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G. England*
E. Gardner**

Compensation for Pension
Benefit Losses in Unlawful
Dismissal

I. Introduction

This paper describes, firstly, how the “real-world” pension benefit losses of an unlawfully dismissed employee are dictated by three main variables: the benefit structure of the plan; the legal structure of the plan; and the employee’s position in the labour market. Secondly, it shows that the common law measure of damages in a wrongful dismissal action fails to compensate adequately those losses. In contrast, the measures of damages in collective agreement arbitration, and in adjudication pursuant to section 61.5 of the *Canada Labour Code*¹ create the potential for a more realistic approach to compensating the employee for his “real-world” losses. Thirdly, comparison is made with the more fully developed jurisprudence under the British unfair dismissal legislation. Fourthly, some guidelines for compensating the “real-world” pension losses of the employee are suggested for Canadian legal umpires.

II. The Problem: Variables Affecting “Real-World” Pension Benefit Losses

The vast majority of pension plans take one of two forms.² First, the employer may contract with a life insurance company for the

*The law herein is stated as of December 31, 1982.

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1. *Canada Labour Code*, R.S.C. 1970, c. L-1 as am. Similar schemes exist in An Act Respecting Labour Standards, S.Q. 1979, c.45 as am. ss. 124-132 and the Labour Standards Code, S.N.S. 1972, c. 10 as am. s. 67A. It can reasonably be expected that other provinces will eventually follow suit.

2. Excellent descriptions of the mechanics of private pension plans, which were relied on heavily by the authors, are found in C.C.H. Canadian, “Employment Benefits and Pension Guide, Vol. 1,” (hereinafter referred to as the C.C.H. Guide); P. Kumar and A.M.M. Smith, “Pension Reform in Canada: A Review of the Issues and Options” (Queens University Industrial Relations Centre, 1981) especially pp. 1-10; J. Fichaud, “Pensions: A Primer for Lawyers” (1975), 2 Dal. L.J. 369; H. N. Janisch (ed.), “Collective Bargaining in the Context of Inflation,” Proceedings of a Conference held at the Faculty of Law, Dalhousie University, May 3, 1975, (Faculty of Law, Dalhousie University, 1975), especially pp. 34-75.

purchase of an annuity in favour of his employees at retirement. The insurance company, which will often administer the rules of the plan alone or in conjunction with the employer, holds the benefit of the contract in trust for the employees. Second, the employer may execute a trust indenture for the benefit of the employees, in which custody and legal title to the fund vest in the trustee, often a trust company. In both cases, the employee beneficiary may have a cause of action against the fund for breach of trust. This paper, however, is concerned with the employee's rights against his employer when, as a result of his unlawful termination,³ he must withdraw from a fund in which he has been and would have remained a member had he not lost his job. His losses, therefore, must take account of both the benefit position which he has accrued up to the date of dismissal and the future benefit position which he would have achieved had he not been unlawfully dismissed.

A. The Benefit Structure of the Plan

The starting point in assessing the employee's losses is to determine, according to the benefit structure of the plan, the amount of his accrued benefits at the date of dismissal and the amount by which such benefits would have increased had he not been dismissed. Although there is a ". . . diversity of arrangements and a complexity of patterns which defy easy description",⁴ it is possible to distinguish the following broad categories of pension plan.

1. "Defined Contribution" Plan

This entails the regular payment of defined contributions by the employee and/or the employer to the account of the employee. The capital sum provided is invested for the benefit of the fund. The total sum is used to purchase the employee an annuity at retirement, the value of which depends on how much is accounted to him at that time. There are two kinds of "defined contribution" plans: a "money purchase" plan, and a "profit sharing" plan. The former

3. In the context of this paper, this is deemed to include common law wrongful dismissal, discharge without "just cause" in collective agreement arbitration and "unjust" discharge under section 61.5 of the Canada Labour Code.

4. Pradeep and Smith, at p. 5, *supra*, note 2. According to Pradeep and Smith, in 1978 there were 15,095 private pension plans covering 4.2 million workers, or 39% of the labour force (at pp. 11-12). Detailed statistics as to the incidence in 1978 of the various kinds of pension plans described herein can be found in the C.C.H. Guide, Vol. 1, at p. 2125, *supra*, note 2.

specifies the amount of contribution required from the employee and/or the employer, normally a fixed percentage of the employee's annual earnings. The latter relates the employer's contributions to the profitability of the company according to a defined formula, and does not generally require joint contribution from the employee.

2. *"Defined Benefit" Plan*

This specifies the amount of pension benefit payable to the employee according to a formula based on given years of service and given income levels. There are two kinds of "defined benefit" plans: a "flat benefit" plan, and a "unit benefit" plan. The former simply specifies a dollar amount for each year of service. The latter bases the amount of benefit on various formulae, the most common of which are: "final" earnings; "final average" earnings; "average best" earnings; and "career average" earnings.

A "final" earnings formula is one which specifies a percentage of the employee's earnings over his last year of service. A "final average" earnings formula is one which specifies a percentage of the employee's earnings as an average over a defined number of years prior to retirement, multiplied by the number of his previous years of service. An "average best" earnings is one which specifies a percentage of the employee's earnings as an average over a defined number of years in which the employee's earnings were at their highest, multiplied by each year of service. A "career average" earnings formula is one which specifies a percentage of the employee's earnings averaged over his total years of service, multiplied by the number of years of service.

3. *"Integrated" Pension Plan*

This type of plan provides in its formula for a reduction in contributions and benefits according to the amount of benefits due to the employee under the Canada Pension Plan. In other words, as the employee's entitlement under the C.P.P. increases, his entitlement under the private plan decreases commensurately, but he ends up with the same overall benefit. "Integration" is common to "defined contribution" and "defined benefit" plans.^{4A} It follows that in order to assess the employee's pension position had he not been fired, account ought to be taken of possible future

4a. In 1978, 41% of all plans were integrated: C.C.H. Guide Vol. I, at 2125, *supra*, note 2.

variations in his Canada Pension Plan benefit position, although in practice the obstacle of making accurate predictions is insurmountable.

B. The Legal Structure of the Plan

1. At Common Law

At common law, the plan may either be a gratuity or a contract, depending on the intention of the parties.⁵ Evidence of an intention to establish a gift would be if the plan expressly refutes any contractual force, or subjects entitlement to the employer's discretion, or permits the employer to modify unilaterally vested benefits. In that case, whereas the employee might reasonably expect the employer to honour the gift, no legal obligation arises prior to actual payment of the benefit, at which time the gift become complete. If the plan is contractual, it may be either a unilateral contract or a bilateral contract subject to a condition, the "requested act/condition" in both instances being satisfaction of the vesting provisions in the plan. It follows that the employee *prima facie* is not entitled to any benefits unless and until those provisions are met. In reality, however, the employee can reasonably expect that he will not be prevented from satisfying the vesting conditions by the employer's act of unlawfully dismissing him. This reality could be reflected in the legal structure in two ways. First, it is arguable that unlawful dismissal violates a duty on the employer not to thwart deliberately the satisfaction of the condition, such duty arising from either an implied term of the plan itself if viewed as a condition going to performance rather than obligation,⁶ or from an implied term in the employment contract, or from a collateral contract⁷ ancillary to the plan and/or the employment contract. Second, if the plan is a unilateral contract, there is authority suggesting that the promisor cannot revoke his promise once performance has commenced without affording the promisee reasonable time to complete it.⁸ It is strongly arguable that unlawful dismissal would

5. The following description of the legal structure is based largely on Fichaud, at pp. 405-410, *supra*, note 2, wherein the authorities are cited.

6. By analogy with *Dynamic Transport v. O.K. Detailing* (1978), 20 N.R. 500 at 510-511 (S.C.C.). See also *Dawson v. Helicopter Exploration Co.*, [1955] S.C.R. 868, [1955] 5 D.L.R. 404.

7. By analogy with *Re Dominion Stores* (1973), 2 O.R. (3d) 279 (H.C.).

8. *Errington v. Errington*, [1952] 1 K.B. 290 *per* Denning L.J. (C.A.); *Daulia v. Four Millbank Nominees*, [1978] 2 All E.R. 557 at 561 (C.A.).

be unreasonable in this context. The significance of those two possible legal actions is that the employee would be compensated for loss of his "real-world" reasonable expectancies as regards his pension,⁹ not just for his *de jure* legal entitlements. There is no case law on those two possibilities in Canada.

The legal structure of the plan must take account of its express provisions. The following provisions are particularly relevant. First, the plan may have a minimum service qualification requirement and/or a provision making continued eligibility dependent on the maintenance of ongoing "employee" status. Second, the plan may contain rules for the withdrawal of accrued benefits prior to vesting. Thus the employee is usually entitled to withdraw his own past contributions, and less frequently those of his employer, if his employment terminates before vesting. Third, the plan will describe when benefits vest, whereupon the employee becomes legally entitled to the value of his own and his employer's past contributions. It is rare for benefits to vest automatically with on-going service, notwithstanding that the employer's contributions are part and parcel of the total compensation package and ought realistically to be viewed as deferred wages, an earned "right."¹⁰ Fourth, the plan may contain "locking-in," or "freezing" provisions which guarantee the employee a deferred pension at retirement by preventing him from withdrawing either parties' contributions, or from otherwise surrendering his benefits for a cash sum, if his employment ceases before retirement. Alternatively, and whilst permitting the employee to surrender his vested benefits upon pre-retirement termination, the plan may state that he must forfeit the employer's past contributions if he elects that option. Fifth, the plan may infrequently contain a "portability" provision, whereby the employer agrees to transfer the employee's accrued benefits to the pension fund of a successive employer, either automatically or at the request of the employee. Sixth, the plan may provide for recovery of accrued benefits by the estate or the spouse of an employee who dies prior to vesting.¹¹ Otherwise, such benefits *prima facie* are irrevocable since the vesting condition will not have

9. *Infra*, p. 349.

10. See Fichaud, at pp. 407-408, *supra*, note 2. In "Better Pensions for Canadians" (Minister of Supply and Service Canada, 1982), at 12, the federal government endorses the automatic vesting philosophy as part of its pension reform strategy.

11. See eg. *Pension Benefit Standards Act*, R.S.C. 1970, c. P-8, s. 13 and *Pension Benefit Standards Regulations*, S.O.R. Cons./78, Vol. 13, p. 10131.

been met. Lastly, the plan may provide for post retirement forfeiture of the whole or part of the pension in defined circumstances, e.g. working for a competitor in breach of a restrictive covenant.¹²

2. *Statutory Intervention*

The legal structure must take account of pension benefit legislation in all jurisdictions.¹³ Attention is focussed herein on the Dominion *Pension Benefits Standards Act*,¹⁴ which is substantially similar to the legislation in most provinces. It should be noted that the Government intends to amend significantly this Act as part of its strategy of revamping the entire retirement income system,¹⁵ which may be a lengthy process. The salient features of the current legislation are as follows. First, section 10(1) (a) requires that the plan “contractually provide” for vesting after ten years of “continuous service” and attainment of forty-five years of age.^{15A} An exception is made in respect to that portion of the benefit which is attributable to voluntary, additional contributions by the employee. Secondly, provision is made for compulsory “locking in” of benefits which have vested pursuant to section 10(1)(a). The employee cannot surrender or commute his benefits for a cash payment during his lifetime,¹⁶ nor can he withdraw any of his own

12. The provision may be held void as an unreasonable restraint of trade, as in *Taylor v. McQuilkin et al.* (1968), 2 D.L.R. (3d) 463 at 469-470 (Man. Q.B.). See also *Bull v. Pitney Bowes Ltd.*, [1967] 1 W.L.R. 273 (Thesiger J.).

13. Pension Benefits Act R.S.A. 1966 c. 69 as am. and Pension Benefit Act Regulations, Alta. Reg. 446/66, December 22, 1966 as am.; Manitoba Pension Benefits Act, R.S.M. 1975 c. 38 as am. and Regs. 139/76 as am.; Nova Scotia Pension Benefits Act R.S.N.A. 1975 c. 14 as am. and Pension Benefits Act Regulations, approved by Governor Council, December 7, 1976; Ontario Pension Benefits Act R.S.O. 1980 c. 373 as am. and Pension Benefits Act Regulations, Reg. 746, R.R.O. 1980 as am.; An Act Respecting Supplemental Pension Plans R.S.Q. 1965 c. R-17 as am. and Supplementary Pension Plans Act Regs. R.R.Q. 1981 c. R-17 r-1 as am.; Saskatchewan Pension Benefits Act R.S.S. 1978 c. P-6 as am. and Pension Benefit Regulations, Order in Council 733/81. In the above jurisdictions, and in jurisdictions not having major pension legislation, statutes exist which regulate pensions in specific industries, such as teaching. Those statutes are cited in the C.C.H. Guide, Vol. 1, *supra*, note 2. On the Nova Scotia legislation, see Anne Mac L. Malick, “Private Pensions — A Legislative Response — Nova Scotia’s Pension Benefits Act” (1976), 2 Dal. L.J. 703.

14. *Supra*, note 11.

15. These proposals are described in “Better Pensions for Canadians,” *supra*, note 10.

15A. Section 16(1) of the Saskatchewan Pension Benefits Act is unique in providing vesting after one year’s service and 45 years of age.

16. Section 10(1)(c).

contributions to the fund.¹⁷ The major exceptions to these “locking in” provisions are as follows.¹⁸ They do not apply to that portion of the benefit attributable to voluntary, additional contributions by the employee, nor to the first 25% of the commuted value of benefit.¹⁹ Nor do they apply to a benefit which entitles the employee to a monthly pension benefit of less than \$10.²⁰ In all of these instances, therefore, the employee who terminates before retirement can withdraw as a cash sum the amounts in question. Thirdly, section 10(1)(b) prohibits the employee from assigning or alienating any part of his pension benefit, irrespective of whether the benefit has vested, except for such portion of the benefit that is attributable to his voluntary, additional contributions.

C. The Employee's Position in the Labour Market

The extent of the employee's pension benefit losses will depend on the following factors. First, it is necessary to predict what would have happened to the employee had he remained on the job. His losses would be limited in proportion to his chances of being lawfully terminated prior to retirement by, for example, his quitting, taking early retirement, being fired for an industrial offence, being declared redundant or the firm ceasing operations or being taken over by a successor employer which discontinues the plan. Indeed, the plan may provide for the forfeiture of defined benefits in those instances. In any case, the employee would obviously cease to improve his pension position beyond such a termination. In particular, if there is a strong chance that termination would occur before vesting, the employee would be deprived of the benefit of the employer's contributions. On the other hand, the employee's losses would be increased in proportion to his chances of receiving periodic wage increases, which may derive from an annual across-the-board increase for all employees, or from a promotion or individual bonus. Thus, the employee's *personal* career and salary progress must be predicted along with the company's general wage policy. In addition, account must be taken of likely amendments to the plan itself, either voluntarily by the parties or by legislation, over the employee's projected period of employment with the company, which may or may not enhance the

17. Section 10(1)(d).

18. The other exceptions are also contained in s.10(2).

19. Section 10(2)(c).

20. Section 10(2)(b).

employee's position. In this regard, if the Dominion Government's reforms are implemented, all plans in the federal jurisdiction will have to provide for vesting after two years of service, for improved treatment of spouses, for more rigorous "locking in" provisions and for improved portability.²¹ The chances are that the provinces will eventually follow this lead.

Second, it is necessary to predict the employee's career progress and pension progress with successive employers.²² The starting point is that the employee will have lost, and must be compensated for, the opportunity to improve his benefits during the period he is unemployed following his discharge. This is easy to determine where the employee has secured alternative employment by the date of the hearing. If not, it is necessary to project his likely period of unemployment, having regard to labour market factors such as the present and anticipated availability of reasonably suitable job openings, the employee's age and abilities, and his opportunities for retraining under private or government schemes.

In addition, the pension benefits offered in successive jobs must be compared with those in the old job. The employee's pension losses will represent only the amount to which the benefits provided in the successive plan are less favourable to him than those in the old. In making the comparison, all of the terms of the plan must be examined²³ in order to produce an overall value. In particular, any qualifying period in the successive plan, whereby the employee must have accumulated defined seniority before he can become a member, must be compensated. Moreover, if the successive job does not provide a pension but offers a substantially higher total compensation package, it might be reasonable to assume that the difference is intended to offset commensurately the absence of a pension and should be utilized by the employee to buy a pension of his own. If so, the employee will not have sustained the pension

21. "Better Pensions for Canadians" at pp. 56-57, *supra*, note 10.

22. The exercise is basically the same as determining the "cut-off" for compensating general damages flowing from an "unjust" discharge under section 61.5(9) of the Canada Labour Code. On this see G. England, "Unjust dismissal in the federal jurisdiction: the first three years" (1982), 12 Man. L.J. 8, at 25-28, and since then the adjudication award in *Willberg v. Jo-Ann Trucking Ltd.*, at 22-33, September 1982 (England).

23. A good example of how this can be done is illustrated in *Willment Bros. Ltd. v. Oliver* (1979), 1 C.R. 378 (E.A.T.), a case arising under the British unfair dismissal legislation currently contained in the Employment Protection (Consolidation) Act 1978, c. 44 as am.

losses that appear on the surface. If the employee's contributions to his own pension fund entail less favourable taxation breaks than if he had remained in the old fund, the difference is a loss for which he should be compensated. It should also be remembered that the employee's likely salary and career progress must be assessed in the successive job because the pension it offers, whilst less favourable initially than the old one, could foreseeably catch up and eventually surpass it. Conversely, if the successive job is less secure, *apparently* superior pension benefits would in fact be less favourable to the employee than in his old job.

Furthermore, certain personal characteristics of the employee must be taken into account. If the employee's chances of surviving to retirement are low due to sickness or poor health, or if his post-retirement longevity is likely to be short, it follows that his pension losses are reduced accordingly. The converse is true if his chances of reaching retirement and his longevity expectancy thereafter are good. If the plan provides for surviving spousal benefits, and having regard to the employee's actual or anticipated marital status, the early death of the employee himself would not serve to "cut-off" his losses. Moreover, assuming that the employee is a sensible "economic man," he will invest the "accelerated" capital sum which he receives by way of compensation for pension benefit losses and receive interest income which he would not otherwise have received had he accumulated his pension benefits in the normal way. The amount by which such interest exceeds the projected interest which the employee would have been credited with had he remained in the fund should be deducted from his damages as being a windfall to him. This entails, therefore, predicting the interest return on the fund's investment as well as on the employee's investment.

In sum, the "real-world" pension benefit losses of the unlawfully dismissed employee will depend on the benefit structure of his plan, the legal structure of his plan and a variety of economic factors relating to his personal position in the labour market as outlined above. Next, it is proposed to examine how the law measures those losses for the purpose of compensating the employee. Attention is focussed on the common law of wrongful dismissal, the arbitral jurisprudence on "just cause," and the statutory protection against "unjust" discharge in section 61.5 of the Canada Labour Code, with special reference to the jurisprudence arising under the British unfair dismissal legislation.

III. The Legal Response to Measuring the Employee's Pension Benefit Losses

A. The Common Law of Wrongful Dismissal

The philosophies governing the measure of damages in a wrongful dismissal action are, firstly, that the employee is only entitled to compensation for contractually-based expectancies and, secondly, that the employer would have performed the contract in the manner least disadvantageous to himself. This means that the employee can only recover damages for benefits which the employer would have been contractually obliged to give him during the period of notice required to terminate lawfully the contract.²⁴ In the context of pension benefit losses, it follows that the cut-off date for assessing future losses is the date when lawful notice to terminate would expire.²⁵

As regards the employee's entitlement to benefits accruing up to the date of dismissal, this is normally a matter between the employee and the pension fund and has nothing to do with the wrongful dismissal action.²⁶ As regards the position between the date of dismissal and the cut-off date, the employee in a wrongful dismissal action ought theoretically to recover his employer's

24. See generally I.M. Christie, *Employment Law in Canada* (Butterworths, 1980), at 385-407; M.R. Freedland, *The Contract of Employment* (Clarendon Press, 1976), at 244-272.

25. Eg. *Mayhew v. Carron Inc. (No. 1)* (1982), 98 A.P.R. 278 (N.S.S.C.); *Sturrock v. Xerox of Canada Ltd.*, [1977] 1 A.C.W.S. 203 (B.C.S.C.); *Bardal v. Globe and Mail Ltd.*, [1960] O.W.N. 253 at 255 (H.Ct.); *Bagby v. Gustavson International Drilling Co. Ltd. et al.* (1980), 24 A.R. 181 at 203 (S.C. App. Div.); *McKilligan v. Pacific Vocational Institute*, [1979] 3 A.C.W.S. 94 (B.C.S.C.). The leading British authority to the same effect is *Bold v. Brough, Nicholson Ltd.*, [1964] 1 W.L.R. 201 (Q.B.).

26. *Bagby v. Gustavson International Drilling Co. Ltd. et al.* (1979), 20 A.R. 244 at 261 (S.C.), which was not overruled on this point on appeal, *supra*, note 25. Presumably, an action would exist against the employer under the employment contract only if, and to the extent that the plan is expressly or impliedly incorporated therein. Such a possibility was suggested in *Taylor v. McQuilkin et al.* (1968), 2 D.L.R. (3d) 463 at 466. In contrast, Freedland, "The Contract of Employment," at 254, *supra*, note 24, implies that the employee can always recover by way of contractual debt in the wrongful dismissal action for his own and his employer's past contributions. It is submitted that in Canada the proper forum would normally not be the wrongful dismissal action, and that the employer's past contributions in any event should theoretically only be recoverable if they have vested, or would have become vested during the proper notice period. On the problems which the employee encounters in an action against the fund, see Christie, "Employment Law in Canada," at 234-235 and especially the cases cited in footnote 600, *supra*, note 24.

contributions for that period since the employer would have been contractually bound to pay them had he remained in the job, but only if vesting has occurred, or would have occurred before the cut-off date. Otherwise, in the absence of such vesting, the employee would not be entitled to the employer's contributions in an action against the fund.²⁷ It would be odd were the employee not to recover for *prior*, non-vested employer contributions but were to recover for *future* ones! Yet the courts appear to compensate the employee for the loss of future employer contributions without mentioning whether vesting will have occurred before the expiry of the notice period.²⁸ The judgements do not seem to attach any importance to vesting in this context. One exception is *Sturrock v. Xerox of Canada Ltd.*,²⁹ where the British Columbia Supreme Court held that because vesting would have occurred before the expiry of the notice period, the employee was entitled to compensation equivalent to the market value of his pension benefit as of that date. In *Bardel v. Globe and Mail Ltd.*,³⁰ where the Ontario High Court awarded compensation for the employer's specific contributions over a twelve month notice period, no mention was made of vesting. In that case, however, it may well be that vesting had occurred since the employee had approximately 17 years seniority. Insofar as the courts do compensate for future employer contributions in the absence of vesting, it is submitted that this is theoretically unsound according to the principle of *restitutio in integrum*. It may be that the courts are deliberately overlooking this obstacle in order to avoid an unjust enrichment to the employer if he kept the contributions. If this is the underlying concern, it is submitted that rather than give the employee a windfall, the court should order the employer to pay the amount into the fund, (even though the employer may also indirectly benefit by an enrichment of

27. This must logically follow if the vesting conditions prescribed in the plan (or the legislation) have not been satisfied. See Fichaud, "Pensions: A Primer for Lawyers", at 378-379 and 407-408, *supra*, note 2. A recent illustration in the collective bargaining context is *Nero et al. v. Rygus et al.* (1981), 33 O.R. (2d) 445 (H.C.).

28. Eg. *Bardal v. Globe and Mail Ltd.*, *supra*, note 25; *McKilligan v. Pacific Vocational Institute*, *supra*, note 25; *Bagby v. Gustavson International Drilling Co. Ltd. et al.*, *supra*, note 25 for the Court of Appeal and note 26 for the Trial Division; *Mayhew v. Cannon Inc. (No. 1)* (1982), 98 A.P.R. 278 (N.S.S.C.).

29. *Supra*, note 25.

30. At p. 255, *supra*, note 25.

the fund). After all, it is the fund and the participants therein who really sustain the loss in this situation.

Assuming that the benefit of the employer's future contributions is *prima facie* compensable, the courts have utilized two methods for calculating the amount of that benefit. First, they have directed the employer to pay the exact contribution he would have paid pursuant to the terms of the plan.³¹ This is simple but crude, especially where the employee's notice period is long³² and/or the employee's pension position depends on the various kinds of formulae common to "defined benefit" plans.³³ Likewise, it is difficult to compute where there is no specific amount of periodic employer contributions relating to each employee.³⁴ In those situations, a more accurate assessment would have to include predictions as to the labour market and pension positions of the employee at a time which may well be two years down the road. Even then it might be difficult to ascertain specific employer contributions relating to each employee.³⁵ This method, therefore, is best suited to employees with "defined contribution" plans whose notice period is relatively short and where a specific periodic employer contribution is readily identifiable. Second, in one case³⁶ the court calculated the benefit by asking how much it would cost the employee to buy pension benefits of equal value to those to which he would have been entitled at the expiry of his notice period according to the market price at that time. This "future oriented" approach is obviously more accurate in cases of longer notice periods and/or "defined benefit" formulae because it entails predictions of the benefit and legal structures of the plan and the employee's labour market and pension positions, along the lines described earlier.³⁷ Unfortunately, in that one case³⁸ in which this

31. Eg. *McKilligan v. Pacific Vocational Institute*, [1979] 1 W.L.R. 201.

32. The current trend is for courts to award longer notice periods, and the prevailing heavy unemployment is likely to preserve the trend. See D. Harris, *Wrongful Dismissal* (DeBoo Ltd., 2 ed., 1980), at 71-77.

33. *Supra*, p. 349.

34. Eg. in the "controlled" funding plan described in *Willment Bros. Ltd. v. Oliver*, *supra*, note 23 which is discussed *infra*, p. . For other examples of such uncertain contributions see Fichaud, "Pensions: A Primer for Lawyers," at 389-390, *supra*, note 2.

35. See *supra*, note 34 and accompanying text.

36. *Sturrock v. Xerox of Canada Ltd.*, [1977] 1 A.C.W.S. 203 (B.C.S.C.).

37. *Supra*, pp. 350-352.

38. *Sturrock v. Xerox of Canada Ltd.*, *supra*, note 36.

approach was used, the judge did not expand on how he measured the above mentioned variables in order to produce the final figure so that it is impossible to comment on how sophisticated his actuarial methodology was.

The major drawback of the common law response is its failure to compensate losses that will foreseeably ensue beyond the expiry of the notice period.³⁹ It means, for example, that a wrongfully dismissed 55 year old employee with an "average best earnings" based "defined benefit" plan, who has no chance of finding successive employment before retirement, but whose employment contract expressly contains a three month notice period, will be entitled only to three months worth of employer contributions by way of damages, notwithstanding that the employer's wrongful act has foreseeably deprived him of his best earning years. It also means that a wrongfully dismissed employee with nine years seniority, being one year short of vesting,⁴⁰ and whose contract contains an express three month notice provision, will be deprived of an accrued pension benefit based on his employer's past contributions, notwithstanding that he would have almost certainly attained vesting seniority had he not been dismissed. At the most he will stand to recover three months worth of employer contributions by way of damages, and even that is theoretically unsound!⁴¹ It may be possible to circumvent the obstacle of the notice period by basing damages not on the employment contract, but on an ancillary, independent contract. It was suggested earlier that if the pension contract is viewed as either a unilateral contract or a bilateral contract subject to a condition, the employer could be regarded as having impliedly promised not to thwart deliberately the employee from attempting to meet the vesting provisions and, *a fortiori*, from attempting to participate further in the venture after vesting.⁴² A wrongful dismissal would surely be breach of such an obligation. In order to compensate for the losses of the opportunities to vest and to proceed further with the venture, the courts would presumably have

39. The same criticism can be made of the common law limitation on general damages arising from wrongful dismissal.

40. The minimum statutory vesting period is 10 years, provided that the employee is also at least 45 years of age, eg. Dominion *Pension Benefits Standards Act*, R.S.C. 1970, c. P-8, s. 10(1)(a). Section 16(1) of Saskatchewan's *The Pension Benefits Act* R.S.C. 1978, c. P-6 is unique in providing for vesting after 45 years of age and only one year of service.

41. For the reasons see *supra*, p. 354.

42. *Supra*, pp. 347-348.

to predict the employee's foreseeable "real-world" losses, having regard to the economic variables and the benefit and legal structures of the plan mentioned earlier.⁴³ To the author's knowledge, this argument has not been canvassed in a reported Canadian case. One English decision might arguably be read as implicitly rejecting it,⁴⁴ although the argument was not put in exactly the above form in that case.

*B. The Arbitral Jurisprudence of Discharge Without "Just Cause"*⁴⁵

The problem of compensating the unlawfully discharged employee for loss of his future pension benefits has not been addressed in the reported arbitral jurisprudence.⁴⁶ This is partly because in the vast majority of awards in which discharge is found to be without "cause" the grievor has been reinstated, perhaps subject to an unpaid suspension in instances of contributory blameworthiness. The issue could conceivably arise were a grievor to request compensation without reinstatement, in which case the duty to mitigate would presumably require that his refusal of reinstatement be supported by reasonable grounds. Otherwise, it is a moot question whether an arbitrator has jurisdiction to refuse reinstatement of his own accord if discharge is without "cause," at least where the collective agreement does not expressly empower him to do so.⁴⁷ On the one hand, it is arguable that if the grievor is denied reinstatement, albeit subject to compensation, he is *in fact* being

43. *Supra*, p. 350.

44. *Bold v. Brough, Nicholson Ltd.*, [1964] 1 W.L.R. 201.

45. The arbitral jurisprudence on the remedial aspects of "just cause" is described in D. Brown and D. Beatty, *Canadian Labour Arbitration* (Agingcourt: Canada Law Books, 1977), at 56-59 and 64 and in E. Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1978), at 35-51.

46. If the employee is awarded reinstatement, the employer will be ordered to make up his part of the employee's pension position during the hiatus, for example by paying into the fund the full amount of employer contributions and making ". . . such further or other financial arrangements with the trustees of the pension plan to reinstate the grievor's entitlement under the pension plan so that his rights thereunder will not be adversely affected by the company's failure to make timely contributions," *per* arbitrator O'Shea in *Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 880 and Direct Winters Transport Ltd.*, L.A.N. December, 1975 at 7.

47. Where compensation without reinstatement has been ordered in cases of discharge without "cause," one arbitrator has based his decision on expressly permissive language: *Fibreglas Canada Ltd.*, [1976] 1 W.L.A.C. 464 (Sychuk).

disciplined, (if not discharged) in the face of collective agreement language which generally requires that discipline/discharge be for "cause." Nor could the arbitrator rely on the common provision in collective agreements and the labour relations legislation empowering him to substitute a lesser "penalty," namely a compensated discharge, because that is only permissible upon finding "cause" for some sort of "penalty."⁴⁸ On the other hand, there are situations in which it doubtlessly makes good labour relations sense that an entirely blameless grievor not be reinstated, e.g. if there has been an irretrievable breakdown in personal relationships between the grievor and a supervisor or work group where a close relationship is essential to the job.⁴⁹ It is arguable that an arbitrator has an implicit mandate, deriving from the purpose which arbitration is deemed to have under the labour relations legislation and the collective agreement of effectively resolving grievances at work, to apply such remedies as he sees fit in order to achieve that purpose. At least one arbitrator⁵⁰ has ordered termination with compensation explicitly on this ground, relying on the decisions of the Supreme Court of Canada in the *Polymer*⁵¹ and the *Attorney-General of Newfoundland*⁵² cases, and on a law review article by Professor Paul Weiler.⁵³ This approach would see the statutory substitution of penalty provision in historical context as a response to the *Port*

Another based his decision on the unique provisions in sections 92, 92(3) and 98 of the British Columbia Labour Code, R.S.B.C. 1979, c. 212 as am.: *Douglas Technical College* (1977), 16 L.A.C. (2d) 139 (Munroe). Another stated that this is inherently within the jurisdiction of an arbitrator without saying why: *Health Labour Relations Association of British Columbia*, [1977] 1 W.L.A.C. 250 (MacIntyre). Another simply did it without bothering, it seems, with the jurisdictional issue: *Research Industries Ltd.*, [1977] 2 W.L.A.C. 277 (Thompson). The latter two decisions, arising from British Columbia, are arguably based on the Labour Code of that province, but the arbitrators did not make this clear.

48. Eg. Alberta *Labour Relations Act*, R.S.A. 1980 (supp.), c. L1-1, s. 125(2).

49. As in *Douglas Technical College* (1977), 16 L.A.C. (2d) 139 (Munroe); *Fibreglas Canada Ltd.*, [1976], W.L.A.C. 464 (Sychuk); and in *Hotel Employees and Restaurant Employees and Bartenders International Union, Local 73 and The Elks Club of Lethbridge*, unreported, March 30, 1982 (Virtue).

50. *The Elks Club of Lethbridge*, *id.*

51. *Polymer Corp. Ltd.* (1959), 10 L.A.C. 51 (Laskin); *affd.* 26 D.L.R. (2d) 609 (Ont. H.C.); *affd.* 28 D.L.R. (2d) 81 (Ont. C.A.); *affd.* 33 D.L.R. (2d) 124 (S.C.C.). (sub nom. *Imbleau v. Laskin*).

52. *Newfoundland Association of Public Employees v. A.-G. for Newfoundland* (1977), 77 C.L.L.C. 14. 085 (S.C.C.).

53. P. Weiler, "The Remedial Authority of the Labour Arbitrator: Revised Judicial Version" (1974), 52 Can. Bar Rev. 29.

*Arthur*⁵⁴ decision, namely as an attempt to *buttress* the arbitrator's powers to fashion sensible labour relations remedies, not as an attempt to restrict other remedies by exclusionary inference. It must be remembered, however, that another purpose of the labour relations legislation is to enhance collective "freedom to contract," so that an employee who is *effectively* discharged by an order of the arbitrator when he is totally blameless might well have a valid complaint that his express rights are being overridden. In light of the courts' track record in reviewing the remedial innovations⁵⁵ of arbitrators it is possible that the arbitrator may very well not have such inherent jurisdiction.

Assuming that an arbitrator has jurisdiction to compensate without reinstatement, the question of how the employee's damages should be measured is largely unanswered in the jurisprudence,⁵⁶ and unfortunately, no mention is made of pension benefits in the few awards on point. Where the issue of measuring general damages has arisen in other contexts, such as damages for illegal strikes,⁵⁷ arbitrators have applied the traditional contract law measure in *Hadley v. Baxendale*,⁵⁸ namely that only such losses as are within the actual or reasonable contemplation of the parties at the date the contract was made are compensable. An alternative approach suggested by Professor Brown⁵⁹ is that any losses which are "proximately caused" by the breach should be compensable, notwithstanding that the parties did not reasonably compensate them when they executed the contract. Whichever approach is taken, it is clear that an arbitrator would have considerable leeway to

54. *Port Arthur Shipbuilding Company v. Arthurs*, [1969] S.C.R. 85. The philosophy of that decision, if not its *ratio decidendi*, must be seriously questioned after the remarks of Laskin C.J. in *A.-G. for Newfoundland*, (1977), 77 C.L.L.C. 14.085 (S.C.C.) at 14.695-14.696.

55. The courts' record is criticized severely by Weiler, "The Remedial Authority of the Labour Arbitrator," *supra*, note 53.

56. In *Health Labour Relations Association of British Columbia*, *supra*, note 47, the arbitrator stated that the object is to compensate, but did not elaborate. No rationale is given for the monetary awards in the other cases cited in footnote 47, *supra*. In *The Elks Club of Lethbridge*, *supra* note 49, the methodology smacks strongly of the common law of wrongful dismissal.

57. Eg. *Polymer Corporation Ltd.* (1959), 10 L.A.C. 51 (Laskin).

58. (1854), 9 Ex. 341; 156 E.R. 145 (Ex. Ct.), as amplified by the Judicial Committee of the Privy Council in *Koufos v. C. Czarnikow Ltd. (Heron II)*, [1969] 1 A.C. 350.

59. R. Brown, "Contract Remedies in a Planned Economy: Labour Arbitration Leads the Way" in B. Reiter and J. Swan (eds.), *Studies in Contract Law* (Toronto: Butterworths, 1980), at 93 ff, and especially at 111.

compensate the employee for his "real-world" pension losses, being unencumbered by any notice period "cut-off" date, and the more so under Professor Brown's wider approach.

C. Section 61.5 of the Canada Labour Code and the British Experience

On September 1, 1978, employees within the federal jurisdiction acquired protection against "unjust" discharge with the coming into force of section 61.5 of the *Canada Labour Code*.⁶⁰ The remedial authority of the adjudicator is extremely broad by virtue of section 61.5(9)(c), which empowers him to require the employer to ". . .do any other like thing that is equitable to . . . do in order to remedy or counteract any consequence of the dismissal." In one case the adjudicator described the rationale of the section as follows.

The starting point is to recognize the "make whole" philosophy which underpins the section. The section should be applied in order to counteract the mischief at which it is aimed, namely the perceived inadequacies of the measure of damages in a common law wrongful dismissal action. At common law the philosophies underlying the assessment of damages are, first, to put the employee in the same position as if the contract had been performed and, second, the assumption that the employer would have performed his obligations in the manner least disadvantageous to himself. These philosophies are reflected in the fundamental principle that the employee can only recover employment benefits to which he is contractually entitled for the period of the lawful notice to terminate the contract. Consequently, compensation is not awarded for reasonable expectancies not based in the contract, nor for losses which accrue after the due notice period, notwithstanding that such losses are attributable to the wrongful dismissal. In order to cure that mischief, section 61.5(9)(c) should be applied so as to "make whole" the consequences of the dismissal, i.e. to compensate the employee for the real world losses sustained as a result of the unlawful dismissal.⁶¹

In particular, the section has been utilized frequently to compensate but not reinstate the "unjustly" dismissed employee.⁶²

60. See generally England, "Unjust discharge in the federal jurisdiction: the first three years," *supra*, note 22.

61. *Willberg v. Jo-Ann Trucking Ltd.*, *supra*, note 22 at 22-23.

62. As of March 31, 1981, of the 35 adjudications in which discharge was held to be "unjust," compensation *without* reinstatement was ordered in 15: Arbitration Services Reporter Vol. 5, No. 5, May 1981, at 2-3.

One would therefore expect that the problem of awarding damages for pension benefit losses would have been considered fully in the jurisprudence. Unfortunately it has not. In most cases adjudicators simply hand down a lump sum award with minimal effort at supporting rationalization, and in only one instance has the issue of pension benefit losses been directly addressed. In *Willberg v. Jo-Ann Trucking Ltd.*⁶³ the adjudicator, having held that the compensable period should run from the date of discharge on December 14, 1981 up to the cut-off date of July 31, 1982, stated,

First, there is a pension plan to which employer and employee jointly contribute and in which Mr. Willberg participated from his date of hiring. The issue of how to apply the “make whole” philosophy to compensate for loss of pension benefits is fraught with difficulties. . . . Mr. Willberg had only been with the company for approximately two years, is still relatively young in his late 20’s and can reasonably be expected to have a substitute pension plan through his own business or through another company if he ever re-enters the labour market. In this sort of case, the “make whole” policy of section 61.5(9)(c) can most readily be applied by giving Mr. Willberg a sum of money which he can then add to his other monies, in order to buy himself two years of pension benefits when he retires. This sum should comprise Mr. Willberg’s contributions to the pension plan and the employer’s contributions up to December 14; *plus* the contributions which the employer would have made between December 14, 1981 and July 31, 1982; *plus* compound interest at the rate of 12% per annum. Had Mr. Willberg been closer to retirement and paid in for a longer period, the method of compensating his loss of expected benefits would have differed.⁶⁴

Presumably, the adjudicator in awarding the return of the employee’s past contributions must have assumed that those either had not, or could not be recovered by him pursuant to the terms of the plan, otherwise the employee would have made a windfall. If the employee has recovered his own contributions they should obviously be discounted. Presumably, too, the adjudicator must have assumed that the employee would have remained with the firm until vesting in order to justify recovery of the employer’s contributions. Also, it is significant that the adjudicator did not have sufficient evidence before him to specify an exact money amount. Instead, he provided the parties with a formula to plug the data into,

63. *Supra*, note 22.

64. *Supra*, note 22 at 26-27.

with a reservation of jurisdiction to resolve disputes arising therefrom.⁶⁵ This illustrates the problem of proof of pension losses, which will be averred to later.⁶⁶ In addition, it is significant that the adjudicator emphasized the unique circumstances of Mr. Willberg's labour market and pension positions as justifying this method of calculating the benefit, namely his short pensionable service and his youth. Given that an employee's pension position is usually gauged in terms of benefits, not contributions, to use as the yardstick accrued contributions will rarely be accurate, especially with high seniority rated employees approaching retirement. Moreover, this method would be inaccurate where the benefit structure of the plan pegs the rate of employer contributions as an average over *all* employees, making it impossible to allocate the contributions to a given individual.⁶⁷ Lastly, the adjudicator failed to make a discount for the fact that the employee would receive an accelerated payment which he could invest and recoup interest on, although in the circumstances of the short compensable period this would have been a relatively small amount. The *Willberg* decision, therefore, throws little light on how adjudicators should handle the hard cases. The more highly developed jurisprudence under the British unfair dismissal legislation provides some useful pointers.

1. *The British Experience*

It is not proposed to scrutinize the minutiae of the case law, merely to highlight those features likely to provide guidance for Canadian legal umpires.⁶⁸ The overriding philosophy of the English legislation is to compensate the employee for his "real-world"

65. *Supra*, note 22 at 33-34.

66. *Infra*, p. 371.

67. A good example is *Willment Brothers Ltd. v. Oliver*, (1979), 1 C.R. 378 (E.A.T.) which is discussed *infra*, p.

68. *Employment Protection (Consolidation) Act 1978*, 1978, c. 44, Part V (U.K.). A useful description of general law of unfair dismissal is contained in B. Hepple and P. O'Higgins, "Encyclopedia of Labour Relations Law, Vol. I" (Sweet and Maxwell, loose-leaf service). The major cases on compensating pension benefit losses are described in detail in J.A. McGlyne, *Unfair Dismissal Cases* 2d. ed., (Toronto: Butterworths, 1979), at 309-316. The best theoretical analyses are D. Jackson, *Unfair Dismissal, How and Why the Law Works* (London: Cambridge University Press, 1975) at 31 ff, and D. Jackson, "Compensation for Loss of Pension Rights in Cases of Unfair Dismissal" (1975), 4 I.L.J. 24. In Britain, original jurisdiction over unfair dismissal vests in industrial tribunals, which are locally based, with appeals on points of law vested in the Employment Appeal Tribunal, a specialized labour law division of the High Court.

losses,⁶⁹ and it has been emphasized time and again that there is no universally “right” way of doing this. Rather, the compensating goal must be achieved by use of plain, common-sense methodology in the circumstances of each case.⁷⁰ There are four main areas: compensation for loss of pension position accrued as of the discharge date; compensation for loss of future pension position; the employee’s duty to mitigate his pension losses; and the problem of proof of losses.

a) Loss of Accrued Pension Position

The industrial tribunals always distinguish the loss of the pension position which has been earned from the loss of future pension opportunities and compensate each loss under its separate heading.⁷¹ This is essential because the two losses will not necessarily be the same. As regards the former, tribunals have utilized two methods of calculating the loss, the “contribution method” and the “actuarial method,”⁷² both of which involve consideration of the factors mentioned earlier arising from the benefit and legal structures of the plan and the employee’s position in the labour market.⁷³

The “contribution method” begins by assessing the loss as the value of the employee’s and the employer’s past contributions as of

69. *Tesco Stores Ltd. v. Heap*, [1978] I.T.R. 17 at 22 (E.A.T.). The *Employment Protection (Consolidation) Act 1978*, 1978, c.44, s.75 (U.K.) imposes a maximum ceiling on overall compensation, which, of course, denies a truly compensatory purpose.

70. See eg. *Willment Brothers Ltd. v. Oliver* (1979), I.C.R. 378 (E.A.T.), wherein Slynn J. (at 383) re-affirmed an earlier dictum of Sir John Donaldson in *Copson v. Eversure Accessories Ltd.*, [1974] I.R.L.R. 247 at 249 (N.I.R.C.) that “. . .(t)here is no one right way of proving or assessing the loss, but a broad commonsense approach should be adopted. Evidence from actuaries or pension brokers would certainly be relevant and admissible, but would not usually be necessary. . .” To the same effect see the comments of Sir John Donaldson in *Scottish Co-op Wholesale Society Ltd. v. Lloyd*, [1973] I.C.R. 137 at 142 (N.I.R.C.).

71. See the statements to that effect in *Copson v. Eversure Accessories Ltd.*, [1974] I.R.L.R. 247 at 249 and the authorities cited therein, and in *Willment Brothers Ltd. v. Oliver* (1979), I.C.R. 378 at 383 (E.A.T.).

72. These titles are taken from Government Actuary’s Department “A Suggested Method for Assessing Loss of Pension Rights under an Occupational Scheme following a finding of Unfair Dismissal by our Industrial Tribunals,” reproduced in Hepple and O’Higgins, “Encyclopedia of Labour Relations Law, Vol. I,” at 1380, *supra*, note 68. (Hereinafter referred to as the British Government Actuary’s Department Guide.)

73. *Supra*, pp. 350-352.

the date of dismissal, increased by compound interest from the date of payment to take account of the fact that they would have been invested and earned interest while they were in the fund.⁷⁴ The tribunals have not sought to calculate precisely the rate of compound interest, being satisfied that “rough and ready justice” will be done by using as the yardstick the simple interest rate.⁷⁵ Discount is made for any past contributions actually received by the employee, plus any interest earned therefrom.⁷⁶ Discount is also made for the possibility that the employee may become disentitled to his accrued benefit by the terms of the plan, for example if there is a “real chance”⁷⁷ that he would resign, be lawfully fired, or take an early retirement before vesting or retirement. It would be repugnant with the compensatory philosophy were the employee to recover the employer’s past contributions if there was a “real chance” that he would not have remained on payroll until vesting or until retirement.⁷⁸ Thus in *Manning v. R. and H. Wale Exports Ltd.*,⁷⁹ where the plan provided for vesting after five years of service and the tribunal was wholly satisfied that the employee would have been lawfully terminated before then, the employer’s past contributions were not recoverable.

It may be that the benefit structure of the plan is such that the precise value of the employer’s past contributions in respect to each employee cannot be ascertained. If so, the tribunal may assess a “notional” value to the employer’s contributions. In *Willment Brothers Ltd. v. Oliver*⁸⁰ the plan was funded by the employees contributing a certain percentage of their wage annually and the employer contributing annually a lump sum in an amount required,

74. Eg. *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 249; *Sturdy Finance Ltd. v. Bardsley*, [1979] 1.R.L.R. 65 at 67 (E.A.T.) *Gill v. Harold Andrews Sheepbridge Ltd.*, [1974] 1.R.L.R. 109 at 111 (N.I.R.C.).

75. *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 249.

76. *Ibid.*

77. *Ibid.*, at 250.

78. In those cases where compensation was made for the lost benefit of accrued employer contributions, the tribunals have not alluded to the requirement that the employee would have remained in the job until vesting, perhaps because the point is so obvious. The benefit of accrued employer contributions was compensated in, for instance, *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247; *Gill v. Harold Andrews Sheepbridge Ltd.*, [1974] 1.R.L.R. 109; *Hill v. Sabco Houseware (U.K.) Ltd.*, [1977] 1.R.L.R. 888, especially at 890 (E.A.T.); *McKinney v. Bieganeck*, [1973] 1.R.L.R. 311 (N.I.R.C.).

79. [1979] 1.C.R. 433 (E.A.T.).

80. (1979), 1.C.R. 378 (E.A.T.).

according to an actuarial formula, to enable the fund to meet its pension obligations for the year in question. In effect, the individual employee paid more in per year than he got out per year in his earlier years of service, eventually broke even, and in his later years got more out per year than he paid in per year. At the date of his unfair dismissal, Mr. Oliver had not reached break-even seniority. The employer argued that since its annual contribution to the fund had not as of that juncture purchased anything for the employee, he should only be able to recover his own contributions. The Employment Appeal Tribunal rejected the argument, holding rightly that the employee had in fact been deprived of the chance to buy in his later years pension benefits at a very low cost when the employer's annual contribution would be carrying the burden. Slynne J. compensated this loss by regarding the employer's *de facto* annual payment into the fund as a percentage of the employee's annual wage and therefore a "notional" contribution⁸¹ to which the employee was entitled for each prior year of service. Slynne J. rejected the alternative method, which was to take the cost of an annuity to provide a pension which had already been purchased at the time of dismissal, the capital sum required to make the purchase being discounted at differing rates of interest.⁸² He regarded as the disadvantage the failure to take into account the effects of inflation.⁸³ The difficulty of assessing an individually rated contribution in some plans, in addition to the deficiencies of this method in compensating fully the employee who is relatively close to retirement averred to earlier,⁸⁴ have resulted in the British Government Actuary's Department recommending that the "contribution method" should only be used when pensionable service is "very short, certainly less than five years."⁸⁵

The "actuarial method" of compensating loss of accrued pension position begins by estimating the capital sum which would be required at retirement to purchase an annuity equal to the pension to which the employee would have been entitled at that date.⁸⁶ This sum is then discounted, firstly, for an accelerated payment from

81. *Ibid.*, at 385.

82. *Ibid.*, at 384.

83. *Ibid.*

84. *Supra*, p. 363.

85. *Supra*, note 72, at para. 10.

86. See *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 249; *John Millar and Sons v. Quinn*, [1974] I.T.R. 281 (N.I.R.C.); *Smith Kline and French Laboratories v. Coates*, [1977] I.R.L.R. 220 at 222 (E.A.T.).

which the employee can derive interest; and, secondly, for the possibilities of his not remaining in his old job until vesting or retirement, so long as there is a “real chance” of the possibility materializing.⁸⁷ The British Government Actuary’s Department Guide recommends use of this method in all cases, and especially when benefits received are a deferred pension.⁸⁸ If the employee’s benefits are portable or payable as a deferred pension on retirement, it will not always be the case that he will have suffered little, if any loss.⁸⁹ Thus in one case where the employee’s deferred pension was to be based on his last three years earnings before retirement, which would have exceeded his earnings at the time of dismissal, the Employment Appeals Tribunal held that there would be a compensable loss.⁹⁰ Lastly, it should be noted that the duty to mitigate and the problem of proving pension losses, which are discussed later,⁹¹ apply to both methods.

b) Loss of Future Pension Position

This head of damages compensates the employee for the reasonable expectation that, had he not been unfairly dismissed, he would have gone on improving his pension position with the firm. Tribunals have utilized two methods for assessing such losses. The first takes the value of the employer’s contributions at the date of dismissal and, treating the employer’s contributions as equivalent to future earnings, simply awards them to the employee until he acquires another job.⁹² If the second job does not have a pension plan, the employee continues to recover the employer’s contributions, at least until his wages in the new job become large enough for him to buy equivalent benefits out of his own pocket. If the second job does

87. *Copson v. Eversure Accessories Ltd.*, [1974] I.R.L.R. 247 at 250.

88. *Supra*, note 72 at para 10(2).

89. See the dictum to this effect in *Copson v. Eversure Accessories Ltd.*, [1974] I.R.L.R. 247 at 250. Thus in *Yeats v. Fairey Winches Ltd.*, [1974] I.R.L.R. 362 (Plymouth Tribunal), no compensation for pension losses was made where the accrued benefits were “locked-in” until retirement.

90. *Sturdy Finance Ltd. v. Bardsley*, [1979] I.R.L.R. 65. See also the dictum in *Smith, Kline and French Laboratories v. Coates*, [1977] I.R.L.R. 220 at 222.

91. *Infra*, p. 370 and p. 371 respectively.

92. See *Copson v. Eversure Accessories Ltd.*, [1974] I.R.L.R. 247 at 250; *Willment Brothers Ltd. v. Oliver* (1979), I.C.R. 378 at 383; *Smith, Kline and French Laboratories v. Coates*, [1979] I.R.L.R. 220 at 222, *Gill v. Harold Andrews Sheepbridge Ltd.*, [1974] I.R.L.R. 109 at 111; *Hill v. Sabco Houseware (U.K.) Ltd.*, [1977] I.R.L.R. 888 at 890; *Pringle v. Lucas Industrial Equipment Ltd.*, [1975] I.R.L.R. 266 (Liverpool Tribunal).

have a pension plan, but on less favourable terms, the employee is entitled to a capital sum to enable him to buy in the market the benefits needed to bridge the gap.⁹³ It follows that the employee should be entitled to the future contributions during the period of unemployment following discharge⁹⁴ and during any re-qualification period under the rules of his new pension plan.⁹⁵ From this capital sum is discounted an accelerated payment factor and an amount representing the likelihood of the employee not remaining on payroll until vesting or retirement.⁹⁶

The second method differs in that it estimates the pension benefit which the employee would ultimately have got at retirement,⁹⁷ multiplies that amount by the number of years he is expected to live after retirement⁹⁸ and discounts for “. . . accelerated payment, the likelihood of remaining in employment⁹⁹ until retirement,¹⁰⁰ . . . a chance of obtaining similar benefit and at what stage a similar benefit may first be obtained.”¹⁰¹ To that is added any possible loss of tax allowance which the employee will have sustained.¹⁰² In addition, if the plan provides that a spouse or a dependent can take advantage under it, then the actual and/or future marital and dependency status of the employee must be ascertained, for the

93. This was done in *Willment Brothers Ltd. v. Oliver* (1979), 1.C.R. 378 at 385-386.

94. Contrast *McKinney v. Bieganeck*, [1973] 1.R.L.R. 311 at 312, where the N.I.R.C. refused to overturn a Tribunal award which had failed to compensate the employee for a 12 month period of unemployment because such period was not, in the view of the N.I.R.C., “. . . sufficiently large to justify any interference.” It is submitted that the decision should be regarded as incorrect on that point.

95. *Hill v. Sabco Houseware (U.K.) Ltd.*, [1977] 1.R.L.R. 888 (E.A.T.) at 891; *Page v. East Midlands Electricity Board*, [1975] 1.R.L.R. 21 (Nottingham Tribunal).

96. For example, damages were reduced by such a factor in *Yeats v. Fairey Winches Ltd.*, [1974] 1.R.L.R. 362. See also *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 250.

97. An excellent illustration is *Powrmatic Ltd. v. Bull*, [1977] 1.R.L.R. 144 (E.A.T.). See also *Tesco Stores Ltd. v. Heap*, [1978] I.T.R. 17; and *John Millar and Sons v. Quinn*, [1974] I.T.R. 281.

98. In *Powrmatic Ltd. v. Bull*, *ibid.*, the E.A.T. held that 4-5 years was appropriate, rather than the 8 year multiplier utilized by the Industrial Tribunal.

99. *Eg. Powrmatic Ltd. v. Bull*, *ibid.* at 146.

100. Thus in *Powrmatic Ltd. v. Bull*, *ibid.* at 146, the E.A.T. held that it was “improbable” that a sales manager with 33 years to go before retirement would stay in the same job throughout that period. Rather, the E.A.T. projected that a 15 year stay was the appropriate multiplier.

101. Per Kilner Brown J., at 222, in *Smith, Kline and French Laboratories v. Coates*, [1977] 1.R.L.R. 220.

102. *Ibid.*

spouse/dependent may be able to benefit notwithstanding the death of the employee himself.¹⁰³ The multiplier variables, therefore, are essentially the same as with the first "contribution" method. The British Government Actuary's Department recommends that this method be used wherever circumstances permit.¹⁰⁴ However, where it is "difficulty or unreasonable"¹⁰⁵ to estimate the ultimate pension benefit, such as with an employee who is a long way from retirement or a pension based on company profitability, the "contribution" method will be used. So too where the employee would not be realistically compensated by the method. Thus in *Tesco Stores Ltd. v. Heap*¹⁰⁶ the industrial tribunal multiplied the ultimate pension benefit of £1,500 per year by 4½ years estimated longevity for a total of £6,750. The Employment Tribunal quashed the award, being satisfied on the basis of actuarial evidence that the employee could purchase an equivalent pension of £1,500 per year for 4½ years for the sum of £3,375 at the prevailing market rate, (the employee being 47 years old at the time). The Employment Appeal Tribunal considered the discrepancy too great for it to be said that the employee was being truly compensated; rather, he was receiving a windfall. Phillips J. cautioned against losing sight of the fundamental compensatory goal in the swamp of actuarial methodology.¹⁰⁷ Again, it should be noted that the duty to mitigate and the problem of proving pension losses, which are discussed later,¹⁰⁸ apply to both methods.

The most controversial issue in the assessment of both past and future pension benefit losses is how to quantify numerically the relevant variables. In one case,¹⁰⁹ for example, the Employment Appeal Tribunal substituted a period of 3-5 years post retirement

103. As in *Copson v. Eversure Accessories Ltd.*, [1974] 1 R.L.R. 247 at 251.

104. *Supra*, note 72 at para 10(2).

105. *Per* Kilner Brown J. in *Smith, Kline and French Laboratories v. Coates*, [1977] 1 R.L.R. 220 at 222.

106. [1978] I.T.R. 17(E.A.T.).

107. *Ibid.* at p. 22. Phillips J. stated that the *Powrmatic* approach is only appropriate where an annual loss can first be ascertained and only then converted into a capital loss respectively. In *Scottish Co-op Wholesale Society Ltd. v. Lloyd*, [1973] I.C.R. 137 at 142, Sir John Donaldson said that evidence of a professional actuary ". . . is not the only proper approach and in many cases it will be properly regarded as not only inconclusive but also quite unnecessary. We think that insofar as in this region it is possible that the broad common sense approach should be adopted."

108. *Infra*, p. 370 and p. 371.

109. *Powrmatic Ltd. v. Bull*, [1977] 1 R.L.R. 144 (E.A.T.).

life expectancy for the industrial tribunal's estimate of 8 years. Bristow J., without citing any supporting evidence, considered the former to be "appropriate"¹¹⁰ because the employee had not established that he was an average, healthy male and, even if he had, the trauma of retirement might kill him! In the same case, Bristow J. held (quite reasonably) that the industrial tribunal had erred in assuming that a sales manager would remain with the same company for the 33 year balance of his working life but substituted a 15 year multiplier without any supporting reasons.¹¹¹ In today's era of economic uncertainty, more so perhaps than at any other time, it is exceedingly difficult to guess at likely interest returns on employee capital sum and pension fund investments, general inflation rates, corporate profitability (and even survivability), and labour market conditions.

In order to alleviate some of those difficulties, the Government Actuary's Department in 1981 published its Guide for industrial tribunals in calculating pension benefit losses.¹¹² It contains a table of factors and supporting formulae, based on "state of the art" actuarial methodology. The Guide seems to have acquired considerable weight, almost to the point of raising a presumption of being an accurate compensating tool for all cases. In *Tradewinds Airways Ltd. v. Fletcher*¹¹³ an industrial tribunal was persuaded by the testimony of an actuary to depart from the Guide because the employee would be entitled to collect a pension at 55, not at 65 as in the Guide. Indeed, the Guide itself contemplates departures where the circumstances of particular cases so justify.¹¹⁴ The Employment Appeal Tribunal, however, quashed the award on the ground that it exceeded the Guide by £2,000 and that therefore ". . .clearly there must be a mistake in law, even though we may not be able to put our finger on it."¹¹⁵ Eventually the Employment Appeal Tribunal "put its finger" on the fact that the tribunal had ignored the possibility of the employee dying before reaching pensionable age. Although Bristow J. described the status of the

110. *Ibid.*, at 146.

111. *Ibid.* See also *Tradewinds Airways Ltd. v. Fletcher*, [1981] I.R.L.R. 272 (E.A.T.).

112. *Supra*, note 72.

113. [1981] I.R.L.R. 272 (E.A.T.).

114. *Supra*, note 72 at para 2.

115. [1981] I.R.L.R. 272 at 275 (E.A.T.).

Guide as merely an “assistance,”¹¹⁶ it seems to carry more weight than that in practice. The important point, however, is that such a guide would be of considerable use to Canadian legal umpires so long as it is remembered that the ultimate decision lies with the umpire who is in the position to assess the uniqueness of each employee’s situation.

c) *The Employee’s Duty to Mitigate His Pension Benefit Losses*

It is established that failure to discharge the duty to mitigate will reduce compensation for losses of both future¹¹⁷ and earned pension benefits.¹¹⁸ An example of the former would be if the employee had acquired another job by the date of hearing at a wage level sufficiently in excess of the old job to enable him to purchase equivalent pension benefits of his own accord, but he chooses not to do so and seeks to recover for future pension benefit losses from his former employer. An example of the latter is *Sweetlove v. Redbridge and Waltham Forest Area Health Authority*,¹¹⁹ where the employee refused his employer’s offer of full reinstatement and sought to recover, *inter alia*, the employer’s past contributions. The Employment Appeal Tribunal rejected the claim on the ground that the employee had acted “wholly unreasonably”¹²⁰ in refusing reinstatement and had therefore not discharged his duty to mitigate. Slynne J. stated that the duty applied equally to accrued pension benefits, for if the employee had accepted he would have been put in the same position as if he had never been fired. In a sense, the employee’s losses were caused by his own act. The position would presumably be the same were the employee not to request reinstatement as a remedy from the tribunal, and *a fortiori* if he refused the tribunal’s offer of reinstatement. The foregoing assumes that the refusal is “wholly unreasonable”¹²¹ in the circumstances of the case. It is established that the onus of proving that the employee has acted “wholly unreasonable” is on the employer.¹²²

116. *Ibid.* To similar effect see *Toye v. Todd and Duncan Ltd.*, I.D.S. Brief 186, August 1980, p. 3.

117. *Smith, Kline and French Laboratories v. Coates*, [1977] 1.R.L.R. 220 at 222.

118. *Sturdy Finance Ltd. v. Bardsley*, [1979] 1.R.L.R. 65 at 67; supra, note 74; *Sweetlove v. Redbridge and Waltham Forest Area Health Authority*, [1979] 1.R.L.R. 195 (E.A.T.).

119. *Ibid.*, note 118.

120. *Ibid.*, note 118 at 196.

121. *Ibid.*

122. *Sturdy Finance Ltd. v. Bardsley*, [1979] 1.R.L.R. 65 at 67.

The position is more doubtful where the employee has the option under the plan and the legislation of either commuting for a cash sum the whole or part of his pension benefit upon dismissal, or of leaving it as a deferred pension until retirement (or, less commonly, transferring it to a successive employer under portability provisions). There is one dictum implying that choice of the first option would not discharge the duty to mitigate.¹²³ The better view, however, is that it depends on the circumstances of the case whether the first option is “wholly unreasonable.”¹²⁴ For example, it might be very prudent to invest a commuted pension in government bonds at a time when they are offering exceptionally attractive interest returns in the region of 20% and when the projected pension return at retirement will have been eroded by inflation to provide a less valuable overall benefit. So too if the capital sum is used to establish the employee in his own business, which may bring him more favourable long term benefits than his expected pension return. It is important to remember that not all employees will lavish their commuted pension on extravagant holidays and drinking bouts. Indeed, in the present climate of high, long term unemployment the employee may be forced to use his pension in order to survive.

d) The Problem of Proving Pension Benefit Losses

The British Government Actuary's Department Guide provides that the employer/employee should furnish the tribunal with the following information:¹²⁵ the age and sex of the employee; his length of pensionable service; his salary at termination; the employer's contribution rate; benefits received by the employee, including premiums paid by the employer under the old age pension legislation; accrued pension entitlement based on salary and service at termination; and any spousal pension entitlement. The tribunal itself is charged with assessing the estimated period of employment and the possibilities of the employee entering nonpensionable, or less favourable pensionable employment.¹²⁶ Although the employer

123. *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 250.

124. See eg. the facts of *Sturdy Finance Ltd. v. Bardsley*, [1979] 1.R.L.R. 65 at 67, wherein the employer failed to adduce evidence to ascertain sufficiently accurately that the present value of the withdrawn contributions would be less to the employee than the value at retirement of the deferred pension.

125. *Supra*, note 72 at para 14.

126. *Ibid.*

is in the best position to disclose most of the above information,¹²⁷ it is the employee who carried the legal burden of *proving* his pension losses,¹²⁸ which may be no easy matter given the complexity of the inquiry. It must also be remembered that many employees are not represented by legal counsel, as is also the case in adjudication under the Canada Labour Code. In practice, the industrial tribunals take the initiative of raising the question and may even go so far as to make their own investigations, including ordering that the employer disclose the relevant information, especially where the employee is representing himself.¹²⁹ The legal burden of proving a particular loss, however, remains on the employee and in the absence of evidence in support thereof, no award will be given. This more "inquisitorial" role of the tribunal was adopted in the *Willberg* adjudication under the Canada Labour Code.¹³⁰ It is obviously vital for the legal umpire to be flexible in this regard.

V. Conclusion

The following guide is suggested for the compensation of pension benefit losses in unlawful discharge cases. It can be used safely by adjudicators under section 61.5 of the Canada Labour Code. It can be used by collective agreement arbitrators who are prepared to assume jurisdiction to compensate the "unjustly" discharged employee without reinstating him. It can be used in a common law wrongful dismissal action within the constraint of the contractual notice period "cut-off" date, but only beyond that if the courts are prepared to adopt the "independent contract"¹³¹ device.

127. Section 11(1)(c) of the Dominion *Pension Benefits Standards Act* requires that the plan provide for a "written explanation" to be given the employee, describing the plan's prevailing terms and conditions and explaining his rights and duties under the plan. Notwithstanding that section, it is probably safe to guess that most employees would not know sufficiently well their pension position in order to conduct an adequate case. Contrast the more detailed information required to be given by paragraph 26 of the Ontario Pension Benefits Act Regulations.

128. This point was emphasized in *Smith, Kline and French Laboratories v. Coates*, [1977] 1.R.L.R. 220 at 221. See also *Cawthorn and Sinclair Ltd. v. Hedger*, [1974] I.C.R. 146 (N.I.R.C.); *Hilti G.B. v. Windridge*, [1974] I.R.L.R. 53, especially at 55 (N.I.R.C.).

129. See eg. *Copson v. Eversure Accessories Ltd.*, [1974] 1.R.L.R. 247 at 250; *Smith, Kline and French Laboratories v. Coates*, [1977] 1.R.L.R. 220 at 222; *Tidman v. Aveling Marshall Ltd.*, [1977] I.C.R. 506 (E.A.T.).

130. *Supra*, p. 361.

131. *Supra*, p. 347.

Firstly, the legal umpire must ensure that he obtains the following information from the employee or the employer:¹³² the age and sex of the worker; the length of pensionable service; his salary at the date of discharge; the employee's contribution rate; any benefits received by the employee; his accrued pension entitlement based on salary and service at the date of discharge; and any spouse's or dependant's entitlement based on salary and service at the date of discharge. As was suggested earlier, the umpire should be prepared to assume an "inquisitorial" role in order to guarantee that the requisite evidence is brought before him.¹³³ The umpire will also have to make projections as to the employee's future career and pension positions with his old and successive employers and as to the length of unemployment, which will have to be ascertained from testimony at the hearing and from the umpire's personal assessment of local labour market conditions.

The employee's pension benefit loss is made up of three components, each of which may be computed independently and totalled to give the full amount.

- A. Loss of accrued pension position as of the date of unlawful discharge.
- B. Loss of future pension position that would have been attained between the date of discharge and the expiry of the notice period required for lawful termination of the employment contract.
- C. Loss of future pension position after the expiry of the notice period which would have been attained had the employee not been unlawfully discharged.

A. Computing accrued pension benefit losses

$(Pr. V. \times [E.C. + W.C. + I]) - R.W.C.$

Wherein:

1. *Pr.V.* = Probability of the employee remaining in the job until vesting date. This can safely be taken as a scale moving from zero at age 25 through to 100% at age 45, assuming that age 45 is vesting date, and subject to any unique characteristics influencing the labour market mobility of the employee.
2. *W. C.* = employee contributions to the fund paid in prior to the date of discharge.

132. British Government Actuary's Department Guide para 14(a), *supra*, note 72.

133. At para 16, *supra*, note 72.

3. E.C. = employer contributions to the fund paid in prior to the date of discharge. These will obviously be easy to ascertain in "defined contribution" plans, but less easy in "defined benefit" plans. The latter may take the form of "career average" or "flat benefit" plans, wherein the amount of expected benefit at any given time is already known. The employee should receive a capital sum to enable him to purchase the amount of his lost benefit. This can safely be calculated by reference to the deferred pension benefit column of the British Government Actuary's Department Guide (table #1). Thus a male employee aged 45 would be entitled to \$3.10 for each \$1 of benefit payable at retirement, subject to reduction for the absence of a widow's pension, as per note 1, if applicable. Further adjustments to this amount are unnecessary since the benefits have already been earned by the employee.

On the other hand, in "final earnings" and final average earnings" plans, wherein benefits are based on the employee's earnings in his last years before retirement and his best earning years respectively, the computation is more difficult because of the uncertainty of predicting such future earnings capacity. This is especially so in the case of younger employees. It is submitted that a reasonably safe method for use with employees below 45 years of age is "notional contribution". This involves dividing the total employer contributions to the plan over the claimant's period of employment by the number of participants in the plan so as to produce a "notional" employer contribution for each participant. Although the method is not exact, it does produce a reasonably fair estimation of the loss. In the case of older workers who are closer to the key earnings years, it is possible to predict future earnings capacity with sufficient accuracy to produce a reasonable estimation of expected benefits. Table #1 can then safely be used to compute the cost of those benefits.

TABLE 1
TABLE OF FACTORS FOR VALUING PENSIONS

| Age last birthday on dismissal | Value at age on dismissal of a pension of 1 per annum | | | |
|--------------------------------|---|------------------------------|--------------------------------------|-----------------------------|
| | Men with retiring age 65 | | Women with retiring age 60 | |
| | Continuing Service (Accrued pension) | Dismissal (Deferred pension) | Continuing Service (Accrued pension) | Dismissal (Accrued pension) |
| | 1 | 2 | 1 | 2 |
| 64 | 10.3 | 10.1 | | |
| 63 | 10.0 | 9.4 | | |
| 62 | 9.7 | 8.8 | | |
| 61 | 9.5 | 8.2 | | |
| 60 | 9.3 | 7.7 | | |
| 59 | 9.1 | 7.2 | 11.6 | 11.4 |
| 58 | 8.9 | 6.8 | 11.4 | 10.7 |
| 57 | 8.7 | 6.4 | 11.2 | 10.0 |
| 56 | 8.6 | 6.0 | 10.9 | 9.4 |
| 55 | 8.4 | 5.7 | 10.7 | 8.8 |
| 54 | 8.3 | 5.4 | 10.5 | 8.3 |
| 53 | 8.1 | 5.1 | 10.3 | 7.8 |
| 52 | 8.0 | 4.8 | 10.1 | 7.3 |
| 51 | 7.8 | 4.5 | 9.9 | 6.8 |
| 50 | 7.7 | 4.3 | 9.7 | 6.4 |
| 49 | 7.6 | 4.0 | 9.5 | 6.0 |
| 48 | 7.5 | 3.8 | 9.4 | 5.7 |
| 47 | 7.4 | 3.6 | 9.2 | 5.4 |
| 46 | 7.3 | 3.4 | 9.0 | 5.1 |
| 45 | 7.1 | 3.2 | 8.9 | 4.8 |
| 44 | 7.0 | 3.1 | 8.7 | 4.5 |
| 43 | 6.9 | 2.9 | 8.6 | 4.2 |
| 42 | 6.8 | 2.7 | 8.4 | 3.9 |
| 41 | 6.7 | 2.6 | 8.3 | 3.7 |
| 40 | 6.6 | 2.4 | 8.1 | 3.5 |
| 35—39 | 6.3 | 2.1 | 7.8 | 3.1 |
| 30—34 | 6.0 | 1.7 | 7.1 | 2.3 |
| Under 30 | 5.5 | 1.2 | 6.5 | 1.7 |

Notes

1. The male factors in the table make allowance for a widow's pension equal to one-half of the employee's pension. Where the scheme does not provide widow's pensions, the factors ought to be reduced by approximately 25 per cent., with a pro rata reduction (or increase) for other levels of widow's pension.

2. If the scheme provides a lump sum benefit on retirement in addition to a pension, the amount of the pension should be increased by one-tenth of the lump sum for men (one-twelfth of the lump sum for women) before applying the factors from the table.

3. Some pension schemes, mostly in the public sector, provide deferred pensions on termination of service that are increased in line with changes in price levels. In such cases the loss of pension rights on dismissal would be very much less than the value given by the above table, although there would be some loss to the extent that earnings increases may be expected to exceed price increases. An approximate value for the loss of pension rights in these circumstances would be one-half of the value obtained from the table.

4. I = interest at the prevailing market rate for R.R.S.P.'s up to the date of judgment.
5. R.W.C. = contributions of the employee which have been returned to him.

B. Losses during the notice period

$([B.B. + I. + T.] \times Pr.V. \times Pr.J.L.)$
 — A.P.F. — S — M.

Wherein:

1. B.B. = the basic pension benefit, calculated the same as for the accrued pension position at the date of discharge¹³⁴, except that the date of expiry of the notice period is substituted for the date of discharge.
2. I = interest on the employer's contributions throughout the notice period at the prevailing rate for R.R.S.P.'s.
3. T = any taxation disadvantage the employee is likely to sustain during the notice period by being deprived of his opportunity to participate in the pension plan.
4. Pr.V. = the probability of the employee attaining vesting date during the notice period. Although this ought theoretically to be vital, it should be emphasized that in a common law wrongful dismissal action the courts have compensated for employer contributions during the notice period irrespective of the probabilities of vesting, presumably under some theory of unjust enrichment.
5. Pr.J.L. = the probability of the employee losing his job lawfully during the notice period had he not been unlawfully discharged. This will not normally arise since in most cases the notice period will have elapsed by the time the action is heard.

134. *Supra*, p. 373.

6. A.P.F. = accelerated payment factor. Compensation must be reduced to take account of the interest the employee will earn by investing his early pension benefit and can safely be taken as the prevailing interest rate. Given the relatively short compensable period, this factor will not be a major one.
7. S = the pension benefit which the employee derives from successive employment during the notice period. This involves examining whether successive plans are more or less beneficial to the employee than his old one. Also, the successive job may have no pension plan but carry commensurately higher wages than the old one, which the employee can reasonably be expected to spend on his own pension plan. Given that the notice period will normally have expired by the date of the hearing, it will be unnecessary in most cases to have to predict the employee's chances of finding successive pensionable employment.
8. M = non compliance with the general duty to mitigate losses.

C. Loss of future pension position that would have been attained had the employee not been unlawfully discharged

$([B.B. + T] \times Pr.J.L. \times Pr.V. \times Pr.L.) - S - A.P.F. - M.$

Wherein:

1. B.B. = the basic pension benefit which the employee would be entitled to had he remained in the job until retirement. This can be calculated using the methodology for the employee's accrued pension position outlined earlier,¹³⁵ but substituting retirement date for the date of discharge.
2. T = any taxation disadvantage the employee is likely to sustain by being deprived of his opportunity to participate in the pension plan.
3. Pr.J.L. = the probability of the employee losing his job lawfully during the remainder of his working life had he not been discharged. This entails predicting the likelihood of the employee resigning, dying, being made redundant, or being discharged for cause.¹³⁶

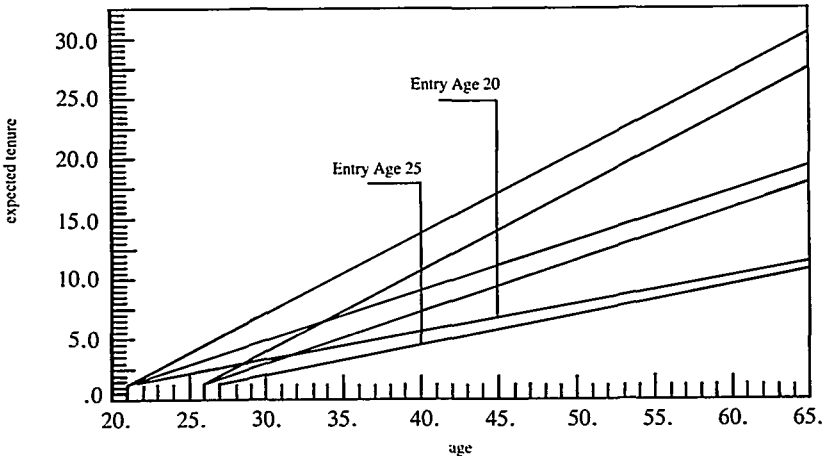
135. *Supra*, p. 373.

136. The following table gives the probabilities of an employee remaining in the same employment as a function of attained age and tenure for high, medium and low mobility job sectors. It was provided by Towers, Perrin, Forster and Crosby

4. Pr.V. = the probability of the employee remaining in the firm until vesting date had he not been discharged.¹³⁷
5. Pr.L. = the probable post retirement longevity of the employee.¹³⁸

Ltd. For an example, an employee aged between 27 and 32 in a medium mobility job sector who has 3 years seniority with the firm has an 84.6% probability of remaining in his job for a further year.

The following graph gives the expected employment tenure for high, medium and low mobility sectors as a function of job entry age and attained age. For example, an employee who enters the work force at age 20, and who has an attained age of 45 in a low mobility sector job will probably remain in that job for a further 15.4 years.



137. *Supra*, note 136.

138. The following life expectancy table was calculated by the authors, based on data supplied by London Life Insurance Company. It should be emphasized that the

| Age | Life Expectancy | |
|-----|-----------------|----------|
| | (Male) | (Female) |
| 60 | 17.91 | 22.91 |
| 61 | 17.16 | 22.16 |
| 62 | 16.43 | 21.43 |
| 63 | 15.72 | 20.72 |
| 64 | 15.02 | 20.02 |
| 65 | 14.35 | 19.35 |
| 66 | 13.69 | 18.69 |
| 67 | 13.04 | 18.04 |
| 68 | 12.41 | 17.41 |
| 69 | 11.80 | 16.80 |
| 70 | 11.19 | 16.19 |

6. S = the pension benefits, or commensurately higher wage adjustment which the employee has either received, or can probably be expected in the future to receive from successive employers. This factor is very difficult to determine because it involves projections over the employee's entire working lifetime as to his chances of getting successive jobs¹³⁹ and the comparative pension/wage positions between those jobs and his old job had he remained in it.
7. A.P.F. = accelerated payment factor representing the interest the employee will earn by investing his early pension benefit. This entails predicting the general interest rates,¹⁴⁰ no easy matter in today's volatile economic environment.

data is generalized, so that the legal umpire must take account of any peculiarities pertaining to the individual claimant. It also assumes a rough difference of 5 years increased longevity for females.

139. The following table gives the expected number of job changes and length of employment for high, medium and low mobility sectors as a function of job entry and retirement ages. Thus a person who enters the labour market at age 20 and will retire at age 65 in a low mobility sector will probably have 3.1 jobs in his working life, each of 14.7 years duration. The table was provided by Towers, Perrin, Forster and Crosby Ltd.

| Termination rates | Periods of employment | | | | | | | |
|-------------------|-----------------------|--------|-------|--------|-------|--------|-------|--------|
| | 20-60 | | 20-65 | | 25-60 | | 25-65 | |
| Low | 3.0 | (13.5) | 3.1 | (14.7) | 2.8 | (12.7) | 2.9 | (14.0) |
| Medium | 6.6 | (6.0) | 7.0 | (6.5) | 5.9 | (6.0) | 6.2 | (6.4) |
| High | 12.3 | (3.3) | 13.1 | (3.4) | 10.6 | (3.3) | 11.4 | (3.5) |

140. The following table, provided by Towers, Perrin, Forster and Crosby Ltd., gives predictions regarding the rates of inflation, return on investment, and wage growth which provide a useful guideline.

| | Rate of Inflation | | | Total rate of return | | | Real wage growth |
|---------|-------------------|---------------|------|----------------------|---------------|------|------------------|
| | Low | Most probable | High | Low | Most Probable | High | |
| 1980-84 | 4.5 | 5.5 | 7.5 | 6.9 | 7.9 | 9.9 | 1.8 |
| 1985-89 | 4.0 | 5.0 | 7.0 | 6.6 | 7.6 | 9.6 | 2.0 |
| 1990- | 3.0 | 4.0 | 6.0 | 5.4 | 6.4 | 8.4 | 2.1 |

8. M = non compliance with the general duty to mitigate losses.

If the reader concludes that the computation of compensation for lost pension benefits is a rather inexact exercise, he would be absolutely correct. However, it is hoped that the foregoing guidelines will be of some use in producing fair and reasonable estimations, which is, in the authors' view, all that can realistically be hoped for.