

COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., BORINS AND MACPHERSON JJ.A.

B E T W E E N:)
)
KENNETH McNAMARA) *David Harris*
) for the respondent
)
Plaintiff)
(Respondent))
)
- and -)
)
ALEXANDER CENTRE) *Norman A. Keith*
INDUSTRIES LIMITED) for the appellant
)
Defendant)
(Appellant))
)
) HEARD: March 9, 2001

On appeal from the judgment of Justice Patricia Hennessy dated May 24,
2000.

MACPHERSON J.A.:

A. INTRODUCTION

[1] When an employee is wrongfully dismissed, he or she is entitled to damages as compensation for salary or wages during a reasonable notice period. Depending on the employee's health, the employee may also be entitled to receive disability payments pursuant to the employment contract. The issue on this appeal concerns the relationship between those two potential forms of compensation to the dismissed employee. Specifically, the question is, can the employee retain both payments, or should the disability payments be deducted from the damages awarded for the wrongful dismissal? The resolution of this issue requires a careful consideration and application of the decision of the Supreme Court of Canada in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315.

B. FACTUAL BACKGROUND

(1) The parties and the events

[2] The appellant Alexander Centre Industries Limited (“ACI”) is a company based in Sudbury. It has been engaged in the construction materials supply business for more than 65 years. The owner and Chief Executive Officer of ACI was Cliff Fielding. His son, Jim Fielding, was also involved in the business.

[3] The respondent Kenneth McNamara (“McNamara”), a young chartered accountant and assistant professor at Laurentian University, was hired by ACI in 1971 as its controller. His starting salary was \$22,000 and he received the regular benefits, including disability coverage, available to ACI employees. During his career at ACI, McNamara made no direct monetary payments towards those benefits; ACI paid for all the coverage.

[4] McNamara became Vice President of Finance at ACI in 1977 and President in 1986. Between 1990 and 1995 his compensation, by way of salary and bonus, ranged from \$175,000 to \$267,000.

[5] In the summer of 1995, ACI dismissed McNamara. The circumstances around the dismissal are troubling and disappointing. On July 24, McNamara attended a meeting with the owner, Cliff Fielding. He brought a letter from Dr. Anderson which advised Mr. Fielding that, for medical reasons, McNamara should “be off the job indefinitely”. Mr. Fielding took the letter and said something to the effect “your health is important; take care of it”.

[6] A week later, on August 1, without further communication and without warning, a letter from Mr. Fielding was delivered by hand to McNamara at his home. It said in part:

I am distressed to receive the medical information and to learn that your condition will prevent you from ever returning to work at Alexander Centre Industries Limited. It is with regret that I accept that reality and your leaving the company. Obviously, you will be entitled to benefits of the disability insurance coverage with London Life.

[7] McNamara, who had been advised by his family physician, Dr. Bakker, the day before, July 31, that he should stay away from work for two more weeks, contacted ACI’s office and tried to arrange a meeting with Mr. Fielding. No meeting took place. McNamara and Dr. Anderson wrote letters to Mr. Fielding explaining that McNamara could return to work in two weeks. ACI did not respond to these letters. McNamara never returned to work. Nor did ACI offer or provide any severance pay to McNamara.

[8] McNamara applied for and received long term disability payments from London Life. He received payments totalling \$163,000 from August 1995 to January 15, 1997.

[9] McNamara also filed a complaint for sums owing under the *Employment Standards Act*, R.S.O. 1990, c. E.14. After a hearing, the Employment Standards Officer ordered ACI to pay McNamara \$109,056.73, representing his entitlement to termination notice and severance payments. ACI paid this amount to McNamara in September 1997.

(2) The litigation

[10] McNamara brought an action for wrongful dismissal against ACI. At the opening of the trial in April 2000, ACI admitted that its dismissal of McNamara was without cause. Accordingly, the trial proceeded only on the issue of damages.

[11] The trial judge, Hennessy J., described the circumstances around McNamara's dismissal in this fashion:

[Mr. Fielding's] acts exacerbated the existing condition of the Plaintiff, of which he was aware. Here was the senior and most responsible employee telling the owner CEO that he needed time off work. In response, the Defendant fires him by way of a cavalier letter which transparently misinterprets the employee's request.

[12] The trial judge awarded McNamara 24 months compensation in lieu of notice and an additional two months salary because the manner in which ACI dismissed McNamara fell within the category of 'bad faith discharge' as articulated by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. The trial judge deducted the statutory payments of \$109,056.73 from the damages award; this was not a contested matter. However, the trial judge did not deduct the long term disability payments totalling \$163,000 from the damages award. The trial judge valued McNamara's leased company vehicle at \$500 per month. Finally, the trial judge held that McNamara had taken appropriate steps to mitigate his losses; she deducted \$52,075 (\$62,075 income less \$10,000 for office expenses) from his damages.

[13] ACI appealed all the matters which it lost at trial – the 24 month notice period, the two month *Wallace* award, the automobile benefit evaluation, the mitigation issue, and the non-deductibility of the long term disability payments. Shortly before the appeal hearing, ACI formally abandoned its appeal on all grounds except the issue of the deductibility of the disability payments from the damages award.

C. ISSUE

[14] The issue on this appeal is whether the trial judge erred by failing to deduct disability payments McNamara received during the notice period from the damages he received for wrongful dismissal during that period.

D. ANALYSIS

[15] As the trial judge and both counsel recognized, the resolution of this appeal turns almost entirely on the application of the principles enunciated in *Sylvester*.

[16] In *Sylvester*, an employee of the Government of British Columbia was terminated during a period when he was receiving disability benefits. He received disability payments from the Government's own disability plan. The entire cost of the disability plan was borne by the Government.

[17] The sole issue on the appeal to the Supreme Court of Canada was whether the disability benefits Sylvester received during the notice period should be deducted from the damages he was awarded for wrongful dismissal. The court held that the deduction should take place. Major J., writing for a unanimous court, framed the issue in this fashion, at p. 321:

Disability benefits . . . are contractual. The question of deductibility therefore turns on the terms of the employment contract and the intention of the parties.

Applying this test, Major J. found that the employment contract did not provide for an employee to receive both disability benefits and damages for wrongful dismissal; moreover, he did not think that such an intention could be inferred.

[18] It is important to note that in *Sylvester* the employer paid both salary and disability benefits. Moreover, the terms of the disability plans established that disability benefits were intended to be a substitute for salary. These are important facts because, near the end of his judgment, Major J. stated a caveat, at pp. 324-25:

There may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the *disability benefits* are *akin to benefits from a private insurance plan for which the employee has provided consideration*. This is not the case here. It is not in dispute that the respondent did not make any contributions to the STIIP or the LTDP. *The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court.* [Emphasis added.]

[19] In the present appeal, the entire caveat, and especially the underlined passages, are in play. The trial judge carefully considered *Sylvester*, but thought

there were two important distinguishing features between Sylvester's and McNamara's situations.

[20] The first distinction flowed from the "akin to benefits from a private insurance plan" component of Major J.'s caveat. The trial judge said:

Firstly, the plan at Alexander Centre Industries Limited was purchased from a private third party. When the employee was in receipt of benefits, it was not the employer who was paying the employee. The payment came directly from London Life to the employee. One can assume, in fact, that the reason for such a plan is to provide income replacement to the employee from a source other than the employer while the employee is not able to provide service to the employer. The employer insured himself against the risk of providing replacement income, and paid benefits to do so.

[21] In my view, this distinction is sound. Although Major J. did not say so explicitly, he must have enunciated the caveat, with its "akin to benefits from a private insurance plan" language, with an eye to the long line of cases culminating in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, which permits an employee to keep both the damages the employee receives in a tort action and the disability benefits received pursuant to a disability insurance policy, provided the employee contributed in some fashion to the policy.

[22] The trial judge in the present action recognized that in *Sylvester* both salary and disability payments came directly from the employer's pocket whereas in this case ACI was responsible for McNamara's salary but London Life would pay the disability benefits. In my view, she was right to think that this was an important difference. It is one thing to be concerned, as the court was in *Sylvester*, with double recovery when all the money comes from a single source, the employer. The concern should be significantly diminished when the double recovery flows from clear entitlement to two different and legitimate recoveries (damages for wrongful dismissal and disability benefits) *and* neither payor would be responsible for paying even a penny more than it should pay pursuant to its individual obligation.

[23] The second distinction, flowing again from Major J.'s caveat, the trial judge drew between Sylvester's and McNamara's situations was this:

Secondly, Major J. specifically notes that there was no consideration by the employee for this benefit. Evidence from the Plaintiff, in this case, was directly to the contrary and there was no evidence from the

Defendant on the point. McNamara stated that the question of benefits was integral to his discussions on salary at the time of hire, that he would not have accepted the salary but for the benefit package as part of the overall compensation scheme.

[24] The record amply supports the trial judge's analysis on this issue. McNamara testified at the trial about his discussion in 1971 with Jim Fielding concerning employment with ACI:

Q.And what did you discuss with Jim Fielding?

A.We discussed the salary that I expected as well as the fringe benefits that the company might have available.

Q.And what did you and Mr. Fielding discuss with respect to those topics?

A.We agreed on a salary of \$22,000. per year and *we talked about the fringe benefit package which I told him was extremely important to me for a number of reasons. One was the sickness and accident and long term disability plan they had in place* and the second was the benefits, the health benefits that they had, including hospital, medical and drug plan. My wife had a problem with her oesophagus during that period of time and I was concerned that we would be covered for those benefits in the event that additional problems might be incurred.

Q.And what was said about these subjects?

A.I told Jim that it was important to me that I have this coverage and if I had this coverage then I would be prepared to take a salary of \$22,000. a year. *If the coverage were not available then my salary request would have been substantially higher.*

[Emphasis added.]

[25] As the trial judge pointed out, McNamara's evidence on this crucial point was not contradicted. Unfortunately, Jim Fielding was terminally ill when the trial took place in April 2000 and he was unable to testify. However, that cannot count against McNamara, especially since the trial had been adjourned in December 1999 at ACI's request because of Mr. Fielding's illness and in light of the fact that

McNamara had served a summons well before the trial to secure Mr. Fielding's attendance. ACI could have availed itself of several procedural options to ensure that Mr. Fielding's testimony was before the court.

[26] In my view, the trial judge was correct to accept that there was in effect a trade-off between McNamara's salary and benefit package, including disability benefits, when he negotiated his employment contract in 1971.

[27] However, accepting the trial judge's finding of fact, there remains the ultimate question posed by Major J. in *Sylvester*: do the terms of the employment contract or the intention of the parties suggest deductibility or non-deductibility of disability benefits from damages for wrongful dismissal?

[28] The contract component of this question is easy to answer: there is nothing in the employment contract to suggest an answer either way.

[29] The intention of the parties component is more difficult to answer. It is obvious that the intention of the parties in 1971 would have been that if McNamara worked he would receive a salary and if he could not work due to his illness he would receive disability benefits. But what would McNamara and ACI have intended with respect to this scenario: after 24 years and rising to become President, McNamara becomes ill and within a week is fired? What should he receive by way of damages for wrongful dismissal and disability benefits? Could he keep both? Frankly, I doubt that the parties would have considered any of this in 1971.

[30] Fortunately, in *Sylvester*, Major J. addressed this problem, at p. 324:

The parties to an employment contract can obviously agree that the employee is to receive both disability benefits and damages for wrongful dismissal. *There may also be cases in which this intention can be inferred.* [Emphasis added.]

[31] What intention can be inferred from the circumstances of the ACI-McNamara employment relationship? It seems to me that there are two possibilities.

[32] If the disability benefits *are* deducted, McNamara will receive his full salary for the entire notice period. However, that salary will be less than it might have been if he had not bargained a trade-off between salary and benefits, and he will forfeit all of the disability payments. ACI, on the other, will derive a huge benefit from the deductibility scenario, solely because it chose an employee's new disability, after 24 years of loyal service, as the moment and reason to fire him. ACI's windfall for acting abominably will be \$163,000.

[33] If the disability benefits *are not* deducted, McNamara will be treated generously (salary plus disability payments), but not for a long period of time; the

disability payments ended after 17 months, and the damages for wrongful dismissal covered his salary for 26 months (including the *Wallace* two month penalty). ACI, on the other hand, will pay precisely what the law requires it to pay – damages in lieu of reasonable notice for wrongful dismissal.

[34] In my view, in an office in Sudbury in 1971, a *reasonable* employer and a *reasonable* prospective employee, if they turned their minds to the ‘what happens if ACI decides to fire McNamara the instant he becomes disabled’ scenario, would have agreed on the second result. I so infer. In my view, the reasons of the trial judge are consistent with the same inference.

E. DISPOSITION

[35] I would dismiss the appeal with costs. The appellant abandoned its appeal on all issues but one on the eve of the appeal hearing. The respondent’s costs should include his costs of preparing to argue those issues.

RELEASED: April 30, 2001

“J. C. MacPherson J.A.”

“I agree R. R. McMurtry C.J.O.”

“I agree S. Borins J.A.”