pension plan to which he subscribed". The following represents the sum total of the judge's adjudication in relation to this aspect of Mr. White's claim:

"I can dispense with the claim for the pension plan by stating that the pension fund is there for him; it is only for him to chose as to how he wishes to receive it. That will be

accomplished by him advising his former employer as to what option he wishes to exercise. It is not a matter for me to decide, as it is not really in dispute."

[100] In concluding that this choice was available to Mr. White, the judge must have had in mind a letter of May 4, 1992 from Woolworth to its former employee dealing with his membership in the company's Deferred Benefit Pension Plan during his employment and "the pension you have accrued to the date of termination". It gave him the option of electing either to leave his accrued benefits in the plan until retirement age, or to have the commuted cash value, that then stood at \$7,197.82, transferred to a Registered Retirement Savings Plan of his choice. However, it stipulated that "(t)hese -funds can only be used to purchase a life annuity".

[101] The original letter had never been received by Mr. White as it had apparently been posted to an old address and its contents only came to light during a discovery proceeding shortly before the trial. The admission of liability by Woolworth in its letter was apparently the basis for the judge concluding that the pension question was not in dispute, but it was merely a matter of Mr. White signifying the mode in which he wished to receive his interest in the pension fund.

[102] Mr. White's counsel contends the judge missed the point and erred in treating the matter of pension entitlement as not being in dispute. He points to the demand in the statement of claim for payment of the pension monies to his client's credit, and to Woolworth having only offered the option of leaving the monies in a pension plan, either within or without the company, as concrete evidence of a live dispute with respect to the matter. He also underscores the lack of any offer on Woolworth's part to make contributions to his client's pension during the period of notice as a further item of dispute.

[103] While Mr. White did demand, as his counsel points out, to be put in funds to the extent of the monies that should have been to his credit in the plan, the judge's reluctance to pass on the pension issue remains comprehensible in light of the incompleteness of the evidence. Mr. White's entitlement to receive these funds in hand depends upon the terms and conditions governing the company's retirement plan. The letter offered only the prospect of the funds continuing to be locked into the plan in which they were already invested or into a life annuity. It was not possible to determine from the evidence adduced whether the Deferred Benefits Pension Plan might have had options additional to the two proposed in the May 4,

1992, letter, and specifically if its terms and conditions might have accommodated Mr. White's desire to realize in cash his interest in the pension plan.

[104] By the same token, the evidence was too inconclusive to determine if Woolworth was refusing to make contributions to Mr. White's pension over the period of notice of termination. It seems fairly clear, at least in the absence of conditions to the contrary in the plan, that as a general principle in this jurisdiction and elsewhere the increased value which would have accrued to an employee's pension entitlement if reasonable notice had been provided is a matter for compensation (see Levitt: **The Law of Dismissal in Canada**, 2nd Ed., p. 354). However, the letter of May 4, 1992, neither challenges this premise, nor rejects liability for the pension's incremental value over the notice period; but merely contains no offer with respect to it. Considering that Woolworth regarded the employment contract as frustrated, and at an end, in February of 1991, it is not surprising that no offer of pension contributions beyond that date would be made. The net result, nonetheless, is that there is no evidence to suggest Woolworth would challenge paying these benefits as part of an award of damages in lieu of notice if it had accepted, as it must, that Mr. White was entitled to the notice which this decision confirms as reasonable.

[105] Accordingly, even in the full light of counsel's complaints against the trial judge's treatment of Mr. White's entitlement from the pension plan, his disposition represents the best resolution of that issue in the circumstances and should stand. There is no evidence which would justify this court substituting the outcome that Mr. White's counsel is seeking. In the absence of knowledge of the terms and conditions of the pension plan, no order can be made directing payment in cash of the acknowledged commuted value of Mr. White's interest in it to him. Neither can any order be made with respect to how the contributions during the notice period are to be remitted to Mr. White in the absence of evidence of these terms and conditions and other factors that might have a bearing on it at this particular point in time.

[106] Actually, the absence of such proof weighs against Mr. White as the burden rests upon him to establish his claim. However, dismissal would appear to be unjust since the employer has admitted liability and it only remains to determine the manner of responding to it. For this reason the disposition of the trial judge with respect to the pension plan issue should be upheld as the most appropriate in all of the circumstances. The judge's rationale that "the pension plan is there for him" is still operative. As stated, it only remains to

determine if Mr. White is to receive it in the form of a cash remittance, or whether the plan is such that it precludes any settlement other than that proposed by the letter, and to ascertain the incremental contributions payable in respect of the notice period.

[107] Therefore, the arguments of counsel urging this court to make an order with respect to his client's claim to the pension fund ought not be accepted. In confirming the trial judge's disposition of the matter, however, it is recognized that all of the outstanding issues may not be resolved amicably. In the event that dispute persists, either party should have the right to be heard so that the matter can be resolved in light of all the relevant evidence. Such leave, if the need arises, should not be considered as a variation of the trial judge's disposition as such rights were inherent in his ruling respecting the matter.

[108] For the foregoing reasons, therefore, the trial judge's treatment of the pension plan issue should not be disturbed. The above discussion has been directed, in part, towards clarifying general principles with the aim of assisting the parties in resolving the realization of Mr. White's interest in the pension fund. If that objective is not attained between the parties, either may be heard. In all of the circumstances this would appear to be the fairest disposition of this issue at the present juncture.

Punitive And Aggravated Damages

[109] The seventh objection to the judge's disposition of damages is directed to his failure to make awards of punitive and aggravated damages to Mr. White. The latter's counsel disputes the finding that there was no evidence to support such awards, maintaining there was ample proof to sustain these claims.

[110] The bases for awarding punitive and aggravated damages in wrongful dismissal cases was canvassed by McIntyre, J., speaking for the majority of the court in **Vorvis**. In his discussion, McIntyre, J., distinguishes between these two heads of damage in the following terms at pp. 1098-1099 [S.C.R.]:

"Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory."

[111] Punitive damages, therefore, focuses on the wrongdoer's conduct and whether it is of such a nature to merit punishment. To be deserving of punishment it cannot be merely conduct of which the court disapproves, but it must be of a "harsh, vindictive, reprehensible and malicious nature" (per McIntyre, J., in **Vorvis** at p. 1108 [S.C.R.]). Being an exception to the general notion of damages as compensatory, and because the censurable conduct must be extreme, the circumstances when an award of punitive damages may be made are rare. The instances are even rarer where sought in respect of contractual breaches, however. That point is made by McIntyre, J., at p. 1107 of **Vorvis** where, although acknowledging that punitive damages may be awarded in cases of breach of contract, he observes "it may be very unusual to do so". The majority judgment goes on to explain on the same page that the scope for such awards is even lesser in contract than in tort because the contractual relationship gives rise to the remedies open to the aggrieved party who "is entitled to have that which the contract provided for him or compensation for its loss". The law, therefore, stipulates that punitive damages will be awarded only very rarely in wrongful dismissal cases and the conduct giving rise to such an award must be quite extreme.

[112] Courts are enjoined to be equally cautious in acceding to claims for aggravated damages in wrongful dismissal cases. In **Vorvis**, McIntyre, J., links this head of damage to compensation for mental distress. In the process of so doing, he discusses with apparent approval a line of authorities which expound the premise that, in a case of wrongful dismissal, damages are limited to lost earnings "and cannot include damages for the manner of dismissal, for injured feelings, or for loss occasioned from the fact that dismissal makes it more difficult for the plaintiff to obtain other employment" (see pp. 1100 - 1101 of **Vorvis**). This statement reflects the reality that contracts of employment are finite and terminable by either party on proper notice. The parties are deemed to know this when they enter their mutual relationship and therein lies both the difficulty of sustaining a claim for mental distress and anxiety for wrongful dismissal and the logic of considering the employee fully compensated on receipt of salary and benefits during the notice period, or in lieu of it.

[113] Despite the difficulty in awarding damages for hurt and anxiety which might be considered innate to the employment relationship, **Vorvis**, nonetheless, asserts that there is still room for an award of aggravated damages. Thus, McIntyre, J. stated at p. 1103 [S.C.R.]:

"I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable ..."

[114] Although not altogether foreclosing aggravated damage awards in wrongful dismissal cases, therefore, the message of **Vorvis** is that the circumstances justifying them are quite rare and exceptional. If such considerations as the manner of dismissal, injured feelings and effect upon securing alternate employment are not considerations, it is evident that the scope for an award because of mental distress will be markedly constricted. Indeed, if these consequences are to be taken as foreseeable and assumed incidents of the employment relationship, it would appear that awards for aggravated damages, related as they are to mental distress, will be limited virtually to exceptional incidents where the impugned conduct transcends the domain of the contractual employment relationship and constitutes a tort which, in the words of the above passage is "independently actionable". Moreover, it appears logical to assume that the impact of that conduct upon the employee would have to be extreme, extending beyond the high levels of stress and anxiety often associated with termination of employment.

[115] In fact, extreme conduct is an essential ingredient and the common thread of punitive and aggravated damages, which explains why both these heads of damage often are considered synonymously and in tandem. Where that conduct merits punishment, punitive damages are imposable. Where its impact causes extraordinary mental distress, the aggrieved party may be entitled to be compensated with aggravated damages. Where such claims are made under either head of damage, courts will be highly cautious and circumspect before imposing them as they are reserved for the rarest of cases.

[116] Counsel for Mr. White maintains this is one of these cases and urges this court to reverse the finding at trial to the contrary. In support of his argument, he details a veritable litany of complaints accusing the company of conduct exploitively negligent, devious, callous, harsh, vindictive, reprehensible and malicious which "by any reasonable standard is deserving of full condemnation and punishment". Highlighting evidence of his client's additional physical and psychological problems after learning his employer was bringing his lifetime career unilaterally to an end because of his inability to work, counsel blames Woolworth for leaving Mr. White in a state of anxiety and distress which was heightened by its

"cowardly" refusal to respond to letters concerning his employment status written subsequent to receipt of the February, 1991, letter of termination.

[117] It will be readily apparent from the foregoing that the sense of moral blameworthiness and censure laid at Woolworth's feet, to which mention was made in the early stages of this judgment and which permeated most of counsel's arguments, reached its zenith when he was speaking to his client's entitlement to punitive and aggravated damages. It is quite comprehensible how Mr. White's plight can result in a real feeling of compassion for him. His being thrown out of work through injury at a critical period of his employable lifetime with the attendant threatened diminished prospects of contributing to his family's support through gainful employment cannot fail to evoke emotions of deep concern. However, such natural sensitivity for Mr. White's situation may not be pressed to the stage of imposing upon his former employer liability for which it is not responsible.

[118] One reason advanced for attributing extended liability to Woolworth, in counsel's perception, is its exploiting of Mr. White for its own corporate purposes. This claim centers upon the employer's alleged failure to provide adequate lifting equipment or assistance that counsel submits as the cause of Mr. White's disabling injury. However, there is no proof that that was the cause. In the first place, the evidence indicated stock personnel were employed to do strenuous physical tasks and lifting was not part of Mr. White's job description. Moreover, there was also evidence that Mr. White was overweight to a degree that might have been a contributing factor in his injury. In any event, there was certainly insufficient positive proof that the employer's negligence was the cause of the injury.

[119] Even if counsel's premise of fault on Woolworth's part were accepted, the actions detailed could not be regarded as calculated, exploitive conduct that was sufficiently extreme to be independently actionable and to expose Woolworth to liability for punitive or aggravated damages. The type of negligence put forward is no different than what might normally be expected in everyday employment. It thus comes within the ambit of workers' compensation where even ordinary damages are not imposable.

[120] Counsel singles out the timing of the dismissal, portraying it as abrupt and callous, as another ground for punitive and aggravated damage awards. In this argument, he stresses that the dismissal took place when his client was incapable of working, but had been in regular contact with local management who gave no indication of any urgency to his return

and, instead, showed consistent concern over his condition, always counselling him to take his time before returning to make sure he was well. In these circumstances, counsel depicts the sudden receipt of the termination letter from head office in Toronto as a veritable bolt out of the blue and evidently views such action coming on the heels of expressions of concerns for his client's well-being as machiavellian and callous.

[121] This second major argument in support of the claim of extended liability finds its answer in the earlier discussion rejecting counsel's proposal for postponement of operation of the notice of dismissal. As noted in that inquiry, this issue of termination during disability absences engages interests additional to those of the disabled party. All of these must be weighed and balanced with those of the employee. While the employee's disappointment and anxiety over the timing of the dismissal can be readily understood in this case, the depicting a notice of termination received, after nearly a year's absence when early return was not imminent, as abrupt and callous, whilst comprehensible, must be regarded as subjective. The timing of the dismissal, therefore, does not represent conduct to ground a claim of punitive and aggravated damages.

[122] Counsel's strongest condemnation of the company's conduct was reserved for the manner of the dismissal. At the time of his communication with the local store manager in January of 1991, Mr. White had stated that he was experiencing great pain. The manager relayed this fact to head office in a report that advised of Mr. White's pending surgery. Counsel castigates Woolworth for writing the letter of dismissal in the knowledge that its employee was in great pain, but requiring that he nonetheless attend to work on pain of him being considered as having resigned. He contends that the letter was a devious attempt to have Mr. White feel that the dismissal was his fault. Echoing the criteria set down by McIntyre, J., in **Vorvis** for punitive damage awards, he describes the letter as a "harsh, vindictive, reprehensible and malicious" measure deserving imposition of punitive damages and allowing scope for aggravated damages.

[123] With respect, that letter does not warrant these epithets. The most that can be said about it, as was suggested during the trial, is it was clumsy. This, in turn, may be put down to conducting personnel relations from afar in an impersonal manner through correspondence rather than the more sensitive route of personal contact with this long time employee. Be that as it may, branding the manner of dismissal as awkward or insensitive is far removed from

the characterization that counsel lends to it. Moreover, the manner of dismissal, as the line of authorities referred to approvingly in **Vorvis** suggest, is not a consideration, apart from its effect upon the question of compensation in lieu of notice. Certainly, clumsiness would not fall within the criteria for an award of punitive or aggravate damages.

[124] As to the broad general catalogue of complaints against Woolworth's conduct launched by counsel for Mr. White, agreement must be voiced with the trial judge's conclusion that no evidence was presented supporting the appropriateness of an award of punitive damages. As the trial judge points out, the company's topping up of Mr. White's income, when it had no legal obligation to do so, belies the aptness of punitive damages. While the amount involved was small, it, nonetheless, is indicative of an effort to assure the employee of his continued importance to the company and refutes allegations of callous and reprehensible conduct. Moreover, the record indicates that the local store manager showed a sensitivity to Mr. White's plight and an appreciation of the dilemma in which he found himself as a result of his disabling injury.

[125] Finally, while the conduct of Wool-worth cannot be deemed sufficiently extreme to support a claim for punitive damages, neither are its actions such as to justify an award of aggravated damages. Mr. White's dismissal had an adverse effect upon him. He testified as to his emotional state on first learning of his dismissal by an employer to whom he had given "the best years of my life" and to subsequently experiencing nervous and stomach problems which required medication.

[126] Such results are understandable, cannot be downplayed and evoke strong feelings of empathy. Nevertheless, such are the regrettable by-products of terminations of employment which are really contemplated by, and inherent in, the contractual employment relationship. If Woolworth had given proper notice, or damages in lieu of same, there is nothing to indicate that the dismissal would have had a different effect upon Mr. White. Woolworth did nothing independently actionable justifying aggravated damages but is only subject to damages in lieu to rectify its imperfect exercise of a right to which it was entitled under the contract.

[127] In the result, counsel's claim that there was ample evidence to support awards of punitive and aggravated damages must be rejected. There was no conduct perpetrated by Woolworth which merited punishment, nor which justified compensation for extraordinary

mental distress by way of aggravated damages. A review of the circumstances in the case at bar does not support any holding that this was one of those unusual or rare instances where such extended liability should be imposed upon the employer.

Excluded Evidence

[128] The eighth and penultimate complaint against the judge's treatment of damages concerns a letter written by Woolworth's solicitor to counsel for Mr. White which was excluded from evidence by the trial judge. Counsel contends it was wrongly excluded and that this contributed to the judge's alleged erroneous resolution of certain issues in this case.

[129] The excluded letter was dated April 5, 1991, and written by a solicitor of Woolworth to counsel for Mr. White. It was stipulated to be sent "without prejudice" and requested a medical report "outlining the nature of your client's injuries and indicating something in the nature of a prognosis". The record showed it followed on the heels of an earlier letter of March 15, 1991, to Woolworth wherein counsel for Mr. White took the position that Woolworth did not have sufficient medical information to make a decision to terminate Mr. White's employment.

[130] The premises which counsel advances supporting his claim for admission of the excluded solicitor's letter are threefold: firstly, that it was relevant to issues in this case; secondly, that the communication itself cannot be considered privileged and inadmissible correspondence under the "without prejudice rule" because it was prejudicial to the recipient, not its author, and thus falls within the exceptions to the rule; and, lastly, that the letter contains neither offers or terms of settlement nor indicates a willingness to negotiate which are also conditions of coming within the ambit of that rule.

[131] Counsel singles out three specific areas relating to the relevancy of the letter which he maintains have a bearing on the outcome of the issues engaged in this appeal. Firstly, he contends that the letter serves as proof that Woolworth did not have proper and sufficient medical information concerning his client in February, 1991, when it wrote its letter of termination. He claims sufficient medical documentation was important and "is a prerequisite to an employer's decision to terminate an injured worker". This position can only relate to termination through frustration where, as already discussed, the prospects of the employee's incapacity likely continuing, and consequently the medical information, may have some

relevance. It cannot be said that such information was a prerequisite to exercise of the right of dismissal as employment contracts have no indefinite existence and either party can bring the relationship to an end upon proper notice or remuneration in lieu of same.

[132] Thus, counsel's claim of relevance of the implied admission of insufficient medical information, which the excluded letter is alleged to provide, can only have possible bearing on the legitimacy of Woolworth considering its employment contract at an end by reason of frustration in February of 1991. However, it is necessary to bear in mind that that claim of frustration was rejected for the self-same reason that counsel seeks to introduce the excluded letter i.e. to establish Woolworth had inadequate grounds to presume in February of 1991 that Mr. White's ongoing absence appeared likely to continue beyond the threshold of temporary. Hence, the very outcome for which counsel must be construed as pressing for inclusion of this excluded letter was reached without resort to it. It, thus, becomes irrelevant in respect of that proffered basis of its inclusion.

[133] The second ground of relevance attributed to the excluded letter relates to the reason its counsel claims it gave to Mr. White to believe he had not been given notice of termination in the letter of February, 1991. This appears to be directed to the issue of the sufficiency of the latter communication as an act of termination and counsel's attempt to extend the effective date of severance to April 15, 1991, when Mr. White's salary cheque was not forthcoming. However, this argument cannot be sustained. As earlier indicated in dealing with that issue, the February letter was unequivocal and a clear communication of termination. The most that the subsequent excluded letter might appear to establish was a possible reconsideration by Woolworth of its position. It could not, however, be construed as giving reason to Mr. White to believe that he remained in Woolworth's employ. Therefore, that rationale of relevancy must be rejected.

[134] The final reason for urging relevancy of the letter requesting a medical report was that it showed Mr. White "was treated in a callous and high-handed manner by Wool-worth". This argument, which goes to the claim for punitive and aggravated damages, is not tenable either. The issue of censur-ability of Woolworth's conduct has already been fully canvassed in the context of inquiry into the justification for such extended liability. It is difficult to perceive how the mere asking for fuller medical information could affect the conclusions reached there. While an absence of full medical data might touch on the issue of frustration, although not a

factor in the instant circumstances for reasons explained, it cannot serve to bring the conduct of the employer to the extremities required to ground extended liability.

[135] For these reasons, therefore, none of counsel's claims of relevancy for the excluded letter stand up in the light of scrutiny. Even were this not so, the attempt to have it admitted into evidence could not surmount the hurdle of it being a privileged communication. This brings the discussion to the second and last points made by counsel in his attempt to obtain reversal of the judge's exclusion of the letter from evidence on the grounds that it was a privileged communication.

[136] The law recognizes settlement of private disputes by the parties to them, rather than litigating them to the end, to be desirable on grounds of public policy. To foster this objective the without prejudice rule protects parties who make settlement offers from having their contents, or anything said in the course of negotiations, being used to their prejudice in the course of legal proceedings. This protection encourages putting cards freely and frankly on the table in furtherance of the general social goal of promoting private resolution of disputes. (See **Rush & Tompkins Ltd. v. Greater London Council**, [1988] 3 All E.R. 737 (H.L.) per Lord Griffith at pp. 739-740.)

[137] The conditions for recognition of this privilege are the communication must be made: in relation to a litigious dispute that is in existence or in contemplation; with the intention of non-disclosure; and, for the purpose of settlement. The second prerequisite is often signified by explicitly stating that the communication is made without prejudice. However, the use of these words is not conclusive of intent, nor guarantees access to the privilege if the conditions are not substantively fulfilled, or if one of the exemptions to the privilege is applicable (see **The Law of Evidence in Canada**, Sopinka, Lederman & Bryant, Butterworths 1992 at pp. 719-734).

[138] One of these exceptions is that the privilege may not be reserved in respect of a communication which, from its character, may prejudice the person to whom it is addressed (see **Daintrey, Re; Ex parte Holt** (1893), 2 Q.B. 116 per Vaughan Williams, J., at p. 120, where it was held that an admission of bankruptcy was provable through a letter from a debtor to the petitioning creditor, although headed with the words "without prejudice"). In his second premise relating to the claimed error in refusing admission of the letter Mr. White's counsel is attempting to invoke that exception. He submits that in requiring Mr. White to

provide a medical report the letter became prejudicial to its recipient and, therefore, may not be reserved from evidence as a privileged communication. He stresses that this was a letter from his client's employer who was "requiring" something from its employee. A refusal, he argues would have visited obvious negative consequences for Mr. White who had advised the company, through his own counsel, it was premature to dismiss him prior to receipt of the medical treatment. In counsel's view letters from a person in an authoritative position, that require information, by their very nature cannot qualify as a "without prejudice" communication.

[139] With utmost respect, this argument, although complete, is too tenuous to uphold. It proceeds on the mistaken presumption that the medical report was necessary to justify Mr. White's dismissal. This may be either a result of confusion between frustration and termination of an employment contract or of the counsel's stance permeating throughout this appeal that it was manifestly unfair to dismiss a disabled employee in Mr. White's position. Be that as it may, prejudice cannot be constructed merely by counsel setting up a premise of prematurity in dismissing his client in the absence of a medical report. For reasons given in this judgment, that thesis is not tenable. There is no basis to claim that Mr. White, as recipient of the excluded letter, would be prejudiced if it were not admitted into evidence.

[140] The third and final point put forth by counsel contesting exclusion of the letter alleges that it contains no offers nor terms of settlement, nor anything indicating a willingness to negotiate. According to this viewpoint, therefore, it failed to meet the essential condition of a privileged communication inasmuch as it could not be considered as made for the purpose of settlement. This was counsel's sole argument advanced at trial for the letter's admission. The trial judge took the position that it was impossible from the contents of the letter to determine whether or not it related to a settlement. Notwithstanding this conclusion, or perhaps more accurately because of it, he refused to admit the letter into evidence.

[141] With respect, the surrounding circumstances suggest that the letter might well be regarded as possibly heralding a prelude to some negotiations. The request for a medical report, expressly made without prejudice, followed correspondence from counsel for Mr. White arguing that the employer did not have sufficient medical information to make a decision. This leaves room for an inference that if Mr. White could produce a medical report showing he could return to work shortly, perhaps his employer might reconsider its position

and waive its right to treat the contract as at an end. Thus, it was open for the judge to hold that the condition in the letter having a settlement purpose and justifying his exclusion of it on a more positive basis. While he did not go that far in his appraisal of the letter, on full analysis his exclusion of it on the evidence was justifiable.

[142] In the result, the complaint of Mr. White's counsel against the refusal to admit the solicitor's letter of April 5, 1991, must be rejected. It meets the conditions of a privileged communication and cannot be exempted from operation of the public policy of exclusion on grounds that it may prejudice Mr. White as its recipient. Moreover, even if this letter were admitted it would not have borne impact or relevance to the issues in this appeal as to cause any of them to have been decided differently.

The Measure Of Damages

[143] This brings the appeal to the ninth and final complaint that is directed towards the judge's computation of the final damage award of \$730.68 which, as already noted, the trial judge characterized as "a rather trivial amount". This figure was reached by deducting overpayments the company had made to Mr. White from the total amount that the judge found to be owed by Woolworth to its employee. This amount of final award might, indeed, be regarded as somewhat inconsiderable in relation to the multiplicity of the issues that had to be addressed to arrive at this juncture of the appeal.

[144] The total amount assessed to be due to Mr. White was \$2,433.60, comprising \$433.60 to top up his salary during the notice period; \$500.00 for discount on purchases; and \$1,500.00 for lost performance bonus. Counsel for Mr. White challenges the amount of each item of loss maintaining they are too low. Counsel for Woolworth complains that there should not have been any amount considered due in respect of the bonus.

[145] As earlier indicated the \$433.60 represents the judge's calculation of the amount needed to continue to "top up" Mr. White's salary so that he would receive his full net salary for the period of reasonable notice. His counsel challenges this amount, contending that Mr. White's weekly salary was higher and proposes a substantially larger figure to be necessary to assure compensation for his client's full salary loss. However, he appears to be using Mr. White's basic salary rather than his actual take home pay in this argument. The "topping up" was with respect to net pay and the small amount necessary to attain this was explained to

result from the fewer deductions from Mr. White's remuneration when in receipt of workers' compensation. The evidence shows the figure awarded by the judge was accurate and served to place Mr. White in the same net position.

[146] In any event, it must be appreciated that Woolworth was not bound to make any payment as a result of the "historic tradeoff of workers' compensation that has already been discussed. While this arrangement, once entered upon, is not considered gratuitous, but as a modified contract to which Woolworth is bound, counsel cannot expect his client to receive more than was agreed to be paid in the altered bargain, which was to furnish Mr. White with the same net salary. The judge calculated this at \$433.60 and there is no basis to disturb that figure.

[147] The discount amount relates to a 15% discount which Woolworth provided for its employees on purchases made by them from the company. In fixing this sum as the amount of the benefit Mr. White would have received over the notice period, the judge remarked on the absence of records provided by Mr. White who was claiming this entitlement; stated that he felt that he should nevertheless receive some award under this item of damage; and, described the consequential \$500.00 amount as generous. Mr. White's counsel argues an annual figure of \$1,450.00 would be fairer. Counsel for Woolworth does not take issue with the \$500.00 sum. A review of the record gives no basis to interfere with the amount allowed by the trial judge in respect of this benefit.

[148] The performance bonus is a remunerative plan provided by Woolworth for employees at Mr. White's level. It was calculated not only on the performance of section managers but upon the results of the entire store. The trial judge was presented with some historical evidence of what the bonuses had been in the past. He also heard the store manager testify that in 1991 the overall results were such that no bonuses were payable under the plan. The trial judge, again stating that he was leaning on the generous side, included \$1,500.00 in Mr. White's award of damages in lieu of notice under this heading.

[149] Counsel for Mr. White contests this award for lost performance bonus on the ground that it is too low. Here again the record does not support this assertion and it must be rejected. The more substantial complaint directed to this element of the damage award, however, comes from Woolworth's counsel who protests the granting of any amount under that heading. He argues that even if Mr. White had worked, he would not have earned any

such bonus for 1991 as a result of poor sales during that economic recessionary year. This position claims consistency with the general rule of damages that the defendant should not normally be ordered to pay an amount which will actually make the plaintiffs position better than it would have been, if the contract had been performed.

[150] In his text, **The Law of Contract**, Stevens & Sons, 1987, at p. 720, G.H. Treitel makes the point that this principle that "the plaintiff should not actually be enriched by an award of damages is, however, not an inflexible one". It would appear that this is an instance where this scope for malleability should come into play. There is a certain degree of incongruity to allowing this employer who brought to an end by wrongful dismissal the contract of employment to take advantage of the hypothetical continuance of that contract to reduce liability for its actions. Having left Mr. White to face an uncertain future in his condition as of February, 1991, as it had the undoubted right to do upon payment of damages in lieu of notice, it would seem that Woolworth's may not complain, and it would be only fair, to calculate those damages on conditions and assumptions based on historical data as of the date of the dismissal.

[151] Here the evidence indicates that the performance bonuses were a part of the section management remuneration package. Before 1991, there was testimony that they ranged from \$400.00 to \$2,000.00. The trial judge was entitled to take this in consideration. As dismissal is deemed to have occurred in February of 1991, it would seem just in this case to base the amount payable on this head of damages on evidence of past benefits received under this incentive plan. His award of \$1,500.00 for lost performance bonus over the period of notice, while it may be considered somewhat liberal as the judge himself concedes, is not in these circumstances untoward and should be upheld. In the result the total of \$2,433.60 that the judge found owed by Woolworth's to Mr. White is affirmed.

[152] Counsel for Mr. White challenges the deduction of the overpayment of \$1,702.92 from the amount owed to arrive at the net judgment award of \$730.68. As earlier mentioned, that overpayment is a net figure which was arrived at by taking into account excess salary paid to Mr. White after February 22, 1991, and giving him credit for holiday pay due to him.

[153] Mr. White's counsel does not dispute the calculation of the overpayment as such. His argument is that no excess salary is owing because his client could not be deemed dismissed until April 15, 1991, when his monthly remittance ceased, and that it should not in

any event be recoverable through this action because at no time was the overpayment of salary pleaded as a counter-claim or set-off. The first of these points has already been resolved against Mr. White's position. This leaves Mr. White with an argument that the overpayment, the accuracy of the calculation of which is undisputed, could not be considered because it was not pleaded.

[154] With respect, this argument is not sustainable either. One of the basic functions of pleading is to enable a plaintiff to know what defence will be raised in answer to the claim. In this case, although the defence incorporates no formal counterclaim or setoff as such, it pleaded the written contract between the parties as the basis of Mr. White's employment and alleged that he had been paid all amounts to which he was entitled under that agreement. Mr. White would, thus, have been aware that Wool-worth's intended to rely on the written contract.

[155] The last clause of that document stipulates that upon termination of employment the employee authorises the employer "to deduct from any amounts owing to the Employee, including salary, any debts, advances or financial obligations ..." owed to the company by the employee. Thus, it is not possible to contend that Mr. White would have been taken by surprise by the claim of deduction of any salary overpayment. It was to be anticipated from the formal agreement between he and Wool-worth's and he was given notice of intent to rely on it. To maintain that it must be specifically pleaded by way of counterclaim or set-off is too rigid a view. Mr. White's factum shows he was not disputing the overpayment calculation. In the circumstances, therefore, it must be considered a waste of the parties' time and resources, and counter-productive, to leave the overpayment's recovery to a separate action. In the result, the claim that it was not deductible by the trial judge must be rejected.

[156] Accordingly, the judge's computation of the final damage award of \$730.68 is affirmed.

Summary And Determination

[157] At the time that notice of termination was given in Woolworth's letter of February, 1991, to Mr. White it was unreasonable to deem the employment contract between them to have been frustrated, as Woolworth's claims it was. Consequently, the judge was correct in finding that Woolworth's must be considered to have wrongfully dismissed Mr. White through

that letter, which was in substance a notice of termination, effective when Mr. White did not turn up for work on February 22, 1991.

[158] The trial judge did not err in holding that Mr. White was entitled to 12 months' notice in the circumstances of this case commencing from the date of the letter and rejecting the thesis that the notice's operation should have been suspended until Mr. White had sufficiently recovered from his disability to be able to conduct a reasonable search for alternate employment. Neither did the judge err in finding Mr. White entitled to damages in lieu of the notice that ought to have been given, notwithstanding Mr. White's continuing inability to work.

[159] Moreover, no issue can be taken with the decision to deduct the workers' compensation benefits received by Mr. White from these damages and to confine Woolworth's liability for salary in lieu of notice to the relatively small monthly sum paid in pursuance of the modified contract that was created in the period of Mr. White's absence from work preceding the February notice of termination. The salary in lieu of notice to which Mr. White was entitled was properly limited to the amount paid to bring his net take home pay up to the level of his net disposable income prior to his injury.

[160] Neither can exception be taken with the trial judge's treatment of the pension plan issue. While that matter may be possibly in dispute, there is insufficient evidence to rule on Mr. White's claim for realization in cash of his interest in the pension plan. The circumstances here indicate that the judge's disposition effectively deferring possible judicial resolution of the issue should be affirmed, recognizing that it gives scope for the parties to be heard if the issue cannot be resolved between them.

[161] The judgment is also correct in holding that no bases for awards of punitive or aggravated damages are present in the case at bar. Neither are there any grounds to disturb the judge's ruling that the letter from Woolworth's solicitor should be excluded from evidence. Even were it admitted, it would not have had any effect on the foregoing resolution of the issues.

[162] Finally, the computation of the final award of damages is confirmed. The judge made no error in arriving at the figure of \$730.68 in deducting the net overpayments to Mr. White from the total amount the judge found to be owed by the company to him. Accordingly both the appeal and cross-appeal must be dismissed.

[163] As to the question of costs, counsel for Mr. White urges this court to reverse the judge's order that each party bear its own costs. This was a discretionary disposition, not contrary to principle, and this court has no basis to disturb it. The only question as to costs of concern is whether this court should follow suit and order each party to pay their own costs of the appeal. The alternative would be to require Mr. White to pay the costs of his unsuccessful appeal and Woolworth those in the cross-appeal. This may well, however, result in an unequal cost burden which in the circumstances would seem unfair inasmuch as the issues were all inter-related, melded, one with the other, and were vigorously pursued by each party. Hence, on balance, it would appear to be fair and reasonable to follow the course set by the trial judge with respect to costs.

[164] Accordingly, this appeal and cross-appeal are dismissed and there will be no order as to costs to the intent that each party will bear their own costs on this appeal as they must on the trial.

*Appeal dismissed;
cross-appeal dismissed.*