

Sylvester v. British Columbia, [1997] 2 S.C.R. 315

**Her Majesty The Queen in right of the Province
of British Columbia**

Appellant

v.

Ossie Sylvester

Respondent

Indexed as: Sylvester v. British Columbia

File No.: 24891.

1997: February 13; 1997: May 29.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Labour law -- Dismissal -- Severance pay -- Employee terminated while receiving disability benefits -- Employer offering severance package of salary minus disability benefits being received -- Whether disability benefits should be deducted from damages for breach of employment contract during the notice period.

The respondent, a B.C. government contract employee, was terminated during a period when he was receiving disability benefits. The employer offered him severance of 12.5 months' salary, less any disability benefits received during that time. The respondent sued for wrongful dismissal, claimed 24 months' notice and sought damages consisting of the salary he would have earned had he worked during that period

in addition to the disability benefits he was receiving. The trial judge found him entitled to 15 months' notice and awarded damages less the disability benefits received during that period. The Court of Appeal allowed an appeal from that judgment, awarded damages equivalent to his salary for a 20-month period and found him also entitled to the disability benefits received during that period. At issue was whether disability payments received by the employee during the notice period should be deducted from damages awarded for wrongful dismissal.

Held: The appeal should be allowed.

An employee who is wrongfully dismissed without adequate notice of termination is entitled to damages consisting of the salary that the employee would have earned had the employee worked during the notice period. The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages. They are based on the premise that the employee would have worked during the notice period. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period.

Disability benefits are contractual and the question of their deductibility, therefore, turns on the terms of the employment contract and the intention of the parties. In this case, the short- and long-term disability plans should not be considered contracts which are distinct from the employment contract, but rather as integral components of it. This contract did not provide for the respondent to receive both disability benefits and damages for wrongful dismissal, and no such intention can be inferred. First, the terms of the plans demonstrate that the disability benefits were intended to be a substitute for

the respondent's regular salary. Second, the simultaneous payment of disability benefits and damages for wrongful dismissal is inconsistent with the terms of the employment contract. Had the appellant provided adequate notice and not breached the contract, the respondent would not have received both disability benefits and salary during the notice period.

Absent an intention by the parties to provide otherwise, an employee who is dismissed while not working but receiving disability benefits and an employee who is dismissed while working should be treated equally. Deducting disability benefits ensures that all affected employees receive equal damages consisting of the salary the employee would have earned had the employee worked during the notice period.

Cases Cited

Distinguished: *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *Peck v. Levesque Plywood Ltd.* (1979), 27 O.R. (2d) 108; *Salmi v. Greyfriar Developments Ltd.*, [1985] 4 W.W.R. 463; *White v. F.W. Woolworth Co.* (1996), 22 C.C.E.L. (2d) 110; *Industries de Caoutchouc Mondo (Canada) Ltée v. Leblanc* (1987), 17 C.C.E.L. 219; **referred to:** *Burse v. Acadia Motors Ltd.* (1980), 35 N.B.R. (2d) 587; *Datardina v. Royal Trust Corp. of Canada* (1995), 6 B.C.L.R. (3d) 1; *McKay v. Camco, Inc.* (1986), 53 O.R. (2d) 257.

Statutes and Regulations Cited

Long Term Disability Plan Regulation, B.C. Reg. 410/78, s. 2.02.

APPEAL from a judgment of a judgment of the British Columbia Court of Appeal (1995), 6 B.C.L.R. (3d) 7, 60 B.C.A.C. 97, 99 W.A.C. 97, 125 D.L.R. (4th) 541, [1995] 6 W.W.R. 537, 12 C.C.E.L. (2d) 71, 95 C.L.L.C. 210-034, allowing an appeal from a judgment of Harvey J. (1993), 2 C.C.E.L. (2d) 55. Appeal allowed.

Timothy P. Leadem, for the appellant.

Brian A. Crane, Q.C., and *Iqbal Sara*, for the respondent.

//Major J.//

The judgment of the Court was delivered by

1 MAJOR J. -- Employment involves, among other things, a contract between the employer and employee. An employee who is wrongfully dismissed without reasonable notice of termination is entitled to damages for breach of contract. These damages represent the salary the employee would have earned had the employee worked during the notice period, less any amounts credited to mitigation.

2 The issue in this appeal is whether disability payments received by the employee during the notice period from a plan established solely by the employer should be deducted from these damages. The answer depends on the intention of the parties to the employment contract. In this case, the terms of the contract demonstrate that the parties did not intend that the employee receive both amounts, and as a result the disability benefits should be deducted.

3 The respondent was employed by the appellant provincial government as the Director of Private Training Institutions in its Ministry of Advanced Education, Training and Technology pursuant to an oral general contract of employment. On June 1, 1992 he became ill and started receiving short term disability benefits consisting of 75% of his salary pursuant to the appellant's Short Term Illness and Injury Plan (STIIP). The STIIP provided disability benefits for up to seven months to an employee who was unable to work because of illness or injury. The respondent received \$33,688.04 under the STIIP from June 1, 1992 to December 31, 1992. He also sought, but did not receive, long-term disability benefits under the appellant's Long Term Disability Plan (LTDP) [*Long Term Disability Plan Regulation*, B.C. Reg. 410/78, s. 2.02] from January 1, 1993 to December 31, 1993, the date on which he would have been able to return to work. The LTDP provided further benefits to an employee who remained disabled after the seven-month period under the STIIP. Both the STIIP and the LTDP were funded entirely by the appellant. The respondent did not make any direct or indirect contributions to either plan.

4 On July 23, 1992, while the respondent was receiving short-term disability benefits, he was notified that he would be terminated because of a reorganization. In its termination letter, the appellant offered the respondent 12.5 months' notice commencing August 31, 1992 and indicated it would top up any payments received by the respondent under the STIIP or the LTDP during the notice period to 100% of his salary. In effect, the appellant offered the respondent 12.5 months' salary as severance, less any benefits received under the STIIP or the LTDP during that period.

5 The respondent sued for wrongful dismissal and claimed 24 months' notice. He sought damages consisting of the salary he would have earned had he worked during the 24-month notice period in addition to benefits under the STIIP and the LTDP.

6 Harvey J. of the Supreme Court of British Columbia found the respondent was entitled to 15 months' notice from August 31, 1992 and awarded him damages of \$76,575 in lieu of notice, less the \$19,285.85 received under the STIIP during the notice period, leaving a balance of \$57,289.15: see (1993), 2 C.C.E.L. (2d) 55.

7 The Court of Appeal for British Columbia allowed the respondent's appeal: see (1995), 6 B.C.L.R. (3d) 7. The court increased the notice period to 20 months commencing July 23, 1992 and awarded the respondent damages of \$102,100, being the salary he would have earned had he worked during that period. The court held the respondent was also entitled to benefits under the STIIP from June 1, 1992 to December 31, 1992 and, since he had qualified under the LTDP during the notice period on January 1, 1993, to benefits of \$35,900.40 under that plan until the date of his recovery on December 31, 1993.

8 The court held that the disability benefits to which the respondent was entitled during the notice period should not be deducted from the damages for wrongful dismissal. It concluded that a disability benefits plan should be considered a distinct contract from the basic employment contract and that once an employee is given notice of termination, the employer is required to comply both with its obligation to pay salary during the notice period and with its obligation to pay disability benefits.

9 On appeal to this Court, there was no challenge to the finding that the respondent was entitled to short-term disability benefits under the STIIP from June 1, 1992 to December 31, 1992, and to long-term disability benefits under the LTDP from January 1, 1993 to December 31, 1993, nor to the finding that the respondent was entitled to 20 months' notice from July 23, 1992. The appellant did not challenge the

finding that the respondent was entitled to damages of \$102,100, being the salary he would have earned had he worked during the notice period. This is consistent with the principle that an employee who is wrongfully dismissed without adequate notice of termination is entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages. They are based on the premise that the employee would have worked during the notice period. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period.

10 The issue on appeal was restricted to whether the disability benefits received by the respondent during the notice period should be deducted from the \$102,100 awarded as damages for wrongful dismissal. This question has produced conflicting appellate authority in Canada. Disability benefits received during the notice period were held to be deductible from damages for wrongful dismissal in *Bursey v. Acadia Motors Ltd.* (1980), 35 N.B.R. (2d) 587 (C.A.), but not deductible in *Datardina v. Royal Trust Corp. of Canada* (1995), 6 B.C.L.R. (3d) 1 (C.A.), and *McKay v. Camco, Inc.* (1986), 53 O.R. (2d) 257 (C.A.).

11 Analogous issues have been considered with unemployment insurance benefits, which were held not to be deductible in *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812, and *Peck v. Levesque Plywood Ltd.* (1979), 27 O.R. (2d) 108 (C.A.), and workers' compensation benefits, which were held to be deductible in *Salmi v. Greyfriar Developments Ltd.*, [1985] 4 W.W.R. 463 (Alta. C.A.), and *White v. F.W. Woolworth*

Co. (1996), 22 C.C.E.L. (2d) 110 (Nfld. C.A.), but not deductible in *Industries de Caoutchouc Mondo (Canada) Ltée v. Leblanc* (1987), 17 C.C.E.L. 219 (Que. C.A.).

12 These decisions involving unemployment insurance benefits and workers' compensation benefits are not helpful in deciding the issue in this appeal because those benefits are statutory, and distinguishable. Disability benefits, on the other hand, are contractual. The question of deductibility therefore turns on the terms of the employment contract and the intention of the parties.

13 In this case, the STIIP and the LTDP should not be considered contracts which are distinct from the employment contract, but rather as integral components of it. This contract did not provide for the respondent to receive both disability benefits and damages for wrongful dismissal, and no such intention can be inferred. I reach this conclusion for two reasons.

14 First, the terms of the STIIP and the LTDP demonstrate that the disability benefits were intended to be a substitute for the respondent's regular salary. An employee who receives disability benefits under either plan does not receive a salary. The employee brochure describing the STIIP states that it is designed to continue all or part of an employee's earnings in the event that the employee is unable to work due to illness or injury. Benefits under the STIIP and the LTDP are calculated as a percentage of the employee's salary. Both plans provide that disability benefits are reduced by other income received by the employee, including other disability income, wage continuation plan benefits, pension benefits, workers' compensation benefits and salary from other employment.

15 Second, the simultaneous payment of disability benefits and damages for wrongful dismissal is inconsistent with the terms of the employment contract. This becomes clear when the assumptions underlying the contractual entitlement of the respondent to each amount are examined. Damages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination. As discussed above, the damages are assessed by calculating the salary the employee would have received had he or she worked during the notice period, notwithstanding that the employee may, in fact, have been prevented from doing so. The damages are based on the premise that the employee would have worked during the notice period.

16 Disability benefits under the STIIP and the LTDP, on the other hand, are only payable when the employee is unable to work. Section 2 of the STIIP provides that an employee is entitled to benefits “[i]n the event [the] employee is unable to work....” Section 2.02 of the LTDP provides additional disability benefits for employees who become “totally disabled”.

17 The respondent’s contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability payments are only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits.

18 In its reasons, the Court of Appeal concluded at p. 17 that the respondent should receive both disability benefits and damages for wrongful dismissal because both contractual provisions operated simultaneously. Lambert J.A. stated:

The fact that the employee is receiving benefits under a disability plan should not, in my opinion, have any effect on the length of the period of reasonable notice or the payment to the employee of his or her regular rate of pay throughout the notice period. I think that from a legal perspective the disability plan should be viewed as a contract that is distinct from the basic contract of employment, but like the basic contract of employment forming a part of the total employment package. It is true that if an employee is able to work, the employee would not receive disability benefits, and if the employee is receiving disability benefits while continuing as a regular employee, then the employee would not also be receiving wages or salary. So in the usual circumstances of continuing employment, no employee would be receiving both wages or salary and disability benefits with respect to the same period. Either the basic contract of employment is controlling the mutual obligations of the employer and employee, or the disability plan is controlling those obligations, but both are not operating at once. But the interrelationship of those two distinct contractual obligations changes when notice of termination is given. In my opinion both contracts then operate together and both must be complied with. And if the employer breaks the obligations under one or other of those contracts, or both, then damages can be assessed under the broken contract or the broken contracts. [Emphasis added.]

With respect, I fail to see how both contractual provisions can operate simultaneously when each is based on a contrary assumption about the ability of the employee to work.

19 The conclusion that it is inconsistent for the respondent to receive both disability benefits and damages for wrongful dismissal under the employment contract is reinforced by the fact that, had the appellant provided adequate notice and not breached the contract, the respondent would not have received both disability benefits and salary during the notice period.

20 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. However, absent an intention by the parties to provide otherwise, an employee who is dismissed while not working but receiving disability benefits and an employee who is dismissed while working should be treated equally.

21 If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is dismissed while working. Deducting disability benefits ensures that all affected employees receive equal damages, i.e., the salary the employee would have earned had the employee worked during the notice period. If disability benefits are not deductible, employers who set up disability benefits plans will be required to pay more to employees upon termination than employers who do not set up plans. This deterrent to establishing disability benefits plans is not desirable.

22 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.

23 The appeal is allowed. The order of the Court of Appeal is varied to the extent that the disability benefits to which the respondent was entitled under the STIIP and the LTDP during the 20-month notice period commencing July 23, 1992 are to be deducted from the damages for wrongful dismissal of \$102,100. The calculations are left

to the parties, who may apply for directions if they cannot agree. The appellant agreed to pay costs in any event of the cause on a party and party basis.

Appeal allowed.

*Solicitor for the appellant: The Attorney General of British Columbia,
Victoria.*

Solicitor for the respondent: Iqbal Sara, Vancouver.