

**COURT FILE NO.:** 07-CV-331363PD1

**DATE:** September 26, 2007

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**SYBILLE DRAGONE**

Applicant

- and -

**RIVA PLUMBING LIMITED**

Respondent

**COUNSEL:**

James Jagtoo for the Applicant

Joseph P. Maggisano for the Respondent

**HEARING DATE:** September 21, 2007

**REASONS FOR DECISION**

**PERELL, J.**

[1] The Applicant Sybille Dragone, who is being treated for metastasized breast cancer, applies for a declaration that she is an employee of the Respondent Riva Plumbing Limited (“Riva Plumbing”), and she seeks an order that Riva Plumbing maintain her employee benefits, which include a medical, dental, and drug insurance plan for which Riva Plumbing pays the premiums.

[2] Riva Plumbing argues that the Application should be dismissed on three grounds: (1) because Ms. Dragone resigned in July 2006, and is no longer an employee; (2) because if she did not resign, with the passage of time since July 2006 and with her continuing absence from work, her employment contract has become frustrated and she is no longer an employee; and (3) because, even if she continues to be an employee, she has been given reasonable notice of a change of her employee benefits and Riva Plumbing is entitled to discontinue paying for her health benefits plan.

[3] Whether Ms. Dragone resigned is a contextual issue of fact. A resignation must be voluntary, and the employee's words or conduct evidencing a resignation must be clear and unequivocal and objectively reflect an intention to resign. All the circumstances must be considered to determine whether a reasonable person would conclude that the employee intended to resign. See: *Kieran v. Ingram Micro Inc.*, [2004] O.J. No. 3118 (C.A.); *Skidd v. Canada Post Corp.*, [1993] O.J. No. 446 (Gen. Div.), aff'd [1997] O.J. No. 712 (C.A.); *Moore v. University of Western Ontario* (1985), 8 C.C.E.L. 157 (Ont. H.C.J.); *Mitchell v. Westburne Supply Alberta* (2000), 2 C.C.E.L. (3d) 87 (Alta. Q.B.).

[4] The evidence establishes that Ms. Dragone began her employment with Riva Plumbing as an office clerk almost ten-years ago in November 1997. There is no written employment contract and no collective agreement. Her salary was \$37,000 a year plus benefits, which included long term disability insurance, and the health insurance plan.

[5] Under the health insurance policy, the insurance terminates for a variety of grounds including: (a) the employee no longer being an employee; (b) the employee ceasing to be actively at work; (c) or the employer terminating the coverage. The policy, however, provides that if an employee ceases to be actively at work due to illness, all insurance coverage will continue until the policyholder terminates the coverage.

[6] In March 2006, Ms. Dragone was diagnosed to have metastasized breast cancer, and on June 26, 2006, she wrote Riva Plumbing as follows:

Due to my illness and the pain associated with it, I am finding it increasingly difficult to walk and move around which makes it hard to get to work and do my daily work. Therefore, I have decided it is time for me to go on sick leave/long term disability. I would like to give Riva Plumbing ample time to find a suitable replacement and enough time for me to train this person. My last day will be Friday, August 4, 2006 which will give us six weeks to accomplish this. I am very sad about this decision, but truly feel it will be the best for all concerned.

[7] This letter is not an unequivocal act of resignation. As I interpret this letter and the events that follow it, Ms. Dragone was making the common sense and necessary decision of going on sick leave – her precise words – to battle her cancer and hopefully eventually to return to work.

[8] Although the letter does not say that Ms. Dragone is resigning, Mr. Tony Ferrari, who is the president of Riva Plumbing, deposes that Ms. Dragone conveyed the message that her cancer was terminal and that she would be leaving Riva Plumbing permanently. He says: “In my discussions with Sybille, she made it clear to me that she was leaving Riva permanently, but would be applying for long term disability benefits, as she was entitled to given her disability.”

[9] To show a resignation, Riva Plumbing relies on Mr. Ferrari's and other employees' conversations with Ms. Dragone, an e-mail message from Ms. Dragone's sister Pauline Lawlor, and the fact that on August 10, 2006, Ms. Dragone accepted a

retirement party and a substantial retirement gift from her workmates. I can accept Mr. Ferrari's evidence that he and others subjectively believed that Ms. Dragone had resigned; however, Mr. Ferrari's and Ms. Lawlor's subjective view that Ms. Dragone's career was at an end is just their interpretation and the question is whether a reasonable person, viewing the matter objectively, would have understood Ms. Dragone to have unequivocally resigned.

[10] It is not clear and unequivocal that Ms. Dragone indicated that it was her intention never to return to work even if she successfully battled her cancer. That she accepted the generosity and commendable decency of her friends and colleagues giving her a retirement party cannot be used as some sort of trap. What was she to do; refuse to attend a party in her honour unless her legal rights were clarified in some formal way?

[11] In any event, there is another reason why the communications between Mr. Ferrari and Ms. Dragone and the circumstances of the party do not amount to a resignation. The case law establishes that words or acts of resignation said under emotional trauma, for example words said in anger or desperation, can be recanted when emotions have settled, unless the employer has acted to its detriment. In my view, that is what occurred in this case. See: *Kieran v. Ingram Micro Inc.*, [2004] O.J. No. 3118 (C.A.); *Tolman v. Gearmatic Co. Ltd.* (1986), 14 C.C.E.L. 195 (B.C.C.A.); G. England, *Employment Law in Canada* (4<sup>th</sup> ed.) (Markham: LexisNexis Canada Ltd., loose leaf), para. 17.44; H.A. Levitt, *The Law of Dismissal in Canada* (3<sup>rd</sup> ed.) (Aurora: Canada Law Book, looseleaf), para. 12:10.20.2.

[12] Ms. Dragone stopped working on July 21, 2006 and on August 21, 2006, Ms. Dragone wrote to confirm that Riva Plumbing would pay for the health and dental portion of her group insurance during her disability. In the letter, she writes:

[Manulife] were being told that I left the company and that I would not be returning. This is not so - I am on sick leave as an inactive employee and hypothetically I could and would return to work if all goes well and the treatment successfully cure me. Tony, I am trying hard to get well, and it would give me great peace of mind to know that this matter was resolved and I did not have to worry whether my coverage will be interrupted or compromised due to any misunderstandings.

[13] Within one month of leaving work, Ms. Dragone is unequivocally making her position clear. She is not resigning, and she plans to return to work if her treatment is successful.

[14] Mr. Ferrari says that Ms. Dragone's letter of August 21, 2006 is a self-serving attempt by Ms. Dragone to revisit the issue of her benefits coverage after she had been told Riva Plumbing would only pay the premiums for the medical and dental plan until November 2006. The issue, however, is not whether the letter is self serving – most letters are written to be self serving – the issue is whether Ms. Dragone resigned, and I conclude that she had not resigned and that she had not intended to resign. Thus, as of

August 21, 2006, Ms. Dragone was an employee on a leave of absence with long-term disability coverage and entitled to other employee benefits.

[15] Given that Ms. Dragone did not resign in the summer of 2006, Riva Plumbing's second argument is that Ms. Dragone's employee status came to an end because her employment contract has been frustrated, which is to say that without fault by either employer or employee, the employment contract has become impossible to perform.

[16] A permanent illness that disables the employee is a frustrating event that will end the employment contract. It has not been established that Ms. Dragone has no prospect of returning to work. The evidence is that: she has not worked since July 2006; her doctor has recommended that she not work now; her treatments are continuing; she wants to return to work if possible; but Ms. Dragone does not know when she will get better. Based on that evidence, there is at least hope that she will eventually be able return to work. A permanent incapacity to return to work has not been proven.

[17] Riva Plumbing, however, argues that since the diagnosis of a metastasized cancer has not changed, an adverse inference that her disability is permanent should be made against Ms. Dragone because she did not provide medical evidence as to her ultimate prognosis. It is, however, not Ms. Dragone's onus to disprove Riva Plumbing's allegation that the contract has been frustrated. The onus is on them to prove that the contract has been frustrated.

[18] That a permanent incapacity has not been shown by Riva Plumbing, however, does not end the discussion, because a protracted temporary illness also may constitute a frustrating event and the current situation is that Ms. Dragone has not worked for approximately 14 months.

[19] Justice Sachs discussed the doctrine of frustration in the context of an employment contract and an ill employee in *Skopitz v. Intercorp. Excelle Foods Inc.*, [1999] O.J. No. 1543 (Gen. Div.). She stated at para. 21:

Whether a contract of employment has been frustrated by an employee illness or incapacity depends on whether or not the illness or incapacity was of such a nature or likely to continue for such a period of time that either the employee would never be able to perform the duties contemplated by the original employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover. To determine if a contract has been frustrated, regard must be had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed: *Lafreniere v. Leduc* (1990) 66 D.L.R. (4<sup>th</sup>) 577 (Ont. H.C.); *Yeager v. R.J. Hastings Agencies Ltd.* (1985), 5 C.C.E.L. 266 (B.C.S.C.).

[20] As Justice Sachs indicates, the determination of whether a temporary incapacity to work is a frustrating event is contextual and whether there is frustration will depend on

the particular circumstances of the case. See G. England, *Employment Law in Canada* (4<sup>th</sup> ed.) (Markham: LexisNexis Canada Ltd., loose leaf), paras. 18.15 – 18.18.

[21] For example, when the absent employee is a senior executive whose absence cannot be long tolerated if the business enterprise is to succeed, then a relative short period of incapacity may frustrate a contract. However, a longer period of time before frustration occurs may be the case for employees with lesser roles in the business.

[22] The presence of long-term sick leave and disability benefits indicates a greater tolerance for the duration of an employee's absence before frustration occurs. Indeed, it has been suggested that contracting for these benefits may postpone the time of frustration because it may be inferred that the contracting parties anticipated that the employee might take leave for illness. See: *Antonacci v. Great Atlantic & Pacific Co. of Canada*, [1998] O.J. No. 876 (Gen. Div.), affd. in part [2000] O.J. No. 280 (C.A.); E.E. Mole and M.J. Stendon, *Wrongful Dismissal Handbook* (3<sup>rd</sup> ed.) (Markham: LexisNexis Canada Ltd., 2004), chapter B-4.

[23] In this regard, Geoff England, *Employment Law in Canada* (4<sup>th</sup> ed.) (Markham: LexisNexis Canada Ltd., loose leaf), at para. 18.22 states:

It is strongly arguable that if the employee is entitled to and is in receipt of long term disability benefits under his or her employment contract which covers his or her sickness or disability, the doctrine of frustration is inapplicable because the parties will have foreseen the alleged frustrating event and will have allocated its risk accordingly. Indeed, it would appear to fly in the face of the parties' factual intentions if the employer could release a sick or disabled employee and deprive him or her of those very benefits by arguing that the employment contract has been frustrated.

[24] Riva Plumbing argued that enough time had passed that Ms. Dragone's contract was frustrated, and Ms. Dragone's counsel conceded that there might come a time when her contract of employment could be frustrated, but he argued that the time had not yet arrived. There was a debate during the argument about whether it would be appropriate for the Court to declare how long Ms. Dragone might have to return to work. However, upon reflection, I think that approach is neither possible nor appropriate.

[25] At the present time, it cannot now be said that the contract of employment has been frustrated. Although there has been 14 months of absence from work, there is no evidence that Ms. Dragone's protracted absence is harmful to the company and the presence of long-term disability insurance suggests, at least, that a much longer period than 14 months was anticipated before it could be said that frustration had occurred, and it is arguable that given the long-term disability arrangements, frustration may never occur. I conclude that in the circumstances of the immediate case that Ms. Dragone's contract of employment has not yet been frustrated.

[26] Given that Ms. Dragone did not resign in the summer of 2006 and given that her employment contract is not yet frustrated, Riva Plumbing's third argument is that Ms.

Dragone has been given reasonable notice of a change of her employee benefits and Riva Plumbing is entitled to discontinue paying for the health benefits plan as of December 1, 2007.

[27] In order to address this third argument, it is necessary to return to the facts briefly. On November 9, 2006, Mr. Ferrari wrote Ms. Dragone to advise that effective December 1, 2006 her coverage under the Group Benefit Program would be terminated in accordance with the insurance policy. He deposes that on humanitarian grounds and without prejudice, Riva Plumbing offered to continue to pay the premiums for the health benefits until June 30, 2007 and then this offer was extended to December 31, 2007. The Application now before the court is brought because Riva Plumbing has indicated that there will be no further extensions.

[28] It is important to note that Riva Plumbing has never actually given notice that it is changing Ms. Dragone's employee benefits. Rather, its position has been that she resigned or her contract of employment was frustrated, and therefore, she is no longer entitled to any benefits of employment.

[29] Employers may change terms of employment with reasonable notice, but that has not yet occurred in the case at bar. Moreover, Riva Plumbing is confronted with a problem if it were now to give Ms. Dragone reasonable notice of a change of employment because it would be arguable that such a change would violate s. 5 of Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19, which provides, amongst other things that every person has a right to equal treatment with respect to employment without discrimination because of disability. Section 17(2) of the *Code* provides that the needs of a person with a handicap must be accommodated unless to do so would cause the employer undue hardship "considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

[30] Ms. Dragone continues to be an employee. She is currently on long-term disability leave because of illness. It would appear to be arguable that it would be illegal for Riva Plumbing to change just Ms. Dragone's terms of employment because of her disability. However, I do not need to decide what might be the consequences of what Riva Plumbing might do in the future; for present purposes, it is enough for me to decide that Ms. Dragone has not received reasonable notice that Riva Plumbing has changed her employee health benefits nor has Riva Plumbing given notice of an intention to end the employment relationship. Since no notice has been given, and perhaps cannot lawfully be given, I conclude that Riva Plumbing's third argument fails.

[31] For the above reasons, it follows that Ms. Dragone's application should be granted. If the parties cannot agree as to the matter of costs, beginning with Ms. Dragone, they may make brief written submissions. Ms. Dragone's submissions may be submitted within 20 days and Riva Plumbing will have 20 days to reply.

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Perell, J.

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