

of \$29,920 (\$22,880 + \$7,040) for severance and termination. It is accepted that these amounts must be deducted from the loss, leaving a balance of \$39,968.

[2] Since Ms. Jensen was not notified of her termination until October 31, 2007, I take that date as the date of her termination. Therefore, the 18 month notice period extends to April 30, 2009. During that period she received income replacement benefits from WSIB of \$45,839.72. That has resulted in her being paid \$5,871.72 more than her lost wages during the notice period.

[3] In submitting that the WSIB benefits received by Ms. Jensen should be applied to reduce her claim, the defendant relies on the analysis of the Alberta Court of Appeal in *Salmi v Greyfriar Developments Ltd.* [1985] A.J. No. 1089 at pars. 9 and 10:

.... in determining the actual award in a wrongful dismissal case the court must take into account the earnings of the plaintiff over the period of the award in mitigation of damages. Therefore if the respondent had been fit for work and had earned \$2,400.00 in wages from the Workers' Compensation Board it would have been deducted. The reason the respondent did not attempt to locate other work was his medical condition. In lieu of wages for the period he received workers' compensation provided by assessments paid by his employer and others in like kinds of industry. The fund is set up by legislation. The employer is the only contributor. The payment is in lieu of wages and takes away the right to sue the employer for injury resulting in his present medical condition which makes him unfit for employment for the period involved or for death.

If the money came from earnings from a complete stranger the appellant would have the advantage of it in mitigation of the loss. As a matter of policy I am quite unable to see why it ought not to be deducted where it is paid from a fund contributed to by the employer by force of law particularly where the payment is in lieu of earnings and to compensate for their loss while unable to work because of injury sustained during the course of the respondent's employment.

[4] Although I am not required to follow this decision I agree with the reasoning and conclude that the benefits paid by WSIB on account of lost earnings during the notice period must be credited against the loss. As a result Ms. Jensen has proven no loss of wages for the 18 month notice period.

[5] Ms. Jensen also claims the following:

- 1) The severance and termination payments made pursuant to the *Employment Standards Act* were based on an hourly rate of \$22. They should have been calculated on a rate of \$22.40 per hour. The difference is \$544.
- 2) \$325 paid for a semi-private hospital room during the layoff period that should have been covered by her continuing medical benefits.
- 3) \$407.95 paid for prescriptions during the notice period.
- 4) \$2,200 for premiums for replacement health care benefits during the notice period.
- 5) \$1,098 for optometry expenses incurred during the notice period and after her medical benefits had been terminated.

[6] I am satisfied that the foregoing which total \$4,674.95, represent pecuniary losses that were sustained by Ms. Jensen as a result of her wrongful dismissal. When this amount is added to her lost wages of \$69,880 the total loss is \$74,554.95. This amount still falls short of the \$75,759.72 she received in severance, termination and WSIB payments by \$1,204.77. Nonetheless she is still entitled to receive the additional \$544 that the defendant was obligated to pay as severance and termination pay pursuant to the *Employments Standards Act*.

[7] Ms. Jensen is also entitled to lost pension benefits during the notice period. This loss is usually calculated by determining the present value of the loss of increase in the employee's pension resulting from the employer not paying its contributions during the notice period. Since I have not been provided with the necessary evidence to make this calculation I would award Ms. Jensen an amount equal to the actual contributions the employer would have made toward her pension during the notice period. She should be paid the difference between that and the surplus of the amounts she has received.

[8] There will be judgment in accordance with the foregoing reasons. Counsel may make written submissions with respect to costs within 30 days.

Justice R. J. Haines

Released: March 1, 2011

CITATION: **Jensen v. Schaeffler, 2011 ONSC 1342**
COURT FILE NO.:

ONTARIO
SUPERIOR COURT OF JUSTICE

MARY ANNE JENSON
(FORMERLY MARY ANNE LOTT)

2011 ONSC 1342 (CanLII)
Plaintiff

- and -

SCHAEFFLER CANADA INC./
FAG BEARINGS LIMITED

Defendant

REASONS FOR JUDGMENT

HAINES J.

Released: March 1, 2011