

**Ontario Supreme Court**  
**Skopitz v. Intercorp Excelle Foods Inc.,**  
**Date: 1999-04-09**

Maria Skopitz, Plaintiff

and

Intercorp Excelle Foods Inc., Defendant

1999

**[Indexed as: Skopitz v. Intercorp Excelle Foods Inc]**

Ontario Court of Justice, General Division Sachs J.

Heard: February 22-26, 1999

Judgment: April 9, 1999

Docket: 97-CU-120917

*David Harris, for Plaintiff.*

*F. Scott Turton, for Defendant.*

**Sachs J.:**

## **1. Introduction**

1 Maria Skopitz worked for the Defendant. After ten years she took a sick leave due to a back problem. Fifteen months later she asked to come back to work on a part time basis with a view to returning full time. Her request was refused. It is Ms. Skopitz's position that in refusing her request her employer discharged her wrongfully. Her employer states that no discharge took place—her full time position remained open. It was simply her request to return to work on a part time basis that could not be accommodated.

2 It took Ms. Skopitz approximately 20 months to find another job. For 12 of those months she was in receipt of long term disability payments. The issues for determination are whether or not Ms. Skopitz was wrongfully dismissed and if she was what damages she is entitled to. Subsidiary questions which arise with respect to damages are:

- a) Did the Defendant act in bad faith such that Ms. Skopitz's damages should be increased?
- b) Did Ms. Skopitz make adequate efforts to find alternate employment?

c) Should Ms. Skopitz's disability payments received during any relevant notice period be deducted from her damages?

## 2. The Facts

3 Ms. Skopitz worked for the Defendant from 1985 to 1995. When she commenced her sick leave on January 5<sup>th</sup>, 1995, she was a promotions manager earning \$42,000.00 per year.

4 In May of 1995 Ms. Skopitz started receiving long-term disability payments. She received them for two years.

5 While Ms. Skopitz was on sick leave she kept the Defendant advised of her progress. On April 4<sup>th</sup>, 1996 Ms. Skopitz met with the Chief Executive Officer of the Defendant, Arnold Unger. The purpose of that meeting was to discuss Ms. Skopitz's return to work. Ms. Skopitz testified that her intention was to start with half days with a view to building up to resuming her full time duties. According to her, this intention was clear to Mr. Unger. She was also clear with him about her immediate limitations—she could not sit for more than fifteen minutes at a time without getting up to stretch; then she could sit again. She wanted to start by working two to two and a half hours a day. She would then see how it went. As she felt better she would work longer. Mr. Unger advised her at the end of this meeting that he would get back to her.

6 According to Mr. Unger at that meeting Ms. Skopitz offered to work two to three days a week, two to two and a half hours per day. Furthermore, she could not tell him how long her periods in between sitting would be. According to him, from what he had observed in the past (Ms. Skopitz had had a back problem prior to taking sick leave in January of 1995) these periods could last as long as half an hour at a time. By his calculations this would mean that she would only be actually working one to one and a half hours per week—something that would be too disruptive for the Defendant company and its employees.

7 On April 12<sup>th</sup>, 1996, Mr. Unger advised Ms. Skopitz by telephone that he had no job for her. It is on that day that Ms. Skopitz says she was discharged. Mr. Unger disagrees. He states that he did not discharge Ms. Skopitz. Rather, her request to return to work on a part time basis as that request was interpreted by him, was denied. Her full time job remained open.

8 On June 3<sup>rd</sup>, 1996, Ms. Skopitz presented Mr. Unger with a letter of reference which she had drafted. He had asked her to draft the letter as he had no time to do so. He signed the

letter as drafted by her. It was clear to him that the purpose of the letter was to allow Ms. Skopitz to look for alternate employment. According to him, however, he assumed that she was only looking for part time employment. The letter was extremely complimentary about Ms. Skopitz and her contributions to the company.

9 On August 21<sup>st</sup>, 1996, Ms. Skopitz met with Mr. Unger and requested a severance package. Mr. Unger said he would consider her request and get back to her. On September 13<sup>th</sup>, 1996, Mr. Unger advised Ms. Skopitz since there had been no termination there would be no severance.

10 On September 20<sup>th</sup>, 1996, Ms. Skopitz wrote Mr. Unger a fairly lengthy letter summarizing her version of what had transpired, reiterating her position that she had been treated unfairly and repeating her request for a severance.

11 That letter went unanswered. However, some weeks later Mr. Unger and Ms. Skopitz ran into each other. Mr. Unger promised to call Ms. Skopitz and eventually on November 1<sup>st</sup>, 1996 he offered her a “goodwill” payment of \$2,000.00. The offer was declined and this action was started in March of 1997. Ms. Skopitz found full time employment in January of 1998.

### **3. Was The Plaintiff Wrongfully Terminated?**

12 The answer to this question turns upon the determination of two issues.

1. Was Ms. Skopitz’s position eliminated or did it continue to be available to her when she was ready to return to work on a full time basis?
2. Was it reasonable for the Defendant to refuse to accede to Ms. Skopitz’s request to return to work on a part time basis?

13 Mr. Unger was the main witness for the Defendant. Generally, I found his testimony to be less credible than that of Ms. Skopitz’s. I make this finding for several reasons. First, Ms. Skopitz was generally clear and focused in her presentation. She struck me as someone who was recounting events which she had occasion to remember and register because to her they were both so significant and traumatic. Her job was a job she loved and to which she had devoted a large portion of her working life. In contrast, Mr. Unger testified in a manner which was consistent with what I perceived to be his view that this was not a major issue in the life of his company. His testimony was vague, disjointed and argumentative. I also had

considerable doubt about the authenticity of the major document produced by him in support of the Defendant's position on the termination issue.

14 This document was a memo from Mr. Unger to two other major principals in the company—his now ex-wife and the company's Chief Financial Officer. The memo was dated the 13<sup>th</sup> of April, 1996 and purports to record the contents of the conversation he had with Ms. Skopitz on April 12<sup>th</sup>, 1996 (the date she says she was terminated). In it Mr. Unger notes his understanding of the conversation, his recollection of her previous work pattern, his impression of her motivation and his recommendation to the principals for input. While I believe Mr. Unger authored the memo I have serious doubts as to when. First of all, the memo was not produced until Mr. Unger's second discovery in July of 1998. This was after a pre-trial had been held on the March 30<sup>th</sup>, 1998 and well after the Defendant had filed its Affidavit of Documents. Mr. Unger claims that he did not find the memo until July of 1998 because the computer he typed it on was stolen in September of 1996. What strains credibility, in my opinion, is the fact that throughout his dealings with Ms. Skopitz he was consistent—when it came to recording something in writing he did not have the time. That is why she drafted the reference letter. That is why he never answered her detailed letter of September 13<sup>th</sup>, 1996. And yet he found the time to type the memo of April 13<sup>th</sup>, 1996—a memo he never mentioned or alluded to as lost or otherwise until July of 1998.

15 Ms. Skopitz states that by April 12<sup>th</sup>, 1996 she had been advised by Mr. Unger that there was no longer a position for her with the defendant. Mr. Unger denies this. Aside from my general comments regarding my assessment of Ms. Skopitz's credibility compared to Mr. Unger's I also accept her position for the following reasons:

1. Pat Black, an employee with the disability insurer who paid Ms. Skopitz her disability benefits testified. She stated that at the beginning of 1996 she called Mr. Unger to speak to him about the possibility of having Ms. Skopitz return to work. According to her, Mr. Unger advised her at that time that Ms. Skopitz's position had been filled, the company had downsized and there was no other position for her. The contents of this conversation were recorded in a memo by Ms. Black, a copy of which was filed as an exhibit. Mr. Unger stated that Ms. Black was mistaken in her understanding of their conversation. Ms. Black, in contrast to Mr. Unger, has no stake in this litigation.

Ms. Black, in contrast to Mr. Unger, made a note of their conversation. For these reasons I believe her testimony and see it as corroborative of Ms. Skopitz's position.

2. Judy Becker, another employee of the disability insurer, also testified. Among other things, she stated that she spoke to Edward Wong, who was then the Accounting Manager for the Defendant. The conversation occurred on June 26<sup>th</sup>, 1996 and a note was made of it by her at the time. According to Ms. Becker, Mr. Wong confirmed that there was not a position available for Ms. Skopitz with the Defendant.

Mr. Wong testified. He had no recollection of the conversation, but he could not imagine that he would have made the statement attributed to him about Ms. Skopitz's position ceasing to be available. Ms. Becker, like Ms. Black, has no stake in this litigation. Mr. Wong, in contrast, still works for the Defendant. Unlike Mr. Wong, Ms. Becker made a note of the conversation which enabled her to recall it. There was no reason why she would have recorded the conversation if it did not occur.

3. Ms. Skopitz's position that she understood that she had been terminated is consistent with her request for a letter of recommendation. If Mr. Unger was in fact keeping Ms. Skopitz's job open for her why would he have provided her with the letter he did and not have made it clear to her at that time that it was not necessary for her to find another full time job because her position was still open? Mr. Unger's testimony that he provided the letter in order to enable Ms. Skopitz to find part time, not full time employment, seems inconsistent with the terms of the letter. The letter clearly reads as one where the employee's relationship with the company has ended, not as one where it was on hold.

4. On September 13<sup>th</sup>, 1996 Ms. Skopitz wrote Mr. Unger an extensive letter. In that letter it was clear that she understood that she had been terminated. If, as Mr. Unger testified, her job was still open, why didn't Mr. Unger immediately reply by telling Ms. Skopitz that she was mistaken, there was no termination and her job was available to her as soon as she was able to return to work on a full time basis?

16 For all of these reasons I find that Ms. Skopitz was terminated on April 12<sup>th</sup>, 1996. I now turn to the question of whether or not the Defendant had an obligation to accede to Ms. Skopitz's request to return to work on a part time basis with a view to working up to a resumption of her full time duties.

17 This question, in my view, cannot be answered without reference to the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 (the “Code”). Section 5(1) of the *Code* provides that every person “has a right to equal treatment with respect to employment without discrimination” because of, among other things, handicap. Section 10(1) defines a “handicap” as “any degree of physical disability” “caused by bodily injury, birth defect or illness”. In my view, Ms. Skopitz’s back condition was a “handicap” within the meaning of the *Code*.

18 The duty imposed by Section 5(1) of the *Code* is a duty to accommodate. The question in this case is whether or not that duty imposed an obligation on the Defendant to take Ms. Skopitz back after a 15 month absence and to allow her to start slowly and work her way into a resumption of her previous duties. 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.” The onus is on the employer to establish undue hardship. (*O’Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.).)

19 Mr. Unger testified that by April, 1996 Ms. Skopitz’s duties were being handled by three other employees on a part time basis. One of these employees, his daughter, had another full time job. I therefore find that it would not have caused the Defendant any undue hardship to take Ms. Skopitz back on a part time basis. She was also not asking for any accommodation which would have required any financial outlay on the part of the Defendant. What she was asking for was the chance to try to resume her duties on a gradual basis. It was Mr. Unger’s position that that request, as he interpreted it, would have been too disruptive for the Defendant to accommodate. First of all, Mr. Unger decided to assume (in spite of what Ms. Skopitz was saying) that Ms. Skopitz would only be able to work one to one and a half hours per week. Rather than testing that assumption by giving her a chance, he concluded that it would be too disruptive to the other employees to give her that chance. There was no evidence before me as to why it would have been too disruptive to the other employees to have Ms. Skopitz back and to see how she was able to perform. Thus, I am not satisfied that the Defendant has established that accommodating Ms. Skopitz by acceding to her request to return on a part time basis with a view to working towards a resumption of her full time duties would have caused it undue hardship. I therefore find that the Defendant breached its duty to accommodate Ms. Skopitz under the *Code*.

#### 4. Frustration

20 The evidence led by the Defendant at trial was to the effect that Ms. Skopitz was not terminated—her job continued to be available to her when she was able to return to work on a full time basis. However, in the alternative, the Defendant submitted that if I did not accept this position, I should find that the contract between Ms. Skopitz and the Defendant was frustrated.

21 Whether a contract of employment has been frustrated by an employee's 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 employee 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 (*Lafrenière v. Leduc* (1990), 66 D.L.R. (4th) 577 (Ont. H.C.); *Yeager v. R.J. Hastings Agencies Ltd.* (1984), 5 C.C.E.L. 266 (B.C. S.C.)). Given the length of time Ms. Skopitz had worked for the Defendant; the fact that the Defendant had been able to manage during Ms. Skopitz's absence without having to replace her with another full time employee; the nature of the duties performed by Ms. Skopitz and the fact that Ms. Skopitz did recover I find that the defence of frustration fails.

#### 5. Notice

22 Counsel for Ms. Skopitz submitted that if I found that Ms. Skopitz was terminated on April 12<sup>th</sup>, 1996 the appropriate period of notice (without considering bad faith) was between 9 and 12 months. Counsel for the Defendant submitted that the proper notice period was 10 months. I agree with counsel for the Defendant.

#### 6. Bad Faith

23 Ms. Skopitz's termination occurred when she was at a particularly vulnerable point in her life—seeking to return to work after a fairly lengthy period of disability. Firing someone who is on disability is one of the examples of bad faith or unfair dealing in the manner of dismissal cited by the majority in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.).

That case also stands for the proposition that bad faith conduct in the manner of dismissal is a factor which is properly compensated for by an addition to the notice period.

24 The Defendant submits that it dealt fairly with Ms. Skopitz. In the months preceding the receipt of disability payments it voluntarily topped up her unemployment insurance payments to her previous net salary level. During the same period it paid the premiums to ensure the continuation of her supplemental medical and long term disability coverage, Mr. Unger signed the letter of reference that Ms. Skopitz drafted and when Ms. Skopitz requested meetings Mr. Unger met with her to discuss the situation. There was nothing, according to the Defendant, in its conduct that was calculated to injure Ms. Skopitz in any way.

25 I agree with the Defendant that it did not act in a calculated manner so as to increase Ms. Skopitz's distress. However, I also find that it did act in a way that was indifferent to the vulnerability of Ms. Skopitz's position. This, in my view, was not the fair dealing that a long term and loyal employee like Ms. Skopitz was entitled to expect from her employer. I therefore would, because of this unfair dealing, increase the notice period to which Ms. Skopitz is entitled from 10 months to 12 months.

## **7. Mitigation**

26 There was extensive evidence led by Ms. Skopitz as to the efforts she made to find alternate employment. She was also vigorously cross-examined on this issue.

27 The onus is on the employer to establish that the employee could reasonably have avoided some part of the damages claimed. Furthermore, as part of discharging this onus, it is incumbent on the employer to establish that the employee either found, or if properly industrious, could have found alternative employment sooner than he or she did. (*Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 (S.C.C.)). No evidence was led by the Defendant to this effect and thus I decline to reduce Ms. Skopitz's award because of a failure to mitigate.

## **8. Disability Benefits**

28 Virtually throughout the notice period that I have found Ms. Skopitz was entitled to she was in receipt of long term disability benefits of \$2,215.19 per month. These benefits were paid by a third party insurer, Unum. Until October of 1994 long term disability coverage was provided

to the Defendant's employees by Paul Revere. The premiums were paid equally by the employer and the employee. At the end of September, 1994 the Defendant arranged for Unum to provide the long term disability insurance coverage to its employees. According to Mr. Unger, the long term disability coverage was established as a policy which the employees would pay for themselves through deductions from their pay slips. This had the advantage of making any benefits received non-taxable in the hands of the employees. Administratively, the premium invoice was sent to the Defendant for all its employees, and the Defendant paid the total invoice after deducting the appropriate amount from each employee's pay cheque.

29 For October, November and December, 1994 the premium costs were deducted from Ms. Skopitz's paycheque. A slight miscalculation was made so that the deduction was less than the full amount. However it was admitted that this was an administrative error and the intention was clear—the employee was to pay the premium.

30 In January of 1995, Ms. Skopitz stopped receiving a regular pay cheque and started receiving sick benefits from U.I.C. At that point, the Defendant topped up her payment to her regular net salary. This resulted in a payment of \$100.00 to every two weeks to Ms. Skopitz. The global premium invoices kept coming to the Defendant from Unum for all its employees. The Defendant paid the invoice and did not seek reimbursement from Ms. Skopitz for this amount.

31 In my opinion, neither party addressed their minds to this matter during the period from January through April, 1995. The Defendant kept paying Ms. Skopitz's premiums as the price of her premium was included in the same invoice as the premiums for the rest of the employees of the Defendant. As of May 1995, no further premium payments were required for Ms. Skopitz's long term disability as she started receiving benefits at that time.

32 In effect, Ms. Skopitz paid the premiums on her long term disability protection for three months in 1994 and the Defendant paid them for four months in 1995. When Ms. Skopitz realized that the Defendant had made these payments (which realization came after discoveries in the summer of 1988) she attempted to reimburse the Defendant for these payments. Her cheque was returned uncashed.

33 There are two competing principles at play when considering the issue of whether the disability payments received by Ms. Skopitz during the relevant notice period should be

deducted from her award of damages. The first is that an aggrieved party should not recover compensation beyond his or her actual loss. The second is that a wrongdoer ought not to be able to take advantage of a benefit provided by another person. The cases on this issue reconcile these competing principles by providing for deductibility of the benefit where it is the employer who provided and paid for the benefit (*Sylvester v. British Columbia*, [1997] 2 S.C.R. 315 (S.C.C.)) and not providing for deductibility where the employee contributed to the scheme. [*Sills v. Children's Aid Society of Belleville (City), Hastings (County) & Trenton (City)* (1997), 30 C.C.E.L. (2d) 217 (Ont. Gen. Div.)].

34 The evidence is that the long term disability plan with Unum was established as one where the employee would make the premium payments. Further, in this case Ms. Skopitz did contribute to the plan which was one funded not by the employer (as was the case in *Sylvester*) but by a third party. Given these facts I find that the disability payments received by Ms. Skopitz during the relevant notice period are not deductible from the award of damages.

## **9. Other Income**

35 Ms. Skopitz's notice period, as established by me, expired on April 12, 1997. On April 7<sup>th</sup>, 1997 she started a contract job where she received \$14.00 per hour. She worked 36 hours on this job between April 7<sup>th</sup> and 12<sup>th</sup> resulting in earnings of \$504.00. I find that this was the only money earned by Ms. Skopitz during the notice period. I believe her when she states that she was not paid by her father for the time that she helped him out at his store.

## **10. Conclusion**

36 I therefore order that the Defendant pay to the Plaintiff the sum of \$41,496.00 plus prejudgment interest thereon from April 12<sup>th</sup>, 1996. Counsel may make written submissions as to costs by 4:00 p.m., April 23<sup>rd</sup>, 1999.

*Action allowed.*