NOVA SCOTIA COURT OF APPEAL

Citation: ***Wilmot v. Ulnooweg Development Group Inc.***, 2007 NSCA 49

Date: 20070427
Docket: CA 271651
Registry: Halifax

2007 NSCA 49 (CanLII)

Between:

Ulnooweg Development Group Incorporated

Appellant

v.

Terry Ann Wilmot

Respondent

Judge(s): Bateman, Saunders & Hamilton, JJ.A.

Appeal Heard: April 3, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed, as per reasons for judgment of Saunders, J.A.; Bateman & Hamilton, JJ.A. concurring

Counsel: Colin D. Bryson & Moneesha Sinha, Article Clerk, for the appellant
Robert H. Pineo, for the respondent

Reasons for judgment:

Introduction

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[1] When does an employee's disability amount to frustration of an employment contract? When is the assessment of incapacity made: at time of termination, or at time of trial? How does one decide if the anticipated length of absence from work is still within an acceptable range? These are some of the important issues that arise in this appeal.

[2] After a three day trial, Justice John D. Murphy of the Nova Scotia Supreme Court delivered an oral decision in which he awarded damages of approximately $33,000 to the respondent for wrongful dismissal. In doing so Murphy, J. found that the respondent was not entitled to augmented ("**Wallace**-type") damages after concluding that the appellant's conduct in terminating the respondent was not tortious and fell "far short of bad faith".

[3] In granting judgment for the respondent the trial judge ruled that her employment contract had not been frustrated by her prolonged absenteeism, and that there was no just cause for her dismissal.

[4] An appeal and cross-appeal were filed; the appellant advancing a principal complaint that the trial judge erred in holding the contract of employment between the parties had not been frustrated, and the respondent cross-appealing the trial judge's refusal to grant her **Wallace**-type damages and in fixing costs said to be woefully inadequate and manifestly unjust.

[5] The cross-appeal has been abandoned. As a result, this appeal essentially turns on a single question, that being the trial judge's conclusion that the employment contract between these parties had not been frustrated.

[6] For the reasons that follow I would dismiss the appeal.

[7] I will begin with a brief review of the factual background in this case.

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Background

[8] The appellant, Ulnooweg Development Group Incorporated ("Ulnooweg") is a not-for-profit corporation that provides developmental lending and business advice to aboriginal businesses in Atlantic Canada. Its main office is located in Truro, Nova Scotia, with satellite offices in New Brunswick and Newfoundland.

[9] The respondent, Ms. Terry Ann Wilmot ("Ms. Wilmot") was, at the time of her dismissal, a 38 year old native Canadian woman who lived on the Millbrook First Nation Reserve near Truro. She completed her grade 12 education and later attended St. Mary's University for a brief period in 1984. Due to health problems she left university and returned home to Millbrook.

[10] Ms. Wilmot and Ulnooweg entered into an oral contract of employment in October 1991. By 2003 Ms. Wilmot held the position of Administrative Assistant earning an annual salary of $39,312 plus vacation pay at the rate of 4%. Ulnooweg terminated Ms. Wilmot on June 26, 2003.

[11] The respondent was employed by Ulnooweg for almost 12 years. For the first 11 of those years she was considered to be an excellent and hard working employee, one who was conscientious and diligent and who contributed significantly to the appellant's operations. The respondent was described as an exemplary employee who in December 2002 was evaluated very highly on her performance review. She had never been disciplined for misconduct of any kind.

[12] In May 2002 Ms. Wilmot began to experience emotional difficulties which resulted in long absences from work. From May 2002 until June 2, 2003 Ms. Wilmot missed 138 days at the office. She was under the care of Dr. Feltmate, her family physician and Dr. Nickerson, a psychologist. Throughout her difficulties the appellant encouraged Ms. Wilmot to take leaves of absence, and granted them to her.

[13] Until April 2003 Ms. Wilmot received full salary as a result of significant sick leave credits that she had earned, as well as her own vacation time, and a few days of special leave. Between April and June 26, 2003 the respondent took an unpaid leave of absence.

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[14] On June 3, 2003 Mr. Todd Hoskin, CEO of Ulnooweg wrote to Ms. Wilmot outlining her absences from work, explaining the impact her absences had on the company's operations, expressing his serious concerns regarding her health and her ability to fulfill her employment with Ulnooweg, and informing her that her attendance would have to improve or she could no longer expect to remain in the appellant's employ. In that same letter Mr. Hoskin advised Ms. Wilmot of the disability benefits scheme available to her.

[15] On June 26, 2003, Ulnooweg handed Ms. Wilmot a letter of termination. The letter stated in part:

> We have made you fully aware that the present situation cannot continue. While we were prepared to allow you time to recover from your illness and re-enter the workforce, we cannot wait for an indefinite period of time. As part of our previous understanding, you were to keep us informed of your doctor's opinion on when and if you could return to work. You had previously committed to provide us with this information in early June, 2003. Despite that clear promise, we have not heard from you in this regard.
>
> . . .
>
> Since we have not heard from you with some definitive plan regarding your projected period of recovery and the proposed date for your return to work, we have no choice but to terminate your employment as of today.

[16] On July 2, 2003, Dr. Nickerson completed the respondent's long term disability application and indicated that Ms. Wilmot would be off work for 52 weeks before instituting a gradual return to the office.

[17] In completing Ms. Wilmot's long term disability application Dr. Nickerson diagnosed the respondent with the following conditions: panic disorder with agoraphobia, post traumatic stress disorder and dysthymic disorder.

[18] In August 2004 the respondent sued, claiming that her employment contract had been terminated without just cause and that she was therefore entitled to damages for wrongful dismissal. She also claimed exemplary and punitive damages, and aggravated damages owing to the way in which she had been treated by her employer.

[19] Ulnooweg defended the action. The essence of the appellant's position at trial is neatly captured in its pleading:

DEFENCE

> 2. The Defendant denies that the Plaintiff's employment was wrongfully terminated. The Plaintiff's employment was terminated only after it was determined that further performance of her obligations would either be impossible or would be a thing radically different from that undertaken by her and accepted under the agreed terms of her employment. The determination was made as a result of the Plaintiff's repeated absences, declining work quality, and failure to attend to her obligations after numerous repeated warnings and assistance by the Defendant to address the Plaintiff's concerns.
>
> . . .
>
> 10. On June 25, 2003, the Defendant delivered a letter to the Plaintiff, requesting that she advise them within 7 days of her return to work. The Plaintiff had been told to advise them by early June and she had not done so. She was then told if she did not inform them within the 7 days, her employment would be terminated. The Plaintiff did not provide the Defendant with the requested information.
>
> 11. The Defendant gave the Plaintiff numerous warnings about her repeated absences, and every effort was made to accommodate the Plaintiff's illness. Further performance of the Plaintiff's employment obligations at the Defendant company was impossible. The Defendants dismissed the Plaintiff with cause.

[20] The case was tried in Truro on June 12-13 with both sides presenting evidence. The parties returned to court on June 16 where the trial judge delivered a comprehensive oral decision, later transcribed and released as a written judgment on October 6, 2006. It is from this decision and order that Ulnooweg now appeals.

Issues

[21] The various grounds of appeal and submissions advanced by the appellant really come down to this: did the trial judge have a proper appreciation of the evidence and apply the correct legal test for determining whether Ms. Wilmot's employment contract had been frustrated on account of her inability to work due to illness?

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[22] The appellant points to four particular errors by the trial judge in understanding the evidence or applying the test. They say the judge erred:

(i) in concluding that the respondent's illness was not sufficiently long term or permanent to constitute cause for discharge;

(ii) in refusing to consider post-termination evidence of disability as providing justification for dismissal;

(iii) in failing to consider important evidence leading to a mistaken conclusion that the employment relationship had not come to an end on account of frustration; and

(iv) by having misapplied the proper test, then arriving at a conclusion that was outside of an acceptable range of time for such an absence from her employment.

[23] These various complaints cover a wide spectrum of alleged error. The appellant says the trial judge: made errors in fact finding; erred in the legal standard utilized to establish frustration in the context of employment contracts; and erred in arriving at his ultimate conclusion said to be outside of an acceptable range. These alleged mistakes constitute errors of fact, of law, and of mixed fact and law, each of course drawing its own standard of review.

Standard of Review

[24] Deciding the appropriate standard of review depends on how one characterizes the particular question that is under scrutiny.

[25] An appeal is not a second trial. Our powers at the appellate level are constrained. On questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which

will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error. See for example **Housen v. Nikolaisen et al**, [2002] 2 S.C.R. 235; **H. L. V. Canada (Attorney General)**, [2005] S.C.J. No. 24; **Campbell-MacIsaac v. Deveaux &** Lombard, 2004 NSCA 87; **McPhee v. Gwynne-Timothy** 2005 NSCA 80; **Flynn v. Halifax (Regional Municipality)** 2005 NSCA 81; and **Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company**, 2006 NSCA 82.

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[26]   For reasons I will now develop I have found that Murphy, J. did not make any errors that would warrant this court's intervention. Specifically, the trial judge made no palpable and overriding errors in the facts as he found them. He applied the correct legal test in deciding the issue of frustration. He conducted the appropriate contextual analysis in reaching his conclusion as to the permanence of the respondent's condition which is within an acceptable range.

[27]   I will now consider each of the appellant's submissions.

(i)   The judge is said to have erred in concluding that the respondent's illness was not sufficiently long term or permanent to constitute cause for discharge

[28]   This first issue lies at the heart of this appeal. It considers the definition of the term "permanent" when disability arises in the context of an employment contract.

[29]   An employer is entitled to expect an employee to show up for work. An employee who fails to show up for work without valid reason is subject to dismissal. Since the decision of the Supreme Court of Canada in **Dartmouth Ferry Commission v. Marks** (1903), 34 S.C.R. 366, the law has been clear that an employer cannot dismiss an employee for temporary absence due to illness (i.e., temporary illness or a valid reason). It is only when the absence extends to illness beyond the temporary time-frame that a dismissal is legally justifiable.

[30]   The law has dealt with this issue through the use of the doctrine of frustration of contract, that being an unforseen intervening event that prevents the

contract from being performed. In this case the unforseen event is the respondent's disability due to illness.

[31] The decision in **Dartmouth Ferry** was applied by this court in **Parks v. Atlantic Provinces Special Education Authority Resource Centre For The Visually Impaired** (1992), 109 N.S.R. (2d) 113. There, Clarke, C.J.N.S. observed:

> [57] **Dartmouth Ferry** is an old case, but the law stated by the Supreme Court of Canada is still valid. Applying it to this case raises the question whether Mr. Parks' disability was permanent or temporary.
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> . . .
>
> [62] When determining whether the disability is permanent or temporary, the trial judge must make that evaluation on objective standards and not rely on the injured persons' subjective belief, although the latter is certainly a factor to be considered.

[32] Chief Justice Clarke also cited with approval the judgment of Sir John Donaldson in **Marshall v. Harland & Wolff Ltd. and another**, [1972] 2 All E.R. 715, wherein Sir Donaldson provided a helpful list of "inter-related and cumulative, but . . . not necessarily exhaustive" factors to be taken into account when deciding whether an employment relationship has come to an end by frustration due to the worker's incapacity caused by ill health.

[33] The required analysis was described by Chief Justice Clarke with clarity and precision, again in **Parks:**

> [54] A permanent disability on the part of an employee which prevents him from fulfilling the functions required by his job will result in the frustration of the contract of employment. This is a proposition that is basic to the law of contract. It results in a failure of consideration.
>
> [55] The circumstances must be examined to determine whether, as Sir John Donaldson states: "... further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? ... "Are the changed circumstances" ... so fundamental as to strike at the root of the relationship",. . . .

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[34] The factors identified by Sir Donaldson in **Marshall**, supra, sometimes referred to as the "*Marshall* test," were applied by Justice Kelly of the Nova Scotia Supreme Court in **Miller v. Fetterly & Associates Inc.** (1999), 177 N.S.R. (2d) 44 (S.C.). There, Kelly, J. relied upon several sources of jurisprudence and academic writings in attempting to articulate the permanence of a dismissed employee's disability. He accepted the following statement from M. MacKillop, *Damage Control: An Employer's Guide to Just Cause* (Canada Law Book Inc., Aurora, 1997), at page 81:

> A contract of employment will be frustrated when an unforeseen event makes performance of the contract either impossible or fundamentally different than originally contemplated. Subject to human rights and workers' compensation legislation, employers may be able to treat an employee's contract as at an end if the employee loses the capacity to perform required job duties because of illness or disability. However, it is only an illness or disability that is permanent in nature which can frustrate an employment contract and justify dismissal. In this context, the term 'permanent' is used to describe a condition that frustrates the object of an employer's and employee's engagement, thereby putting an end (in the business sense) to their relationship. In order to determine whether an illness or disability is sufficiently permanent and whether the employment contract has been frustrated by an employee's incapacity, the overall context of the particular employment situation should be assessed. In this respect, one essential question must be answered. Has the employee been incapacitated to such a degree that further performance of the employee's obligations are impossible or would be substantially different from the performance initially contemplated? (emphasis in original) If this question is answered in the affirmative after considering a number of cumulative and interrelated factors, it is likely that the employment contract has been frustrated and that dismissal of the employee is therefore justified.

(additional underlining mine)

[35] In this case Justice Murphy specifically referred to the analysis in **Fetterly**, supra, which as I have already explained, applied the factors originally enunciated by Sir Donaldson in **Marshall**, and accepted by this court in **Parks**. In finding that the employment contract between the appellant and the respondent in this case was not frustrated as a result of Ms. Wilmot's health difficulties, Murphy, J. completed his analysis on the defence of frustration with this conclusion at ¶ 26:

> [26] I have considered the factors set out in the cases, particularly **Miller v. Fetterly**, with respect to frustration - such considerations as the expected length of future absence, and whether the employer was prepared to try and accommodate that absence, which in this case the employer certainly gave indications it was prepared to consider doing, including in the June 3rd letter and in Mr. Hoskin's testimony. The Plaintiff was a long-term employee with good employment record; she would have had a long future with the Defendant, if she had continued. She was a valuable employee, but not in a key position - I do not find that she was in a managerial position. She had a very significant but not what could be deemed to be a permanent illness in June of 2003. And based on those considerations and all of the evidence, I have reached the conclusion that the employment contract was not frustrated.

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[36] I am not persuaded that Murphy, J.'s conclusion resulted from any palpable and overriding error of fact, or mistaken interpretation and application of the law. Given the substantial medical and other evidence presented at trial, as well as the context of this relationship between these parties, it was certainly open to the trial judge to find that Ms. Wilmot's mental illness was not sufficiently long term or permanent as to constitute just cause for her dismissal. I would not intervene.

(ii) The judge is said to have erred in refusing to consider post-termination evidence of disability as providing justification for dismissal

[37] The appellant takes the position that Murphy, J. erred in refusing to take into account post-termination evidence of disability when deciding the issue of frustration. Justice Murphy held:

> [25] In my view the evidence does not support the existence of an established permanent illness or a disability in June of 2003 and I should say, despite the conflicting authorities, it is my conclusion that the Court should assess whether frustration occurred as of the time of dismissal and not make the assessment as of the time of trial.

[38] Citing a number of cases decided at the trial level in British Columbia, the appellant argues that <u>post-termination evidence of disability</u> ought to be received based upon (as expressed in their factum):

> . . . the long-accepted law that an employer may justify a dismissal based upon after-acquired evidence of employee conduct, even though, at the time of dismissal, that conduct was not known by the employer. . . .

> It is submitted that there is a certain unfairness to an employee being entitled to damages for dismissal for the employer's failure to give adequate notice, when the purpose of such notice is to permit the employee to search for new employment, and in the circumstances of permanent disability, the employee is unable to work and thus the notice to that person is irrelevant. In these circumstances, damages for inadequate notice are a windfall to the employee. Given that employment law permits after-acquired information to support an argument of just cause, it is submitted that it is hardly inconsistent or unfair to consider evidence of the continuation of the disability after the dismissal.

(underlining mine)

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[39] With respect, I am of the opinion that the appellant has misapprehended the focus of the inquiry. To resist a claim for breach of contract on account of wrongful dismissal by raising a defence of frustration, it is only logical that the defence must be evaluated as at the time of the termination. For it is at that time that the employer reached its conclusion that the worker's illness was so enduring as to defeat the object of the employment contract. To paraphrase the observations of Smith, J.A., writing for the British Columbia Court of Appeal in **Whiteman Estate v. 2774046 Canada Inc.**, 2006 BCCA 424 at [21], one should ask this question: Does the incapacity prevent the worker from fulfilling the essential elements of the position for a period of time sufficient to say, in a practical or business sense, that the object of their employment relationship is frustrated?

[40] I recognize that in the employment law context where the frustration defence is raised the authorities are divided with respect to whether the worker's medical prognosis should be evaluated at the time of termination, or the time of trial, or the date of termination but with the benefit of evidence obtained and hindsight at the time of trial. See for example **England, Wood and Christie,** *Employment Law in Canada* (4th ed., Butterworths) at 18.19; and **Whiteman Estate**, supra, at [61]. In my respectful view the variance in approach may be explained by appreciating the subtle distinction in the use to which such evidence may, or may not, be put.

[41] The issue before Murphy, J. was whether Ulnooweg had met its burden of proving that the contract had been frustrated. In other words, the question to be decided was whether the contract was frustrated when in June, 2003 Ulnooweg decided to fire Ms. Wilmot. Evidence as to whether she was still disabled at the time of trial, i.e., "how she turned out" was not relevant to answering that question.

Presenting and considering evidence which is acquired later, and which bears upon the person's circumstances at the time of dismissal, is permissible, but not otherwise. This distinction was explained by L'Heureux-Dubé, J. writing for the Court in **Cie minière Québec Cartier v. Quebec (Grievances Arbitrator)**, [1995] S.C.J. No. 65, at ¶ 13:

> This brings me to the question . . . whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. . . .

See as well the comments of Gonthier, J., writing for the Court in **Farber v. Royal Trust Co.**, [1996] S.C.J. No. 118 at ¶ 41-43. Finally, as I point out in my reasons at [45] infra, this approach was followed by Marshall, J. A., of the Newfoundland Court of Appeal in **White v. Woolworth Co.** (1996), 139 Nfld. & P.E.I.R. 324, (N.F.C.A.).

[42] Clearly, the question of where the de-markation line lies in assessing such evidence when considering the defence of frustration, is a matter of law. In my opinion Murphy, J. was correct. With respect, I would decline to follow the approach taken in British Columbia in such cases as **MacLellan v. H. B. Contracting Ltd.,** [1990] B.C.J. No. 935 (S.C.); and **Demuynck v. Agentis Services Inc.**, [2003] B.C.J. No. 113 (S.C.).

[43] In **Marshall**, supra, the point is made very clearly that the measure of the worker's disability is gauged at the time of dismissal and not at the time the case comes to trial. Sir Donaldson said, beginning at p. 718:

> In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: was the employee's incapacity, **looked at before the purported dismissal**, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? . . .

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(my emphasis)

[44] I agree with the respondent that it would be unfair to adopt the approach taken in **MacLellan**, and **Demuynck**, supra. The respondent's counsel put it very well in his factum:

> . . . First, the loss of one's job could contribute to the degree of disability suffered by the time of trial that might not have existed but/for the loss of employment. (adopting) . . . The *MacLellan* position could allow an employer to take advantage of a post-termination condition that might have been affected by the effects of the termination itself. . . .
>
> Second, the employer would be taking advantage of an employee's condition after the employment relationship formally ended (by the employer's termination). . . .

Finally, in refuting the analogy from those cases where evidence of bad conduct, post-termination, is admissible to legitimize "just cause," counsel for the respondent argued:

> Third . . . this analogy is logically flawed. The doctrine of "after acquired knowledge" in just cause cases allows the employer to use the conduct and actions of an employee before termination to subsequently establish just cause. That evidence has crystallized as of the date of termination. To the contrary, the post-termination condition of employees takes into account their condition after the termination. This offers no guarantee that the condition was permanent as of the date of the termination because that condition could change for any variety of reasons, some of which might or might not have been operating at the time of termination. Simply put, the use of the employee's post-termination condition is not logically consistent with the use of actions and conduct that occurred before the termination. . . .

[45] These very same considerations were addressed by the Newfoundland Court of Appeal in **White**, supra. I would respectfully adopt the comments of Marshall, J.A. where at ¶ 30 - 33 he observed:

> [30] Thus, **Marshall** sets the time and circumstances for judging whether frustration has occurred because of absence from work for sickness or disability as the period "before the purported dismissal" as did the trial judge in this case. **Maclellan**, on the other hand, may be construed as indicating the time between

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the notice of termination and the trial is also relevant for purposes of that assessment.

[31] The position espoused in **Marshall**, and other authorities following a similar approach, ought to be adopted over the opposing view expressed by the line of cases represented by **Maclellan**. No exception is taken with the premise that after acquired knowledge of conduct or circumstances sufficient to vitiate a contract, which occurred prior to its formal termination, may serve to justify its repudiation, even if the grounds advanced for ending the relationship had nothing to do with the subsequently discovered facts. However, there is an air of incongruity in allowing a party to an employment contract who has terminated it claiming frustration to argue that the relationship that has been so brought to an end may be justified by subsequently occurring events. Having brought the contract to an end, it cannot rely on it and expect that the employee be treated as having subsequent work obligations. Having asserted that the engagement is at an end because of disability and resultant absence from work, what transpired afterwards would appear irrelevant to such a justification.

[32] Moreover, there is also a ring of unfairness to taking the subsequent situation into account. This is because the notice of termination may have had an effect upon it. In the instant case, for example, the evidence indicated that this employee, finding himself severed from the employment in which he had been engaged for the entire period of his adult life, understandably experienced a depression that required medical attention. The record also revealed that the surgery, which Mr. White had advised his superior in January of 1991 he was slated to undergo, was not performed until the following December. There is no way of knowing if that operation might have been accelerated if, unencumbered by his depressed state and the diminished urgency of returning to work which the notice conveyed to him, additional pressure might have been applied resulting in Mr. White having the procedure earlier. While the employer was entitled to buttress his argument of frustration by referring to Mr. White's incapacity before the dismissal, and the likelihood of it continuing, it would be unfair to base any finding of permanent disability or absence on what subsequently transpired because of the effect of the dismissal on these circumstances.

[33] In the result, the contention of counsel that the time span subsequent to the dismissal should be taken into consideration is not supportable. . . .

(underlining mine)

[46] For all of these reasons I would reject the appellant's submission. Here, the trial judge was correct in limiting his review of the permanency of the respondent's

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disability and absence from the workplace, to the circumstances that existed at the time she was terminated.

(iii) The judge is said to have erred in failing to consider important evidence leading to a mistaken conclusion that the employment relationship had not come to an end on account of frustration

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[47] In this segment of the appeal Ulnooweg complains that the trial judge missed or failed to appreciate important evidence with the result that he erred in his application of the **Marshall** factors, leading him to mistakenly conclude that the contract was not frustrated. Ulnooweg makes three points.

[48] First, the appellant says the judge erred in finding that the appellant's willingness to investigate a leave of absence was inconsistent with the employment contract being frustrated. Second, it is argued the judge found that Ms. Wilmot was not a key employee based only upon the fact that she was not in a managerial position when he ought to have looked at whether her position was one that must be filled on a permanent basis if her absence were prolonged. Third, the appellant says the trial judge looked only at whether the respondent would return to work *at some point*, rather than look at how long it would likely take for her to return to her job.

[49] I respectfully disagree with the appellant's submissions. I am not persuaded that the judge made any palpable and overriding error in analysing the evidence or finding facts. He conducted a proper legal and contextual analysis of the circumstances between these parties.

[50] In his submissions Mr. Bryson, counsel for the appellant, complained that the trial judge erred in his consideration of Mr. Hoskin's evidence concerning the appellant's willingness to grant the respondent a leave of absence. While conceding that offering a leave of absence is a relevant consideration when addressing the permanency of disability in the context of a defence of frustration, Mr. Bryson argued that the trial judge misconstrued the evidence of Mr. Hoskin, namely that while the CEO may have been prepared to *consider* another position or business opportunity if and when the respondent returned to work, such an overture would have been subject to executive board approval, and was in no way a commitment to the respondent that her old position would be kept open for her.

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[51] With respect, I cannot accept the appellant's submission. Even if I were to assume that Murphy, J. misconstrued this particular portion of Mr. Hoskin's testimony - and I do not - I say it doesn't matter. The formal title, or exact job description was irrelevant to the trial judge's assessment. What is important was the appellant's willingness to extend Ms. Wilmot *any* leave of absence. This is a most relevant factor when, in addressing the defence of frustration, the trial judge was obliged to decide whether the employer had proven "the existence of an established permanent illness or disability in June of 2003."

[52] Appellant's counsel also complains that Murphy, J. erred in his assessment of the importance of her position to the company by mistakenly treating what is characterized as a "key" position as meaning the same thing as "a managerial position". In this the appellant says the trial judge erred in addressing the third "factor" from **Marshall**, supra which reads:

> (c) *The nature of the employment* - Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

Here the appellant argues that the trial judge misunderstood and effectively undervalued the respondent's position in the business; that he ought to have directed himself to ask whether Ms. Wilmot's position was one which would have to "be filled and filled on a permanent basis" if her absence were prolonged.

[53] I respectfully disagree with the appellant's submission. It is clear from the trial judge's decision that he did not restrict his interpretation of the word "key" to a mere comparison to management. Rather, I am satisfied that the trial judge reviewed all of the evidence (as he said he had) in the context of that particular employment relationship, so as to properly assess Ms. Wilmot's duties, level of responsibility and importance within the company's operations. For example [42] the trial judge declared:

> [42] . . . I have looked at all the factors . . . in the context of the evidence, including that the Plaintiff was about 40 years of age, and the length of her service, about 11 years. I have considered the unique nature of her employment situation, her particular background . . . with this particular employer with her community situation. I have also considered her level of responsibility which I

> don't find to be at the high end advanced by the Plaintiff, but of an administrative rather than management nature. . . .

In my opinion the trial judge did not err in his articulation or his application of the factors from **Marshall**, supra.

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[54] In any event I see this issue as somewhat of a red herring. The fact is that Ulnooweg had given Ms. Wilmot a new position before she was terminated. They had obviously redefined many of the functions among personnel in the business. Murphy, J. was in the best position to review those circumstances and come to a determination as to the degree of importance that ought to be attached to her presence within the appellant's operations. Those findings would then of course be relevant to the parallel consideration of what might happen to her position if her absence were prolonged. I am satisfied the trial judge completed the proper analysis.

[55] The appellant says Murphy, J. erred in failing to pinpoint exactly when she would return to work. This they say was a fatal error. I disagree. As **Marshall**, makes clear:

> . . . The question is and remains: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance . . . would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment? Any other factors which bear on this issue must also be considered. (underlining mine)

Murphy, J. obviously understood that this inquiry lay at the heart of the case. For example at ¶ 22 he said:

> [22] The issue boils down to whether the absence from work was such that an employer could not be reasonably expected to await an employee's return any longer.

After again reviewing the evidence in detail he concluded:

> [25] In my view the evidence does not support the existence of an established permanent illness or a disability in June of 2003 . . .

[56] The essential question before Justice Murphy was whether Ulnooweg had met its burden of proving that Ms. Wilmot's capacity was permanent thereby frustrating the employment contract. To answer that question the trial judge did not have to precisely pinpoint when she would be back to work.

[57] Murphy, J. instructed himself as to the proper question, and I see no error in his conclusion or the analysis which led to it. In the circumstances of this case, he cannot be said to have erred by failing to pinpoint, with precision, the date of Ms. Wilmot's return to work.

[58] In summary, a review of the transcript and the documentary evidence clearly demonstrates that the following facts or inferences relied upon by the trial judge are supported by the record:

- The anticipated length of absence of approximately one year;
- Ulnooweg would have considered accommodating Ms. Wilmot with a leave of absence of one year;
- Ms. Wilmot was a long term employee;
- Ms. Wilmot was a valuable employee who consistently met or exceeded expectations;
- The respondent went above and beyond her customary responsibilities for Ulnooweg following the death of Mr. Bower, her former CEO and a friend with whom she was very close;
- She would have had a long future with the appellant but for her illness;
- She was not a "key" employee, a conclusion reached by the judge after hearing considerable evidence as to the size, operations and functioning of the appellant's business;
- The respondent suffered a significant illness, but not a medically permanent disability.

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[59] It seems to me that the appellant's real complaint lies with the weight attached to certain evidence by the trial judge. However, such an assessment is clearly within the trial judge's authority and I am not persuaded there is any basis warranting our interference.

(iv) The judge is said to have erred in having misapplied the proper test, and then arriving at a conclusion that was outside the acceptable range of time to be absent from her employment

[60] The appellant emphasizes that given the small size of the appellant's operations, the combination of Ms. Wilmot's absence from work to the date of termination, and the guarded prognosis of returning to work on a gradual basis in a year's time, the judge's assessment of her prolonged absence from the business was outside the range one would reasonably set for employment contracts for employees in like situations. In this they say the judge erred in his disposition.

[61] I respectfully disagree. After carefully analysing the context of their employment relationship, Murphy, J. concluded that Ms. Wilmot's projected disability of approximately one year did not constitute a "permanent" disability. As the jurisprudence makes plain, the term "permanent" does not literally mean "forever." Rather, it meant - in the context of this particular employment relationship - was a one year absence "permanent"? Here the trial judge applied the facts as found, and inferences drawn, to a legal standard. I am satisfied he was correct in his application of legal principles. His consideration of this issue was one of mixed fact and law, subject to a palpable and overriding standard of review. As Bateman, J.A. observed in **Silvester v. Lloyd's Register** 2004 NSCA 17 at ¶ 11:

> [11] In **Minott v. O'Shanter Development Co.** (1999), 117 O.A.C. 1; 40 C.C.E.L. (2d) 1; 168 D.L.R. (4th) 270; 42 O.R. (3d) 321 (C.A.), Laskin J.A., writing for the Court, expressed the standard of review on a wrongful dismissal action in this way at pp. 343 - 344:
>
>> "... Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one 'right' figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a

> trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact: see **Isaacs v. M.H.G. International Ltd.** (1984), 45 O.R. (2d) 693, 7 D.L.R. (4th) 570 (C.A.). If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle."
>
> (Underlining mine)

[62] In June 2003, prior to the termination, the appellant's CEO, Mr. Hoskin had in his mind that he would consider "12 months" for a leave of absence. The appellant cannot now be heard to say that one year is outside an acceptable range.

[63] Because cases in this field are so fact-driven, reaching for precedent to find reliable comparisons is not especially helpful. I note however that in **White**, supra, the Newfoundland Court of Appeal held that an employment relationship of 23 years allowed for "temporary absences of 18 to 24 months." Here, the respondent was a 12 year employee. By halving the time frame in **White**, 9 to 12 months seems to me on the facts of this case to represent a reasonable range. Relevant factors would include:

- her good performance history;
- her contributions to the company;
- her extra work when Ulnooweg needed it (after the death of Mr. Bower);
- the fact that she was not a "key" employee;
- Ulnooweg's willingness to accommodate her;
- that she would have had a long future with Ulnooweg but for her illness;

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- that she was a long term employee;
- that she was a "valuable" employee;
- that her illness was not "medically" permanent.

[64] Justice Murphy also commented upon the extent to which Ms. Wilmot was candid about her mental illness, or the degree to which Mr. Hoskin pressed the respondent for more details. The trial judge appreciated that this was a delicate subject requiring some diplomacy and observed that whereas the appellant may not have been as inquisitive about the exact nature of Ms. Wilmot's illness as (with hindsight) it might have been, it was also true that the respondent had "not been completely forthright about her condition and prognosis. . ." and that she ". . . was probably herself in some sort of denial about her condition." The judge emphasized that although he found the dismissal was not justified, the appellant's dealings with Ms. Wilmot always "showed responsibility and compassion."

[65] Murphy, J. had a distinct advantage in seeing and hearing the witnesses at trial. He heard first hand the evidence of the size of Ulnooweg, the respondent's position within that organization, and the operational difficulties that were experienced in her absence. He looked to Ms. Wilmot's excellent work performance, her contributions to Ulnooweg, and her loyalty. He then balanced all of these facts and decided that one year was not too long for Ulnooweg to await the return of this valuable employee.

Conclusion

[66] I see no error - on this record - in the trial judge's conclusion that an approximately one year long absence from her employment did not constitute a permanent disability. Further, one year is not outside an acceptable range of time for such an absence in the circumstances of this case.

[67] Accordingly, I would dismiss the appeal with costs of $2,000 plus disbursements to the respondent.

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Saunders, J. A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.

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