

Ontario Supreme Court
Henderson v. Canadian General Life Insurance Co.
Date: 1994-02-17

Henderson

and

Canadian General Life Insurance Company

Ontario Court (General Division), Mandel J. February 17, 1994

Gordon A. Meiklejohn, for applicant (plaintiff).

Thomas R. Lofchik, Q.C., for respondent (defendant).

[1] MANDEL J.:—This is an application by the plaintiff for a determination of a question of law, namely “whether, pursuant to the provisions of the defendant’s group disability policy, it can deduct a severance payment made to the plaintiff from her entitlement to disability benefits for the period April 1, 1989 to and including September 6, 1990”.

[2] The plaintiff was employed by the defendant who was also the insurer under a disability group policy in which the plaintiff was enrolled and paid the premiums. The policy was in effect and provided coverage for the plaintiff from December 31, 1985 until her employment was terminated on March 31, 1989. On August 24, 1988, the plaintiff became disabled as a result of a motor vehicle accident. At the time of the termination of her employment (March 31, 1989), she was receiving long-term disability benefits under the policy. At termination, the defendant was paid severance pay. Such severance pay totalled the sum of \$60,524.25. The severance pay was calculated pursuant to a formula based on the length of the plaintiff’s employment and it equalled 17.18 months’ salary. By letter dated April 4, 1989, the defendant informed the plaintiff that the said sum “represents full and final payment of all monies to you which you are entitled upon termination of your employment on March 31, 1989 with the exception of any claim you may have for disability benefits under Canadian General Life Insurance Company Policy No. G482”.

[3] The plaintiff, upon receipt of the payment, executed a release of the defendant with the exception of her disability claim.

[4] She continued to be disabled but no disability payments were paid under the policy from April 1, 1989 to September 6, 1990 (17.18 months after the termination). She was reinstated on September 6, 1990.

[5] Before me, the defendant originally took the position that the plaintiff, by the terms of the policy, was not entitled to any sums during the period in question and in the alternative, that she was not entitled to recover such sums because it would result in her receiving double recovery. During submissions, both the plaintiff and the defendant agreed that the principle of double recovery was not applicable to the facts of this case. I therefore need not and do not address such alternative position.

[6] Turning then to the policy in question, the position of the defendant arises out of the limitation section and reads:

The amount of monthly benefit shall be the amount specified in the Schedule of Benefits, reduced by,

- (i) any disability benefits payable from Workers' Compensation and/or the Canada/Quebec Pension Plan, excluding benefits for dependents;
- (ii) any disability benefits payable under any plan of insurance provided by or under the administrative control of any government or agency thereof in accordance with any law, or any plan providing insurance coverage pursuant to the regulatory power of government, unless legislation specifically prohibits the Company from acting in this manner;

The Company reserves the right to reduce the monthly benefit if the Employee neglects or refuses to exercise his rights under the above laws and plans.

This monthly benefit shall be further reduced as necessary so that the total monthly income from all sources does not exceed 85% of the monthly salary, after deduction of taxes and contributions to any pension plans, earned by the Employee immediately before the period of Total Disability. Total monthly income from all sources shall include the following:

- (i) payments under this benefit;
- (ii) earnings from employment;

(iii) disability benefits payable under any other group, association or franchise insurance plan;

(iv) benefits payable from a retirement or pension plan;

(v) benefits payable under a plan of automobile insurance established or under the control of a federal or provincial government;

(vi) benefits specified in subparagraph 1 above;

(vii) loss of salary benefits payable because legal responsibility for the loss lies with a third person;

but excludes any changes in amount which are due solely to a provision for cost of living adjustments.

[7] The position of the defendant is that the severance payment received by the plaintiff falls within

[8] 1. “(vii) loss of salary benefits payable because legal responsibility for the loss lies with a third person”;

[9] 2. “(ii) earnings from employment”;

[10] 3. “total monthly income from all sources”

[11] and is therefore deductible.

1. Loss of Salary Benefits Payable Because Legal Responsibility for the Loss Lies with a Third Person

[12] It is the position of the defendant that the loss of salary benefits arose as a result of the termination of her employment. In that regard, the agreed statement of fact is as follows:

3. On August 24, 1988, Elizabeth became disabled as a result of a car accident, applied for STD benefits and received such benefits (at 100% of her monthly income) pursuant to the Policy and CGLIC corporate policy for the period August 24, 1988 until November 24, 1988 and for the period December 20, 1988 until March 9, 1989. Elizabeth was found to be totally disabled pursuant to the provisions of the Policy and received LTD

benefits (at 60% of the first \$2,000 of her monthly income plus 50% of her remaining monthly income) for the period March 9, 1989 until March 31, 1989. Elizabeth's monthly income immediately prior to the commencement of her disability was \$3,525.00.

[13] Further, as hereinbefore stated, the disability benefits were reinstated on September 6, 1990, 17.18 months after the termination.

[14] It is to be remembered that the employer and the insurer are one entity. (This is so regardless of the merger, for the plaintiff's employment was terminated after the merger, *viz.*, March 31, 1989 and the policy was renewed after the merger, *viz.*, January 1, 1989.) The insurer is referred to in the policy as "the Company" (see the opening sentence on the signature page (first page) of policy).

[15] It is then seen that the insurer does not fall within the latter part of the clause which reads: "because legal responsibility for the loss lies with a third person". The defendant (who is both the employer and the insurer) is not "a third person". It is "the Company".

[16] As the parties did not address the principle that a person legally responsible for a loss cannot take advantage of his own wrong, I make no comment in respect thereof. However, having regard to the clear wording of cl. (vii) as well as the circumstances of the case as hereinbefore cited, in my view, such clause is not applicable.

2. *Earnings from Employment*

[17] The word "earn" is defined in the *Shorter Oxford English Dictionary* as: "to render an equivalent in labour for; hence to obtain or deserve as the reward of labour". The noun "earnings" is then the reward of labour. Likewise, it has been held in *Abram Coal Co. v. Southern*, [1903] A.C. 306, that earnings "in the popular sense" is a rough measure "and means the sum the workman gets for his work".

[18] The question to be determined is whether the lump sum that the plaintiff received is "earnings" or something else. It was characterized by the defendant in its correspondence as a "severance allowance"; by the parties in the agreed statement of fact as "severance payment". In my view, nothing turns on the different words used, *viz.*, allowance or payment.

There is no doubt that in exchange for the payment, the defendant was released by the plaintiff from all claims except any claims for disability she may have under the policy.

[19] It is the position of the defendant that as the payment was calculated on the basis of 17.18 months from March 31, 1989, that this represented earnings for the plaintiff for such period without her having to perform any work or services. It is then necessary to determine what “severance pay” or “severance allowance” is. It is clear both from the correspondence filed and the statement of agreed fact that the employment was terminated on March 31, 1989 and a release given by the plaintiff (excepting thereout any claim under the disability policy) in exchange for the sum of \$60,524.25 which was calculated as aforesaid based on length of employment. It is also clear that this was not in any way a continuation of employment. It is an amount offered by the defendant and accepted by the plaintiff as a result of the position of the plaintiff with the defendant becoming redundant. It does and did not form part of the agreement of employment (originally or otherwise). It cannot then be said to be a “reward for labour”. Rather, in the circumstances of this case, it is a payment for loss of office. Put another way, it is an agreement by the parties to terminate the contract of employment upon payment of the sum in question.

[20] The case of *Henley v. Murray*, [1950] 1 All E.R. 908, 31 Tax Cas. 358, is instructive with respect to what the payment is. At pp. 908-09, the following is stated:

It is clear that a man who has a contract in respect of which he is entitled to periodic remuneration may say: “Well, I will take a lump sum now instead of the periodic remuneration in the future, and, though I will continue to serve under my contract, I shall not be expected to do quite as much work,” or he may even say: “I shall not be expected to do any work at all.” If that were the form of the arrangement in this case, I think it would be true to say that the lump sum which was paid was profits which became payable under the taxpayer’s contract of service.

[21] The court continues at p. 909:

It is plain, however, that the real basis of the decision was (in the earlier of the sentences I quoted) that the bargain there was that the employers should remain liable under the contract for the remuneration they had contracted to pay though they gave up their right to call on Mr. Hofman, their works manager, to perform the duties under the

contract which he was bound to perform. If that is a correct analysis, it seems to me that the case is clearly one of the first kind which I have stated—a case in which the contract persists. Though the right of one party to call on the other for performance of its terms may be modified, or, indeed, wholly given up, still the corresponding right to require payment either of the whole remuneration or of some less figure is preserved and is still payable under the contract.

There is another class of case where the bargain is of an essentially different character, *viz.*, where the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract. In the course of the argument an extreme case was put to counsel for the Crown of an employer who wrongfully breaks a contract of service and discharges a servant wholly therefrom and the servant then sues for damages for wrongful dismissal. Although, of course, it is true to say that the sum awarded as damages arises from the contract in the sense that if there had never been a contract the sum of damages could never have been awarded, counsel admitted, in a case of that sort, it would be impossible to suggest that the sum awarded to the servant for damages was taxable under sched. E.

In the circumstances of the present case also it is not open to the Crown to say that this sum of £2,000 odd constituted profits from the office or employment, since, on its true analysis, it constituted the consideration payable to the taxpayer for the total abrogation imposed on him of his contract of employment, so that from July 6, 1943, no contract existed under which that figure or any other sum could be paid. I, therefore, come to the conclusion on the facts that this case is of the second class, namely, one in which the agreement itself ceased altogether to exist for all purposes on July 6, 1943.

[22] As for the submission that the lump sum payment in the case where the contract was totally abrogated was in effect future remuneration without the plaintiff having to do any work, the following words of Sir Raymond Evershed M.R. found at p. 910 after referring to the case of *Wales (Inspector of Taxes) v. Tilley*, [1942] 2 All. E.R. 24, are germane, *viz.*:

As the learned Master of the Rolls there pointed out, the essential question is not the form in which the salary is paid, but the fact that it is remuneration—that it is reward for services under a subsisting agreement. None of that language seems to me to have any

application once the essential fact is accepted that in the present case there ceased to be any contract of service, and, therefore, from that date onwards there was no remuneration. This was not a sum paid in advance because there was no future claim which the taxpayer could ever assert, nor was it reward for his past service. It was a cash consideration paid for his agreeing to submit to the terms which the assurance society sought fit to impose.

[23] Likewise in the case at bar, it is clear both from the documentation and the agreed statement of fact that the contract was terminated and the payment was a cash consideration for such termination.

[24] The matter is put concisely by Jenkins L.J. at pp. 911-12 of the same case:

I agree. As the many cases on this topic show, it is often very difficult to determine the character of a payment made to the holder of an office when his tenure of the office is determined, or the terms on which he holds it are altered, and the question in each case is whether, on the facts of the case, the lump sum paid is in the nature of remuneration or profits in respect of the office, or is in the nature of a lump sum paid in consideration of the surrender by the recipient of his rights in respect of the office.

The only possible conclusion of law in the present case seems to me to be that the payment in question was not a payment of remuneration, but was one made in consideration of the taxpayer, at the request of the company, giving up his right to continue to be employed by the company down to Mar. 31, 1944, and to earn and receive his contractual remuneration down to that date. It is not suggested that the payment was a mere gratuity, nor is it suggested that the payment was in the nature of additional remuneration for the services which the taxpayer had already performed in the past for the stipulated reward, nor is it suggested that there was an arrangement of the nature sometimes met with under which, in effect, the holder of the office is given the equivalent of leave of absence on full pay for the residue of the contractual term. There is no evidence of any such arrangement. It was a simple case of resignation under which the office was to be immediately vacated, and no further services were to be performed. Accordingly, by a process of elimination, I arrive at the conclusion that this sum can only be regarded on the facts of this case as paid to the taxpayer in

consideration of his surrendering his right to serve, and receive remuneration, to the end of his contractual engagement.

[25] Gale J. (as he then was) after referring to part of the above reasons of Jenkins L.J., had this to say in *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547 (C.A.) at p. 681, 46 D.L.R. (2d) 210 at p. 344:

His Lordship found that an amount paid to a taxpayer by way of compensation for loss of office, although equal to the balance of the salary to the end of the employee's period of service, was payable in consideration of the abrogation of the contract and was not taxable, being received for the surrender of the taxpayer's right to serve and receive remuneration to the end of his contractual engagement, a capital right.

[26] It is thus seen that the severance payment in question constituted capital at common law. However, such payment became taxable in England by virtue of the enactment of the *Finance Act*, 1960, c. 44, and see *Parsons v. B.N.M. Laboratories Ltd.*, [1963] 2 All E.R. 658, [1964] 1 Q.B. 95, and in Canada by virtue of the provisions and wording of s. 6(3) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, and see *Ward's Tax Law and Planning*, vol. I, para. 34.11, pp. 3-85 and 3-86. Thus, it is seen that the wording of a statute may make what is at common law a capital right, income. Similarly, the defendant by its wording would also be able to include in the reduction of the monthly benefits any sums received for loss of office. However, it has not done so with respect to the wording "earnings from employment" nor "loss of salary benefits because legal responsibility for the loss lies with a third person".

3. Total Monthly Income from All Sources

[27] In regard to this heading, what is set forth in the Court of Appeal decision of *Elliott v. Ontario (Attorney General)*, [1973] 2 O.R. 534, 34 D.L.R. (3d) 486, is germane. Although that case set forth the manner to interpret a regulation under the *General Welfare Assistance Act*, R.S.O. 1970, c. 192, yet as will be seen, the wording of such regulation was in format similar to that found in the policy in question.

[28] The regulation [General Welfare Assistance Regulations, R.R.O. 1970, Reg. 383] is found at pp. 535-36 of the *Elliott* case, and is therein stated to be as follows:

12(2) For the purpose of determining a person in need and for the purpose of subsection 1 of section 10, the income of an application or recipient, other than a foster mother who is eligible for general assistance for one or more foster children, shall include, with all other income, [payments described in 12 clauses lettered (a) to (l) inclusive] but shall not include [payments described in 11 more clauses lettered (m) to (w) inclusive].

[29] The court had this to say as to the manner that the matter is to be approached [at p. 536]:

It is quite clear that liquid assets are distinguishable from income, and, accordingly, Mr. Ritchie's argument, to the effect that "income" in s. 12(2) is to be given the widest possible meaning, must be qualified. In addition, if he were right, it would not have been necessary to set out specifically all of the types of receipts that are included in cls. (a) to (l). We are assisted, too, in our interpretation of the word "income", as it appears in the subsection, by the fact that, with one exception, all of cls. (a) to (l) refer to payments which truly can be characterized as income.

We cannot agree with the way in which the Board approached the problem. Instead of deciding how the word "income" in s. 12(2) should be interpreted, it seems to have looked at the excluded payments in cls. (m) to (w) and, finding that allowances from the Victim of Crime Board are not amongst the exclusions, came to the conclusion that they must be regarded as "income" to the appellant. We think it should have considered whether the payments were included as income under s. 12(2), by virtue of the payments referred to in cls. (a) to (l), and if so then, of course, they would be deemed to be income for the purposes of the Act. These payments are not so included. If they are excluded by cls. (m) to (w) then the payments would be deemed not to be income. Again they are not so excluded in that subsection. The Board ought then to have decided whether the payments constituted income or capital at common law. We deal with the problem in that way and have no doubt that the payments will not be income to Mrs. Elliott under the Act.

[30] As hereinbefore set forth, the severance payment does not fall within the inclusions enumerated in the policy. Turning then as to whether the payment "constituted income or

capital at common law”, the payment, having regard to what is hereinbefore set forth, was capital. The wording in the policy is insufficient to include such payment in any deduction.

[31] Accordingly, the defendant cannot deduct the severance payment made to the plaintiff from her entitlement to disability benefits for the period April 1, 1989 to and including September 6, 1990.

[32] I may be spoken to if the parties cannot agree as to costs.

Order accordingly.