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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., SHARPE AND CRONK JJ.A.

B E T W E E N :

FRED TAGGART
Respondent (Plaintiff)

Dan J. Shields, for the appellant

- and -

**THE CANADA LIFE ASSURANCE
COMPANY**
Appellant (Defendant)

John D. Campbell, for the respondent

Heard: December 14, 2005

On appeal from the judgment of Justice Colin Campbell of the Superior Court of Justice dated February 8, 2005, reported at (2005), 39 C.C.E.L. (3d) 48.

SHARPE J.A.:

[1] This appeal concerns the extent to which a dismissed employee is entitled to receive damages for the loss of pension benefits that would have accrued during the employee's notice period following termination of employment.

Facts

[2] The respondent worked for the appellant for 30 years and rose to the position of Vice-President, Individual Life Insurance. He was enrolled in the appellant's registered pension plan and also in a supplemental pension plan for senior executives. Both are defined benefit plans under which benefits are determined on the basis of a formula that incorporates the employee's years of service and earnings.

[3] In July 2003, The Great West Life Assurance Company purchased the appellant. One month later, the respondent was advised that he was terminated as part of the integration of the two companies and consequent downsizing. The appellant's severance offer provided for a 24 month notice period, comprised of two months working notice and payment in lieu of 22 months notice. The respondent's pensionable service and pension credits were continued for only the two month working notice period. The appellant refused to give the respondent anything for the loss of pension benefits that would have accrued during the 22 month notice period. The loss of 22 months service made a significant difference to the respondent's pension benefits. Credit for the 22

month notice period would have given the respondent more than 30 years of pensionable service, entitling him to an unreduced pension at age 60. As a result of his early termination, he was left with only 28.3 years of pensionable service (he did not participate in the pension plans during his first two years of employment).

[4] The respondent refused to accept the appellant's severance package and commenced this action. The parties resolved all issues except the pension claims. The parties agree that the present value of the lost pension benefits is \$333,526. However, the appellant asked for a partial wind-up of the pension plan for those employees who lost their jobs following the Great West Life acquisition. If the respondent participates in the partial wind-up, he will be entitled to certain "grow in" rights pursuant to s. 74(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 that will entitle him to an unreduced pension at age 60 notwithstanding the fact that he only had 28.3 years of pensionable service. However, his pension will still be reduced from what it would have been had he worked through the notice period. It is agreed that if he receives these "grow in" rights, the present value of his pension loss is \$135,506.

[5] The registered pension plan contains the following provision:

16.01

Employment Rights

The establishment and implementation of the Plan shall not constitute an enlargement of any rights which a Member or Field Management Member may have as an Employee or Field Management Employee apart from the Plan. Membership in the Plan does not confer a right on a Member or Field Management Member to require the Company to continue the Member or Field Management Member in its employment, and if the service of the Member or Field Management Member is terminated before the Member's or Field Management Member's Normal Retirement Date, such Member or Field Management Member has only such rights as are provided for under the Plan. *The benefits conferred herein shall not be used to increase damages in respect of the dismissal or termination of employment of any Member or Field Management Member* [emphasis added].

[6] The supplemental pension plan, first reduced to writing in 2001, contains the following provision:

10.01

Employment Rights

The establishment and implementation of the Supplemental Plan shall not constitute an enlargement of any rights which a Member may have as an employee apart from the Supplemental Plan. Membership in the Supplemental Plan does not confer a right on a Member to require the Company to continue the Member in its employment, and if the

service of the Member terminated before the Member's Normal Retirement Date, such Member has only such rights as are provided for under the Supplemental Plan.

[7] The trial judge held that the respondent was entitled to damages for the loss of the pension rights that he would have earned during the 22 month notice period. He found that any limitation of pension accrual to active employment could only occur if the employee was actually informed of this fact prior to dismissal, and explicitly or implicitly agreed to the limitation. The trial judge found that the appellant had failed to demonstrate clear unequivocal terms binding on the appellant capable of limiting the accrual of his pension rights. To fix the damages, the trial judge required the respondent to elect whether or not he would participate in the enhanced pension benefit due to the wind-up of the pension plan. The respondent has elected to participate in this scheme, thereby reducing the damages now at issue from \$336,526 to \$135,506.

Issue

[8] Did the trial judge err by awarding the respondent damages for loss of pension benefits that would have accrued during the notice period?

Analysis

[9] The appellant submits that the terms of the pension plans are determinative of the respondent's rights. The appellant argues that the pension plans clearly stipulate that pensionable service accrues only during periods of active employment and that the respondent therefore has no claim to any pension benefits he may have lost during the 22 month notice period. The appellant relies on the theory that the pension plans are contracts collateral to the employment contract and argues that, as the pension plans exclude entitlement to the benefits claimed by the respondent, he has no legally enforceable claim to those benefits.

[10] The appellant referred us to several provisions in the pension plans in support of its submission that the plans do not contemplate accrual of pensionable service following the termination of active employment. The appellant says that provisions dealing with accrual of service during periods of disability and approved leaves of absence demonstrate that, absent specific stipulation to the contrary, pensionable service cannot accrue unless the employee is actively employed. Particular emphasis was placed on s. 16.01 of the registered plan and s. 10.01 of the supplemental plan, both of which I have already quoted.

[11] I do not accept the proposition that the respondent's rights can be determined by looking only to the terms of the pension plans. His claim is not for pension benefits but rather for damages as compensation for the pension benefits he lost as a result of the appellant's termination of his employment contract.

[12] In my opinion, the proper way to analyze the respondent's claim is to consider:

(1) his common law right to damages for breach of contract, and

(2) whether the terms of the pension plans alter or remove a common law right.

[13] Where an employer terminates an employee without cause, the employer is liable for damages for breach of contract, measured by the loss of wages or salary and other benefits that would have been earned during the reasonable notice period: S.M. Waddams, *The Law of Damages*, looseleaf (Aurora: Canada Law Books, updated to 2005) at para. 5.1080. It follows that a terminated employee is entitled to claim damages for the loss of pension benefits that would have accrued had the employee worked until the end of the notice period. In *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), McRuer C.J.H.C. found that the plaintiff was entitled to damages for lost pension benefits accruing during a reasonable notice period of one year. The chief justice held at p. 146 that “had the plaintiff been given proper notice according to the implied term of the contract he would have had another year’s service with the defendant which would have increased his pension allowance.” In *Rivers v. Gulf Canada Ltd.* (1986), 13 C.C.E.L. 131 (Ont. H.C.J.), Galligan J. refused to follow *Perry v. Gulf Minerals Canada Ltd.*, [1985] O.J. No. 1041 (H.C.J.), a case which held that as pension entitlements are separate and collateral to contracts of employment, no damages flow for loss of pension benefits. Galligan J. determined that an employee is entitled to the difference between the value of the pension at the time of termination and the value of the pension had the employee been allowed to work during the notice period. Galligan J. stated at p. 139:

[A]n employee who is discharged without cause is entitled to compensation for the salary and the other benefits of employment including pension benefits that would have accrued had the employee been permitted to work until the end of the notice period. While it is common and often practical for an employer to make payment in lieu of giving notice, I do not think the payment satisfies the contractual obligations to give reasonable notice, unless it compensates the employee for the lost salary and the other benefits, including pension benefits of the employment. As Craig J., put it in *Bauer v. Cdn. Industries Ltd.*, [unreported, October 15, 1981 (Ont. H.C.J.)] at p. 18, an employer cannot be put in a better position by paying the appropriate salary, than by giving the appropriate notice with continued employment during the notice period.

[14] In *Durrant v. British Columbia Hydro and Power Authority* (1990), 49 B.C.L.R. (2d) 263 (C.A.) at 265, the British Columbia Court of Appeal held that “an employee terminated without cause or proper notice is entitled, in addition to compensation for the salary he would have earned during his period of notice, to compensation also for loss of any pension rights which would have accrued during that period.” This view has been implicitly accepted by this court in several cases: see *Canadian Bechtel Ltd. v. Mollenkopf* (1978), 1 C.C.E.L. 95 at 99-100 (Ont. C.A.); *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 12 C.C.E.L. (3d) 5 at 11 (Ont. C.A.); and *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 37 C.C.E.L. (3d) 182 at 197 (Ont. C.A.). Howard Levitt notes in *The Law of Dismissal in Canada*, 3rd ed., looseleaf (Aurora: Canada Law Books, updated to 2005) at 9-23 that “the general principle is that the

increased value that would have accrued to the employee's pension entitlement if reasonable notice had been provided is properly a matter for compensation." Even if pension plans are properly considered to be collateral to the contract of employment, the employer cannot avoid the argument that, as a direct result of the employer's breach of the contract of employment, the employee has lost pension benefits that would have accrued during the notice period and that the employee is entitled to compensation in damages for such loss.

[15] It follows, in my view, that unless there is some contractual term limiting the respondent's right, he is entitled to claim damages for loss of the pension benefits. For the following reasons, I conclude there is nothing in the pension plans at issue here capable of depriving the respondent of his common law right to damages for the loss of the pension benefits that he would have earned during the notice period.

[16] Assuming that the pension plans can be read as requiring active service as a prerequisite for the accrual of pension benefits, I find unpersuasive the argument that this precludes damages as compensation for lost pension benefits. This argument, it seems to me, ignores the legal nature of the respondent's claim. The claim is not, as I have said, for the pension benefits themselves. Rather, it is for common law contract damages as compensation for the pension benefits the respondent would have earned had the appellant not breached the contract of employment. The respondent had the contractual right to work and to be paid his salary and receive benefits throughout the entire 24 month notice period. The appellant chose to terminate the respondent after two months and pay him damages rather than allow him to work through the remainder of the 22 month notice period. Had his contractual right not been breached, he would have earned his full pension. By terminating the respondent earlier, the appellant became liable to pay damages that "place the employee in the position that he or she would have been in had the contract been performed – the proper measure of damages for breach of contract": *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 115.

[17] I turn next to the argument that the pension plans explicitly deny the right to damages for lost benefits. The appellant relies on cases such as *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1094 holding that where "the express provisions of the pension agreement . . . provide for the very events" which ground the claim in damages, the terms of the plan will operate to limit or deny the dismissed employee's right to claim damages. The crucial provision in the case at bar is s. 16.01 of the registered pension plan, which, for ease of reference, I repeat here:

16.01

Employment Rights

The establishment and implementation of the Plan shall not constitute an enlargement of any rights which a Member or Field Management Member may have as an Employee or Field Management Employee apart from the Plan. Membership in the Plan does not confer a right on a Member or Field Management Member to require the Company to

continue the Member or Field Management Member in its employment, and if the service of the Member or Field Management Member is terminated before the Member's or Field Management Member's Normal Retirement Date, such Member or Field Management Member has only such rights as are provided for under the Plan. *The benefits conferred herein shall not be used to increase damages in respect of the dismissal or termination of employment of any Member or Field Management Member* [emphasis added].

[18] The pension plan is a “unilateral contract”, the terms of which were not negotiated between the parties but rather imposed by the appellant. I agree with the respondent that the principle of contract interpretation that clauses excluding or limiting liability will be strictly construed applies with particular force. I refer here to *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 459 where Dickson C.J. quoted Lord Wilberforce's statement in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.) at 846:

These words have to be approached with the aid of the cardinal rules of construction that they must be read *contra proferentem* and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary.

[19] When interpreting limitation clauses in the employment context, courts have required clear language in order to limit a dismissed employee's common law rights: see *Orlando v. Essroc Canada Inc.* (1995), 17 C.C.E.L. (2d) 19 (Ont. Ct. Gen. Div.) at para. 28-31; *Veer v. Dover Corp. (Canada) Ltd./Société Dover Canada Ltée* (1999), 45 C.C.E.L. (2d) 183 at 185 – 187 (Ont. C.A.); *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. (3d) 43 at 56-57 (Ont. C.A.).

[20] The starting point or base line for analysis is the respondent's common law right to damages for the loss of the pension rights he would have earned but for the appellant's breach of contract. The question at this stage is whether there is something in the language of the pension contract between the parties that takes away or limits that common law right.

[21] The trial judge's findings in this regard are not altogether clear. He found, at para. 45, that the language of the plan was not ambiguous, but that finding related to the submission that the plan limited accrual of benefits to active employment. As I have already explained, that does not determine the respondent's right to damages. When it came to the question of whether the terms of the plan limited the respondent's right to claim damages, the trial judge ruled at para. 54 that “the notice to the employee must be clear and unequivocal”. The trial judge concluded at para. 53 that the appellant could not rely on the plan to limit the respondent's right to damages as “this could occur only when the employee knows in an informed way – by it being brought to his or her attention some time before dismissal takes place – and expressly or by implication agrees to the limitation”. The trial judge rejected the respondent's argument that as he had not been provided with a copy of the pension plans in a timely fashion, the appellant was not entitled to rely on them in limiting his right to damages. It follows, in my view, that the

trial judge must have concluded that the language of the plan itself was not sufficiently “clear and unequivocal” to limit the respondent’s rights.

[22] In any event, I have concluded that the language of s.16.01 does not, in law, meet the *Vorvis* test of an express provision providing for the very event that occurred. The contract does not say that a dismissed employee is disentitled to damages as compensation for the loss of pension benefits that would have accrued during the notice period. The first sentence of s. 16.01 states the plan shall not “constitute an enlargement” of the rights the employee has apart from the plan and the last sentence states that the plan benefits shall not be used “to increase damages”. The respondent is already entitled at common law to be compensated in damages for the pension benefits he lost by virtue of the appellant’s breach of the contract of employment. He is not using the plan to enlarge his rights, nor is he using “the benefits conferred” by the pension plan “to increase damages” beyond what he is entitled to at common law. Rather, the appellant is attempting to use the language of the pension plan to *limit* the respondent’s common law right to damages. I find the language of s. 16.01 to be, at best, ambiguous in this regard and accordingly, I would not interfere with the result reached by the trial judge.

[23] Finally, as the respondent has clearly elected to participate in the partial wind-up scheme, any issue as to whether the trial judge erred by holding that the respondent could opt out of the statutory benefits arising out of the partial wind-up is now moot. Similarly, as the parties were able to agree on the quantum of damages should the respondent elect to participate in the partial wind-up, it is unnecessary to consider whether the trial judge erred concerning the effect of the “grow-in” enhancement arising out of the partial wind-up.

Conclusion

[24] Accordingly, I would dismiss the appeal with costs to the respondent fixed at \$12,260, inclusive of disbursements and GST.

RELEASED: “R.R.M.” Jan. 27, 2006

“Robert Sharpe J.A.”

“I agree: R. Roy McMurtry C.J.O.”

“I agree: E.A. Cronk J.A.”