Case Name:

Roy v. Metasoft Systems Inc.

Between
Marcie Lynn Roy, Plaintiff, and
Metasoft Systems Inc., Defendant

[2013] B.C.J. No. 1448

2013 BCSC 1190

9 C.C.E.L. (4th) 263

[2013] CLLC para. 210-042

50 B.C.L.R. (5th) 190

229 A.C.W.S. (3d) 1055

2013 CarswellBC 2039

Docket: S24400

Registry: Chilliwack

British Columbia Supreme Court
Chilliwack, British Columbia

B.M. Joyce J.

Heard: March 12, 2013.
Judgment: July 4, 2013.

(84 paras.)

Employment law -- Employment standards legislation -- Improper practices by employer -- Remedies -- Amount awarded to plaintiff under s. 79(2)(c) of Employment Standards Act for lost wages was to be deducted from damages to which plaintiff was entitled under common law for wrongful dismissal -- Delegate found defendant breached Act by dismissing plaintiff after she threatened to file complaint for unpaid commissions -- Delegate awarded plaintiff lost wages from

time of dismissal until she found alternate employment -- Determination under s. 79(2)(c) was same as factors considered in determining damages for wrongful dismissal -- Failing to deduct amount of award under Act would result in double recovery for plaintiff.

Wrongful dismissal damages -- Deductions -- Amount awarded to plaintiff under s. 79(2)(c) of Employment Standards Act for lost wages was to be deducted from damages to which plaintiff was entitled under common law for wrongful dismissal -- Delegate found defendant breached Act by dismissing plaintiff after she threatened to file complaint for unpaid commissions -- Delegate awarded plaintiff lost wages from time of dismissal until she found alternate employment -- Determination under s. 79(2)(c) was same as factors considered in determining damages for wrongful dismissal -- Failing to deduct amount of award under Act would result in double recovery for plaintiff.

Application for determination of a question of law. The plaintiff sued for wrongful dismissal damages. She was dismissed by the defendant after threatening to file a complaint for non-payment of commissions owing to her by the defendant. After her dismissal, the plaintiff filed a complaint under the Employment Standards Act alleging that the defendant had failed to pay compensation for length of service and had refused to continue to employ her in contravention of s. 83 of the Act. The Delegate determined that the defendant had breached s. 83 and awarded the plaintiff $19,506 in lost wages under s. 79(2)(c) from the time of termination to the time she found new employment. The defendant argued that this amount was deductible from the damages recoverable by the plaintiff at common law in the wrongful dismissal action.

HELD: The amount paid pursuant to s. 79(2)(c) was to be deducted from the amount of damages to which the plaintiff was otherwise entitled as a result of her wrongful dismissal. The remedy under s. 79(2)(c) for the payment of compensation for breach of s. 83 was an alternative to the remedy of reinstatement and the payment of past wage loss under s. 79(2) (b). An award under s. 79(2)(c) was compensatory and intended to make the claimant "whole" in the economic sense. The purpose of the determination under s. 79(2)(c) and the factors that were considered by the Delegate in determining the award were the same as those that the court must apply in deciding the quantum of an award of damages for wrongful dismissal. Failing to set off the amount paid under s. 79(2)(c) would amount to double recovery that was not warranted by a distinction in the purpose of the two awards. Allowing a set-off did not mean that an employee was barred from bringing an action whenever there had been a Determination under s. 79(2)(c). A court could find, upon application of the factors to be considered, that a dismissed employee was entitled to damages for the wrongful dismissal that exceed the amount of the determination under the Act and to that extent, the employee ought to be able to recover the excess by an action at law.

Statutes, Regulations and Rules Cited:

Employment Standards Act, RSBC 1996, CHAPTER 113, s. 1, s. 2, s. 63, s. 74, s. 79(2)(b), s. 79(2)(c), s. 82, s. 83, s. 118

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 9-4

Counsel:

Counsel for the Plaintiff: A.R. **Ayliffe.**

Counsel for the Defendant: C. Edstrom.

Reasons for Judgment

B.M. JOYCE J.:--

Introduction

1 By consent, the parties have applied to the Court pursuant to R. 9-4 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] for the determination of a point of law arising from the pleadings in this action: whether amounts awarded to the plaintiff pursuant to s. 79(2)(c) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] in a Determination made under the *ESA* are deductible, at all or in part, from the damages recoverable by the plaintiff at common law in an action for wrongful dismissal.

2 Rule 9-4 provides as follows:

> (1) A point of law arising from the pleadings in an action may, by consent of the parties or by order of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial.
> (2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

3 In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 77 B.C.L.R. (2d) 128 (C.A.) (leave to appeal refused [1993] S.C.C.A. No. 159) at para. 23, the Court of Appeal adopted what was said in *Alcan Smelters and Chemicals Ltd. v. Can. Assn. of Smelter and Allied Workers, Local 1* (1977), 3 B.C.L.R. 163 (S.C.) at 165 with respect to the principles to apply when considering whether it is appropriate to entertain an application under this rule:

> (1) the point of law to be decided should be raised and clearly defined in the pleadings;
> (2) proceeding on a point of law is appropriate only where, assuming

allegations in pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law;

(3) the facts relating to the point of law should not be in dispute and the point of law should be capable of being resolved without hearing evidence;

(4) whether the point of law ought to be decided before the trial of the action is discretionary and it should appear that the determination of the question would be decisive of the litigation or a substantial issue raised in it; and

(5) in deciding whether the question is one which ought to be determined before trial, the court should consider whether the effect of such a decision would immeasurably shorten the trial, or result in a substantial saving of costs.

4 The parties in this case are in agreement that a point of law arises from the pleadings and that the determination of the point of law will enable them to resolve the plaintiff's action entirely. I am satisfied that those principles are met in the present case.

Facts

5 In order to understand the factual matrix in which the point of law arises, it is necessary to provide some background. The following uncontroverted facts were taken from the pleadings.

6 The plaintiff is a sales consultant who works in the computer software industry. The defendant is an information technology consulting and software development company that carries on the business of developing and marketing online tools to assist non-profit and charitable fundraisers.

7 On May 12, 2003, the plaintiff entered into a contract of employment with the defendant as a sales associate. The plaintiff was responsible for selling the defendant's software products to non-profit organizations.

8 In or about May 2010, the plaintiff complained to the defendant that she had not received all of the commissions to which she was entitled. The matter was not resolved to the plaintiff's satisfaction and she advised the defendant that unless the matter was resolved to her satisfaction she intended to file a complaint with the Employment Standards Branch, pursuant to the *ESA*.

9 The relationship between the plaintiff and defendant deteriorated and on or about October 1, 2010, the defendant terminated the plaintiff's employment.

10 The plaintiff filed a complaint under s. 74 of the *ESA*, alleging that the defendant had failed to pay compensation for length of service and had refused to continue to employ her in contravention of s. 83 of the *ESA*.

11 On May 3, 2011, the plaintiff found employment in a comparable position.

12 On November 9, 2011, J.R. Dunne, as Delegate of the Director of Employment Standards, (the "Delegate") issued a Determination under the *ESA* in which he found that the defendant had contravened s. 83 of the *ESA* by its actions in intimidating the plaintiff and in terminating her employment as a result of her efforts to exercise her rights under the *ESA*. As a result of the contravention of s. 83, the Delegate assessed an administrative penalty against the defendant in the amount of $500.00. The Delegate also granted the plaintiff a remedy pursuant to s. 79(2)(c) of the *ESA*, finding that she was entitled to wages in the amount of $19,506.12. In the Determination, the award was stated to be for lost "wages" for a period of six months, from October 1, 2010 to March 30, 2011, based upon her average monthly earnings in the years 2009 and 2010, prior to her termination.

13 On February 22, 2012, the Employment Standards Tribunal dismissed the defendant's appeal of the Determination, [2012] B.C.E.S.T.D. No. 22.

14 On April 26, 2012, the plaintiff commenced this action claiming, amongst other things, damages for wrongful dismissal. In paragraph 16 of her notice of civil claim, the plaintiff referred to the award made by the Delegate under the *ESA*.

15 On May 25, 2012, the defendant filed its response to civil claim in which it pleaded in paragraph 9 that the award "constituted both statutory compensation for length of service and compensation to address what the Plaintiff would have earned in lieu of reinstatement". In paragraph 17 of its response to civil claim, the defendant claimed a setoff of "any amounts the Plaintiff has earned, including the amount prescribed by the ESB Award".

Relevant provisions of the *ESA*

16 I have set out portions of the *ESA* that are relevant to the consideration of the issue before the Court:

1

(1) In this Act:

...

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,
(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this

Act,

(d) money required to be paid in accordance with

(i) a determination, other than costs required to be paid under section 79 (1)(f), or

(ii) a settlement agreement or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses,

(i) penalties, and

(j) an administrative fee imposed under section 30.1;

...

2

The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

...

63

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;
(ii) 2 weeks' notice after 12 consecutive months of employment;
(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or
(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
(b) dividing the total by 8, and
(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

...

74

(1) An employee, former employee or other person may complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of this Act, or
(b) a requirement of the regulations specified under section 127 (2) (l).

...

79

(1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:

(a) comply with the requirement;
(b) remedy or cease doing an act;
(c) post notice, in a form and location specified by the director, respecting

(i) a determination, or

(ii) a requirement of, or information about, this Act or the regulations;

(d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
(e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;
(f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:

(a) hire a person and pay the person any wages lost because of the contravention;
(b) reinstate a person in employment and pay the person any wages lost because of the contravention;
(c) pay a person compensation instead of reinstating the person in employment;
(d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

...

82

Once a determination is made requiring payment of wages, an employee may commence another proceeding to recover them only if

(a) the director has consented in writing, or
(b) the director or the tribunal has cancelled the determination.

83

(1) An employer must not

> (a) refuse to employ or refuse to continue to employ a person,
> (b) threaten to dismiss or otherwise threaten a person,
> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
> (d) intimidate or coerce or impose a monetary or other penalty on a person,
>
> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.
>
> ...
>
> 118 Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

Positions of the Parties

The Plaintiff

17 The plaintiff submits that the point of law in this case should be determined in a manner that best attains the purposes of the *ESA*. By setting-off any portion of the Determination from the common-law award of damages, the Court would frustrate the purposes of the *ESA*, as enumerated under s. 2.

18 In support of this argument, she notes that the provisions of the *ESA* are to be interpreted in accordance with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

19 The plaintiff says that in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (*Machtinger*), the majority decision written by Mr. Justice Iacobucci recognized the fundamental importance of employment in Canadian society and the unequal bargaining position between an individual non-unionized employee in relation to their employers. The Court observed at para. 31

that the employment standards legislation fulfils this objective by providing for the following protections:

> ... to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination.

20 The plaintiff also refers to *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (*Rizzo*), where Iacobucci J., writing for the Court, held at para. 36 that the Ontario *Employment Standards Act* is "*a mechanism for providing minimum benefits and standards to protect the interest of employees*" and is to be characterized as "*benefits-conferring legislation*" that is to be interpreted "*in a broad and generous manner*" with "*any doubt arising from difficulties of language*" to be "*resolved in favour of the claimant*".

21 The plaintiff says that the Determination made under s. 79(2)(c) for the breach of s. 83 serves multiple purposes, which include:

> (1) encouraging employees to make complaints under the *ESA*;
> (2) encouraging employers to be careful in their observance of the law prohibiting retaliation against employees who invoke the *ESA*; and
> (3) granting generous compensation to an employee who is terminated as a result of a breach of s. 83.

22 Thus, the plaintiff argues that the remedy granted under s. 79(2)(c) of the *ESA* has punitive, rehabilitative and compensatory aspects. She says that an award under s. 79(2)(c) is not a remedy for breach of contract; rather, it is a remedy awarded against an employer for behaving in a way that obstructs the operation of the *ESA*. It addresses the most egregious circumstances and, in order to have teeth, it ought not to be deductible from the common law damage award for breach of contract.

23 The plaintiff says the fact that Canadian authorities interpret employment standards legislation and its remedies as benefits-conferring and distinct from common law entitlements favours a ruling against deductibility.

24 The plaintiff further submits that an award for breach of s. 83 is akin to statutory, collateral benefits, which are not deductible from damage awards for wrongful dismissal.

25 The plaintiff also argues that:

> The application of s. 83 is not triggered by, nor substantially related to, termination. It allows the Director to order an employer to pay an employee who has been disciplined but remains employed; in fact, its purpose is to encourage complaints under the *ESA* during the period of employment.

26 The plaintiff says that:

> The employer should not be able to profit from its breach of s. 83 by being permitted to avoid its common law obligations for failing to provide reasonable notice. It would be a miscarriage of justice for an employer to rely on its own illegal act to prevent an employee from recovering damages at common law.

27 The plaintiff relies on *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220 (leave to appeal refused, [2007] S.C.C.A. No. 306) (*Colak*), which I shall discuss below, which she says stands for the proposition that a person who has received compensation for length of service under the *ESA* (s. 63) is not barred by s. 82 from bringing a civil claim for contractual termination damages and that, by analogy, a person who has received an award consequent upon a breach of s. 83 should not have that award taken into account in an assessment of damages in a civil action for damages for wrongful dismissal.

The Defendant

28 The defendant submits that the award under s. 79(2)(c) is a remedial, compensatory statutory benefit that is designed to put the employee as close as possible to the position she would have been in had the contravention of s. 83 not occurred.

29 The defendant says that the award made under s. 79(2)(c) falls within the definition of "wages" in the *ESA* as do termination payments under s. 63. The defendant says that termination payments are regularly deducted from damage awards for wrongful dismissal and so should an award under s. 79(2)(c).

30 The defendant says that the test used by the Delegate under the *ESA* to determine the quantum of the award is similar to that used to determine reasonable notice at common law. The defendant further submits that this award serves the same compensatory purpose. Therefore, by failing to allow a set-off of the award, the Court would allow for double recovery, which would be inconsistent with the underlying principles of awarding damages for wrongful dismissal.

31 The defendant argues that the Supreme Court of Canada and the Ontario courts have affirmed that termination and severance awards under the Ontario employment standards legislation should be set off against common law damage awards in lieu of reasonable notice because the nature and purpose of the statutory benefits overlap with the nature and purpose of the damage awards. Both are intended to cushion economic hardship and provide compensation for loss of employment. The defendant says that s. 79(2)(c) awards should be set-off for the same reason. The object of the s. 79(2)(c) award is to make the employee "whole" and to put her in the same economic position as she would have been if the s. 83 breach had not occurred, which breach in this case included termination. The defendant says an award of damages for wrongful dismissal serves the same purpose.

Analysis

32 Counsel for the parties advise me that they have not been able to find any decision in British Columbia expressly dealing with the point of law to be decided or with s. 83 of the *ESA.*

33 When considering the nature of the award under s. 79(2), it is appropriate to look at how the British Columbia Employment Standards Tribunal views it. In *Colak*, the court said at para. 5:

> In working out the interplay the Legislature intended between the authority of the civil courts and that of the Director, that Tribunal's understanding of the current *Act* merits respect. The Tribunal seems to have a clear and settled view of that relationship. ...

34 The Tribunal has dealt with remedies for contravention of s. 83 of the *ESA* on a number of occasions. The decisions indicate that the remedy under s. 79(2)(c) is applied in a generous fashion with a view to making the employee "whole", that is, placing the employee where she would have been had the s. 83 breach not occurred.

35 This interpretation is confirmed in a number of decisions.

36 In *Photogenis Digital Imaging Ltd. (Re)*, [2002] B.C.E.S.T.D. No. 534 (*Photogenis*), an employer discharged two employees because they had made complaints under the *ESA* in respect of unpaid wages. The Director's Delegate found that the dismissals were contrary to s. 83(1(a) of the *ESA*. The Delegate concluded that the appropriate remedy for the breach was compensation under 79(4)(c) (now s.79(2)(c)) of the *ESA* and awarded 18 weeks' pay and 26 weeks' pay, respectively. On appeal, the Tribunal agree with the Delegate that compensation in lieu of reinstatement was the appropriate remedy but held that the amount of compensation had been overly generous. At paras. 34-36, the Tribunal said:

> ... in my opinion, if compensation is to be awarded it must be commensurate, in an economic sense, with reinstatement. In other words, an employee should not be better or worse off depending on the remedy awarded (reinstatement versus compensation).
>
> Ms. Thompson was awarded 5 months' wages on the basis that it took her that long to secure new employment. Mr. Pook was awarded about 6 months' wages on the basis that he would be able to find new employment within that time frame -- the Determination was issued approximately 5 months after his employment ended.
>
> However, in my view, the period of actual or anticipated unemployment is but one factor to be considered when determining an appropriate amount of compensation under section 79(4)(c) of the *Act*. Previous Tribunal jurisprudence

> suggests that other factors -- such as length of service, efforts to find new employment (i.e., mitigation efforts), actual earnings from other employment sources (i.e., successful mitigation), the nature of the previous employment -- should also be given some weight (see, e.g., *Afaga Beauty Service Ltd.*, BC EST # D318/97 and *W.G. McMahon Canada Ltd.*, [1999] B.C.E.S.T.D. No. 391, BC EST #D386/99).

37 The Tribunal noted that the employees' respective periods of employment were of very short duration, less than four months in each case, and found that even if the complainants' employment had not ended in late January, they would have ended in early spring in any event and concluded that an award equal to 13 weeks' wages would put them in the same economic position that they would have been in if their employment had not wrongfully been terminated contrary to s. 83.

38 *Photogenis* refers to s. 63 and compares the precise formula under that section to the lack of clear formula for the determination of awards under s. 79(2)(c) (as it is now), but there is no suggestion that any part of the award in *Photogenis* was made under s. 63.

39 In *Rite Style Manufacturing Ltd. (Re)*, [2005] B.C.E.S.T.D. No. 105, the employer appealed a Determination that it owed the employee $8,664.94 in unpaid wages pursuant to s. 88 of the *ESA*. The employee was also awarded $7,488.00 for retaliatory discharge contrary to s. 83, based on 12 weeks' wages plus vacation pay as it took the employee 12 weeks to find new employment. In upholding the decision, the Tribunal noted that the employee could have been "made whole" by a reinstatement order coupled with an order to pay lost wages under s. 79(2)(b) and that a compensation order under s. 79(2)(c) should reflect an equivalent level of compensation. The Tribunal found the award, based on 12 weeks' wages, to be reasonable. I note that this case could not have involved s. 63 of the *ESA* because of the limited length of service of the employee.

40 In *Urban Sawing & Grooving Co. (Re)*, [2005] B.C.E.S.T.D. No. 188, the employee gave ten weeks notice of his intention to cease his employment. While still employed, he made a complaint under the *ESA*, which resulted in the employer taking steps that were held to be a discharge. The Delegate hearing the matter found that the employee was entitled to four weeks' wages as compensation for length of service under s. 63 of the *ESA*. The Delegate also held that the employer had committed a breach of s. 83 and imposed a remedy under s. 79(2)(c) to compensate for an additional six weeks' wages. The awards placed the employee in the same economic position that he would have been in had he been permitted to work for his ten week notice period. The awards were upheld by the Tribunal on appeal and upon a reconsideration of its decision. On the reconsideration, the Tribunal noted at para. 29 that:

> ... even if Urban Sawing was not obliged to pay any compensation for length of service by reason of the section 65(1)(e) exemption, in our view, Urban Sawing would have nonetheless been liable to pay Mr. Sentes a total of 10 weeks' under section 79(2) of the Act.

41 The remedy under s. 79(2)(c) for the payment of compensation for breach of s. 83 is an alternative to the remedy of reinstatement and the payment of past wage loss under s. 79(2)(b).

42 In *Afaga Beauty Service Ltd. (Re)*, [1997] B.C.E.S.T.D. No. 288 (*Afaga*), the Tribunal set out the following factors that may be considered in determining the quantum of compensation under s. 79(2)(c) at para. 12:

> (1) length of service;
> (2) time needed to find alternative employment;
> (3) mitigation;
> (4) other earnings during unemployment; and
> (5) projected earnings from previous employment and the like.

43 These decisions of the Tribunal persuade me that an award under s. 79(2)(c) is compensatory. It is intended to make the claimant "whole" in the economic sense.

44 This was the approach taken by the Delegate with regard to Ms. Roy's claim. Having found that the employer breached s. 83, the Delegate turned to the appropriate remedy and stated:

> Section 79(2) of the Act contains the most remedial power under the Act and permits the complainant to be "made whole" (*W.G. McMahon Canada Ltd.*, BC EST Decision No 386/99). This provision gives the Director the means to put an employee as close as possible to the position she would have been in if the contravention had not taken place.

45 The Delegate awarded the remedy under s. 79(2)(c) because reinstatement was not a realistic remedy. In determining the appropriate compensation for loss of employment instead of reinstatement, he applied the factors set out in *Afaga*. The Delegate noted that Ms. Roy sought $17,800.00 in lost wages from the time of her dismissal until March 2010 and an additional seven weeks' "compensation for length of service" in the amount of $7,835.33. The Delegate agreed in principle with Ms. Roy's method of calculating her lost wages but made some adjustments. He found that she was entitled to an award of $19,506.12 based on six months' lost wages from the date of termination until the date she found another comparable position at a rate equal to her average monthly earnings in 2009 and 2010 ($3,251.02).

46 With regard to the claim for "compensation for length of service" the Delegate said:

> The remedy contemplated by the "make whole" remedy would include both the statutory compensation for length of service pursuant to section 63 as well as compensation to address what would have been earned if the employee was properly reinstated, plus wages lost to the date of the award for compensation in lieu of reinstatement.

> Although any remedy pursuant to section 83 would also include a separate remedy for section 63 the remedy pursuant to section 63 would be included in the remedy under section 79(2) and not in addition to it. That is, the section 63 remedy would form part of the "make whole" remedy and would not be over and above the remedy contemplated by section 79(2). To put it another way, the remedy for a section 83 contravention would include at the very least the amount of compensation for length of service the employee would be entitled to. The section 79(2) remedy would go beyond the requirements of section 63 to "make whole" the employee based on the above factors.

47 I find the decisions of the Tribunal are of little assistance in resolving the question of law posed in this case, whether or to what extent, the statutory award under the *ESA* should be taken into account in determining the quantum of damages in an action for wrongful dismissal.

48 With regard to the issue of set-off or deductibility, the plaintiff refers to decisions of other Canadian jurisdictions that have dealt with the issue of the deductibility of other payments or awards under other statutory schemes from an award made pursuant to the governing employment standards legislation and submits that they are informative in deciding whether the award under the *ESA* should be view as separate and should not be taken into account in the assessment of common law damages for wrongful dismissal.

49 The plaintiff referred to *Auto Gallery 1994 Ltd. v. Saskatchewan (Director of Labour Standards)*, 2010 SKQB 319 (leave to appeal refused 2010 SKCA 156) (*Auto Gallery*). In that decision, Mr. Justice Zarzeczny held that wage loss benefits conferred pursuant to the provincial workers' compensation legislation were not deductible from an award made under a section of the *Labour Standards Act*, R.S.S. 1978, c. L-1 that provides for minimum notice or pay in lieu of notice. In reaching this conclusion, Zarzeczny J. said at para. 18:

> ... there is a difference between the principles of mitigation as they apply to common law actions for wrongful dismissal and the claims of an employee to statutory entitlement where the statute does not contain any provision for mitigation or reduction of the entitlement for employment related incomes earned during the entitlement period.

50 In dismissing the application for leave to appeal, the Court of Appeal noted at para. 9 the distinct purpose behind each entitlement:

> The argument of Auto Gallery and Glen appears to be inconsistent with the statutory scheme and intention of the *Act* and the *Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1. Each provides for distinct benefits. The *Act* seeks to ensure that employees are paid all wages due to them by employers for their services. The WCB legislation establishes a scheme whereby workers who have been injured or disabled in the course of their employment, and their families,

will receive the benefits administered by the WCB.

51 *Auto Galler* y deals with the question of the deductibility of an award made under a different statutory scheme (WCB) from an award made under employment standards legislation. It does not deal with the question of the deductibility of an award made under a statutory scheme from a common law award of damages for wrongful dismissal. In fact, at para. 8, the court observed:

> ... Counsel provided supplementary material after the hearing, which established that there were many cases which allowed deduction of WCB benefits from common law dismissal and damage awards, but none which allowed the setoff of one statutory payment from another statutory payment as argued in this case.

52 The plaintiff also refers to *Mattiassi v. Hathro Management Partnership*, [2011] O.J. No. 4774 (S.C.) (*Mattiassi*). *Mattiassi* was concerned with two separate sets of provisions under the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 (*OESA*). One set of provisions, ss. 54 and 57, provided for notice of termination on a scale that increased based on the number of years of employment, to a maximum of eight weeks if the employee's period of employment was eight years or more. The employer could terminate with less notice provided it paid an amount equal to that under the notice provision. The second set of provisions, ss. 64 and 65, provided for severance pay equal to one week's wages for every year worked up to a maximum of 26 weeks. Section 65 further provided:

> (7) Subject to subsection (8), severance pay under this section is in addition to any other amount to which an employee is entitled under this Act or his or her employment contract.
>
> (8) Only the following set-offs and deductions may be made in calculating severance pay under this section:
>
> 1. Supplementary unemployment benefits the employee receives after his or her employment is severed and before the severance pay becomes payable to the employee.
> 2. An amount paid to an employee for loss of employment under a provision of the employment contract if it is based upon length of employment, length of service or seniority.
> 3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2.

53 Ms. Mattiassi was dismissed after about 28 years of service following 54 weeks of working notice. She made a claim for 26 weeks of severance pay pursuant to s. 64 of the *OESA*. The employer argued that the amount of working notice requested went over and above the notice requirement under s. 54 and that the requested severance exceeded the amount required under the

OESA. The court held that the *OESA* established two distinct and separate entitlements and that each provision stands on its own, serving a different purpose and providing distinct benefits (or entitlements) to the employee. The *OESA* required payment in lieu of notice only if the required notice was given; it also required payment of severance regardless of whether or how much notice was required. The Court held that the excess notice could not be used to diminish the obligation to pay severance pay.

54 *Mattiassi* clearly stands for the proposition that the notice provisions under the *OESA* cannot be used to offset against the obligation to pay severance under the *OESA*. It does not, however, stand for the proposition that awards under the *OESA* cannot be taken into account in an action for damages for wrongful dismissal.

55 On the contrary, I agree with the defendant's submission that the Ontario courts have recognized the deductibility of awards made under the employment standards legislation from awards of damages for wrongful dismissal.

56 In *Stevens v. The Globe and Mail* (1996), 28 O.R. (3d) 481 (C.A.) (*Stevens*), the Ontario Court of Appeal expressly dealt with the issue of the deduction of severance pay under what was then s. 58 of the *OESA* then in force, which contained essentially the same provisions of ss. 64 and 65 of the current legislation in force. Mr. Justice Catzman found:

> 22 There is no controversy respecting the deductibility of termination payments under s. 57 of the Act from awards of damages for wrongful dismissal. The uniform practice of trial judges has been to order such a deduction: *Wood v. Indal Technologies Inc.* (1990), 73 O.R. (2d) 97, 90 C.L.L.C. 14,037 (H.C.J.); *Brown v. Black Clawson-Kennedy Ltd*. (1989), 29 C.C.E.L. 92 (Ont. Dist. Ct.); *Mattocks v. Smith & Stone* (1982) Inc. (1990), 34 C.C.E.L. 273 (Ont. Gen. Div.); *Williams v. Motorola Ltd*., [1996] O.J. No. 120 (Gen. Div.); *Leduc v. Canadian Erectors Ltd*., [1996] O.J. No. 897 (Gen. Div.). This practice is consistent with the decision in *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491, that, where the period of reasonable notice at common law exceeds the period of notice under the predecessor of s. 57 of the Act, the former prevails over the latter.
>
> 23 The deductibility of severance payments under s. 58 does not, however, reflect a similar unanimity. ...

57 Catzman J.A. noted that the majority of the judgments surveyed favoured deduction and he went on to find:

> 24 The majority approach is synthesized in the following passage from the reasons for judgment of Corbett J. in *Mattocks v. Smith & Stone* (1982) Inc.,

supra, at p. 279:

> ... the nature and purpose of severance pay is similar to the nature and purpose of common law damages for failure to give reasonable notice of termination of employment. The triggering event is the same, namely, termination of employment. Severance pay cushions economic hardship and provides some compensation for loss of employment. While this payment is made whether or not the employee gets another job, the Legislature has recognized that termination of employment generally results in economic upset. Both termination pay and severance pay are intended to cushion the economic dislocation of the employee.

> 25 I agree with this assessment of the substantial overlap between the nature and purpose of severance pay and the nature and purpose of damages for wrongful dismissal.

58 Catzman J.A. found he could "discern no policy reason for deducting termination payments, but not severance payments from damages for wrongful dismissal" and concluded that severance payments under s. 58 should be deducted from awards of damages for wrongful dismissal.

59 In *Boland v. APV Canada Inc*. (2005), 250 D.LR. (4th) 376 (O.N.S.C. Div. Ct.), one of the issues before the court was whether a plaintiff could claim *ESA* benefits in an action. The court held:

> 12 The ESA is remedial legislation, intended to provide a minimum set of standards applicable to employment practices in Ontario for the protection of employees. It should be given a large and liberal construction so as to achieve the ends the Legislature had in mind. As it provides minimum standards, the possibility always exists that in some instances other entitlements are actually better for the employee than the ESA minimum standards. It is not always easy to know whether the one is better than the other because common law damages are not predictable except within a fairly wide range. There appears to be no principled reason why an employee should not be able to seek both the statutory minimums and the possibly more advantageous common law remedies in the same action, always subject to double recovery considerations.

60 The court went on to deal with the question of whether *ESA* awards were to be offset if the employee brought an action. The court referred to *Stevens* and held:

> 20 These authorities permit a definitive answer to the question posed. ESA standards are minimum and if a larger amount is assessed as damages, those

damages are awarded, but any ESA payments actually paid are deducted.

61 The plaintiff submits that in British Columbia, the Court of Appeal in *Colak* held that an award under s. 63 was not deductible from damages for breach of contract in a wrongful dismissal action. The plaintiff argues that an award for breach of s. 83 should be treated in the same manner. The precise issue in *Colak* was whether the former employee was barred by s. 82 of the *ESA* from bringing an action to enforce an express termination provision in the contract of employment because it was a claim for "wages". The material part of the termination provision in the contract read as follows:

> 6.B. Employer may terminate this Agreement by providing the Employee,
>
> a) a minimum of twelve (12) months' pay (herein the "Paid Termination Period") except in the case of a change of current management or ownership, in which case the minimum payment will increase to 24 months. The employer may elect to increase the number of months' pay in order to extend the "Paid Termination Period" and thereby extend the applicable "non-compete" period covering Employee's obligations outlined in the clause 8. ...

62 Mr. Colak had filed a complaint with the Employment Standards Branch and a series of determinations were made by a delegate, which were appealed to the Tribunal. The end result of this process was that Mr. Colak obtained a determination that the employer owed him $32,572.64 for "unpaid wages, unpaid commissions and vacation pay". One cannot determine from reading *Colak* or the trial decision (*Colak v. UV Systems Technology Inc.*, 2006 BCSC 1078) the section or sections of the *ESA* under which the determinations were made and, in particular, whether there was a determination under s. 63. However, I have obtained a copy of the decision of the ESB Tribunal (# D255/03), from which it is apparent that a part of the award was for "length of service" made pursuant to s. 63 of the *ESA*.

63 The trial judge held that the claim for "termination pay" under clause 6B of the employment contract was a claim for "severance pay", which fell within the definition of "wages" under the *ESA* and was barred by s. 82 because a determination had already been under the *ESA* for unpaid wages, unpaid commissions and vacation pay. In so holding, the trial judge relied on *Citation Industries Ltd. v. British Columbia (Director of Employment Standards* (1988), 52 D.L.R. (4th) 347 (B.C.C.A.) (*Citation*).

64 In *Citation*, numerous employees who had been terminated by their employer had applied to the Director for payment of severance. The Director issued an order requiring the employer to pay severance. The Director's decision was upheld on appeal to the County Court. An appeal of that decision was dismissed. The issues on appeal included the question of whether the "severance pay" fell within the definition of "wages" under the former *ESA* and whether the claim under the *ESA*

was barred because those formal complaints had not been filed within six months of the severance pay falling due. Madam Justice McLachlin (as she then was) held that the severance pay indeed fell within the definition of wages.

65 In *Colak*, the Court of Appeal held that the trial judge erred in his application of the reasoning in *Citation*. The court noted that *Citation* dealt with "severance pay" that was payable pursuant to a section of the *ESA* in force at that time, which later became "compensation for length of service" under s. 63 of the *ESA*. An obligation to pay money under s. 63 falls within the definition of "wages". However, the court found that the contractual termination payment that was provided for by Mr. Colak's employment agreement did not constitute "wages", according to the statutory definition, and Mr. Colak could maintain an action for damages for breach of the termination provision.

66 In arriving at its decision and considering the interplay between the authority of the civil courts and that of the Director of Employment Standards, the court referred with approval to the following statements from *Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515:

> 10 It must be recognized that the statutory entitlement to compensation for length of service is a separate concept from that of damages for failure to give proper notice of termination. In the latter case, proper notice will be determined by either an express notice provision (i.e., an amount of notice specifically agreed to between the parties) or, in the absence of an express contractual term, by the principles of "reasonable" notice (i.e., an implied contractual term).
>
> 11 Compensation for length of service payable under section 63 of the Act is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027).
>
> 12 In an indefinite contract of employment where there is no express notice clause (or where the clause is unlawful -- see *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986), the employee is entitled to "reasonable" notice of termination. "Reasonable" notice depends on various factors including the

> employee's age, length of service, position, prevailing labour market conditions etc. -- see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 -- and may amount to 24 months' or more notice. If, as appears to be the case here, there is a lawful express notice of termination clause in the governing employment [contract], damages may be awarded for breach of that clause. The damages payable in the latter instance will be predicated on the terms of the express notice clause subject to any deduction for the employee's failure to mitigate their loss.
>
> 13 Although an employee may well be entitled to claim damages for breach of an express or implied notice of termination provision, I cannot find any proviso in the *Act* which gives the Director, or her delegates, the jurisdiction to make such a damages award. Under the *Act*, the Director's authority is limited to awarding compensation for length of service and, in my view, the Director does not have the authority to make a damages award based on an employer's failure to abide by an express or implied notice of termination provision.
>
> 14 "Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo, supra*.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette, supra*.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the *Act*.

67 The Court of Appeal also referred to the following passages in *Rupert Title Search Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 70:

> 25 ... The Tribunal has consistently recognized that Section 63(1) of the Act establishes a statutory liability on an employer to pay an employee length of service compensation upon completion of three consecutive months of employment. It is not only a statutory liability on an employer, but in a sense it is also an 'earned' benefit to the employee that accumulates as the length of service of the employee increases. The employer may discharge its statutory liability by giving the appropriate written notice, a combination of notice and money or by the payment of an amount of money equivalent to the appropriate notice. The statutory objective of Section 63 is to provide an employee with working notice, or its equivalent, in order to allow the employee a reasonable opportunity to seek

> out alternative employment and to arrange their affairs to deal with the imminent loss of employment. Working notice, or its equivalent is both time and money. That objective is not met if the affected employee is disabled, unable or unavailable to utilize the opportunity intended by the legislation to be provided. ...
>
> 33 The administration of Section 63 of the Act is different. As noted above, the objective of length of service compensation is to give an employee a brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. It is, in a sense, a statutory benefit earned through employment. The 'default' position on length of service compensation is that it is a statutory liability for the employer. It is not necessary for an employee to prove a wrongful dismissal in order to claim payment for length of service compensation under the Act. The employee needs only to establish the fact of employment for a term longer than the qualifying period and the fact of termination. The Act, in subsection 63(3), allows an employer to discharge the statutory liability for length of service compensation by providing notice, or a combination of notice and compensation, paying compensation or by showing the employee has quit, retire[d] or engaged in conduct that provides just cause for termination. It only makes sense that the burden of showing that liability has been discharged should be on the employer, since the statutory liability to pay length of service compensation belongs to the employer and the question of whether the employer should be discharged from it is invariably raised by the employer. [Emphasis added in *Colak*.]

68 The court held at para. 15:

> Is Mr. Colak statute barred by s. 82 of the *Act* from claiming termination pay under the Contract? I think not. Section 82 bars only those claims requiring payment of "wages." While benefits payable under s. 63 (and its predecessor s. 41) are wages by definition, contractual termination payments are not. When the trial judge applied this Court's reasoning about "severance payments" under s. 43 in *Citation* to contractual termination benefits, he erred. As the Supreme Court of Canada explained in *Re: Rizzo*, the *Act* is to be viewed as benefits-conferring legislation. The potential for overlap in the purposes served by s. 63 and contractual termination provisions is not enough reason to justify the inclusion of those termination benefits in the definition of "wages." Were it otherwise, the Director would be called upon to enforce not only express termination provisions, but [also] implied contractual notice requirements.

69 The court found that the circumstances brought Mr. Colak within the longer period of 24 months' termination pay and that he was entitled to the greater of the two.

70 The plaintiff argues, based on *Colak*, that an award of damages for wrongful dismissal is distinct from an award under s. 63 or s. 79(2)(c) and serves a different purpose. An award of damages for wrongful dismissal provides the plaintiff with her remedy for loss suffered because the employer has breached an implied term of the contract. An award under s. 79(2)(c) is a remedy awarded against an employer for behaving in a way that obstructs the operation of the statute and must be recognized as independent of any award of damages at common law in order to maintain its substance and "teeth". The plaintiff submits that while there may be overlap in the end result, such overlap is not enough reason to deduct the s. 79(2)(c) award from an award for damages.

71 The defendant submits that the precise issue of whether an award under the *ESA*, whether pursuant to s. 63 or under s. 79(2)(c) for breach of s. 83, is deductible from an award of damages for wrongful dismissal on the ground of double recovery was not before the court in *Colak* and was not decided, one way or the other.

72 I agree that *Colak* is not binding authority that answers the point of law to be determined.

73 The issue in *Colak* was whether s. 82 of the *ESA* barred an action at law to enforce an express termination provision of the contract on the ground that it was an action for the recovery of wages that had been awarded by a determination made under the *ESA*. As the court observed, the express termination provision was not a typical notice provision. It was a contractual provision quite different from the implied condition not to terminate unless there was cause without giving reasonable notice or pay in lieu thereof.

74 In *Colak*, the determination under the *ESA* at issue was the total amount of $32,572.74, which included an award for "length of service" in the amount of $7,455.46 pursuant to s. 63 of the *ESA*. The balance of the determination was for outstanding wages, unpaid commissions and vacation pay. Those latter amounts were due and owing under the contract prior to termination and obviously would not amount to double recovery. In determining that Mr. Colak was entitled to recover 24 months' pay pursuant to the express termination provision in his contract, the Court of Appeal did not make any deduction for any part of the award, including the length of service portion under s. 63. That result, in my opinion, was consistent with the view that s. 63 conferred a statutory benefit that was quite different in character from the entitlement under the express termination provision of the contract.

75 *Colak* does not, however, lead to the conclusion that an award made pursuant to s. 79(2)(c) for breach of s. 83 should not be taken into account in awarding damages for wrongful dismissal, even if the award notionally included an award under s. 63.

76 The plaintiff also argues that the Determination under s. 79(2)(c) is akin to a statutory collateral benefit and that the law has recognized that such benefits are not deductible from an

award of damages. Thus, in *Jack Cewe Ltd. v. Jorgensen*, [1980] 1 S.C.R. 812 (*Jorgensen)* at 818, the Court held that unemployment insurance benefits are not to be deducted from an award of damages for wrongful dismissal. In *Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4 (O.N.C.A.) at para. 21, social assistance benefits were held to be non-deductible from an award of damages in a tort action.

77 In my view, those decisions are not of any assistance. In *Jorgensen*, the Court observed that the unemployment insurance benefits were a consequence of the contract of employment, not its breach, and were akin to payments under an insurance policy. In *Boarelli*, the court characterized the payments at para. 12 as in the nature of "public benevolence":

> Moneys received by an injured party as a result of a private or public benevolence have never been taken into consideration in assessing damages for loss of income or earning capacity.

78 Finally, I note that the payment in these collateral benefits cases to which the plaintiff refers are of a very different character from the awards of damages from which the party sought deduction or set-off.

79 The defendant argues that an award under s. 79(2)(c) is largely compensatory in nature. There is a separate punitive provision for the s. 83 breach in the assessment of the administrative penalty. The defendant argues the purpose behind s. 79(2)(c) is to make the employee" whole", to compensate her economically, for the effect of the breach of s. 83, which in this case was the termination of the plaintiff's employment in retaliation. That is the same purpose for which an award of damages for wrongful dismissal is made -- to put the employee in the position she would be in if she had received proper notice: see *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.) (affirmed (1986), [1986] B.C.J. No. 3006, 55 B.C.L.R. xxxiii) at 36-37 and *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at para. 115. The quantum of the award under s. 79(2)(c) is determined applying the same factors that are applied when determining an award of damages for wrongful dismissal. The defendant argues that there is a complete overlap between the two and that it would offend the principle against double recovery if the plaintiff were to receive damages without deducting the amount of the award.

80 The defendant also says that decisions of this court have recognized that termination pay is to be deducted from an award of damages for wrongful dismissal. The defendant refers to *Potter v. Halliburton Group Canada Inc.*, 2004 BCSC 1376 in which the court deducted the amount paid to the employee on termination from an award of damages for wrongful dismissal and to *Kastens v. The Bank of Nova Scotia*, 2012 BCSC 1893, where the court deducted two amounts of "severance pay", one of which was the payment of two weeks' salary on the date of termination. While not expressly stated, it appears to me that the termination and severance payments in those cases were paid by the employer to satisfy its obligations under s. 63 of the *ESA.*

81 I agree with the defendant's submission that the purpose of the Determination under s. 79(2)(c)

and the factors that were considered by the Delegate in determining the award are the same as those that the court must apply in deciding the quantum of an award of damages for wrongful dismissal. I agree that to fail to set off the amount of the Determination under s. 79(2)(c) would amount to double recovery that is not warranted by a distinction in the purpose of the two awards. This conclusion accords with the law in Ontario with respect to the same issue involving similar legislation and it accords with what in fact has been done in other cases by this court.

82 Allowing a set-off does not mean that an employee is barred by s. 82 of the *ESA* from bringing an action whenever there has been a Determination under s. 79(2)(c). A court may find, upon application of the factors to be considered, that a dismissed employee is entitled to damages for the wrongful dismissal that exceed the amount of the determination and to that extent, the employee ought to be able to recover the excess by an action at law. The court, when considering the double recovery argument, must examine the purpose of the award granted pursuant to the *ESA* to determine whether it fulfils the compensatory principle for wrongful dismissal.

Conclusion

83 In conclusion, I answer the question of law by finding that the amount obtained by the plaintiff pursuant to s. 79(2)(c) of the *ESA* is to be deducted from the amount of damages to which she is otherwise entitled as a result of her wrongful dismissal.

84 The parties may arrange to speak to the issue of costs, if necessary.

B.M. JOYCE J.

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