CITATION: Kerwin v. Manulife Financial, 2017 ONSC 7166
COURT FILE NO.: CV-17-1595-00
DATE: 20171130

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAVID KERWIN – and – MANULIFE FINANCIAL also known as THE MANUFACTURERS LIFE INSURANCE COMPANY

BEFORE: Emery J.

COUNSEL: Frank J. Burns, for the Plaintiff

Gordon Jermane, for the Defendant (moving party)

HEARD: October 30, 2017 at Brampton

ENDORSEMENT

[1] David Kerwin was severely injured in a motor vehicle accident on June 30, 2015. Mr. Kerwin had been employed by AT & T Global Services Canada Co. ("AT & T") for approximately 20 years at the time of the accident.

[2] Mr. Kerwin was covered by a group disability insurance policy AT & T had purchased for its employees from Manulife Financial, also known as The Manufacturers Life Insurance Company ("Manulife"). That policy included a benefit for Long Term Disability ("LTD") that would be payable to an employee in the event of a total disability.

[3] Mr. Kerwin's injuries prevented him from returning to work at AT & T following his release from the hospital. AT & T paid Mr. Kerwin short term benefits to September 1, 2015, after which AT & T continued to pay his regular salary until October 13, 2015.

[4] AT & T accommodated Mr. Kerwin's participation in a gradual return to work process up to September 25, 2015. AT & T terminated Mr. Kerwin's employment on September 29, 2015. He received his last regular pay on October 13, 2015. On February 4, 2016, Mr. Kerwin reached a settlement after his termination from AT & T for $314,843.

[5] Mr. Kerwin has brought an action against Manulife to compel payment of all LTD benefits pursuant to the claim he has made under the policy. Manulife has brought this motion for summary judgement to dismiss the action.

BACKGROUND FACTS

[6] Mr. Kerwin applied for LTD benefits from Manulife upon, or shortly after his termination from employment. Manulife accepts that Mr. Kerwin has coverage for this claim. Manulife has accepted this claim. Manulife also accepts that Mr. Kerwin is totally disabled within the meaning of the policy.

[7] As a result of accepting coverage for the claim and Mr. Kerwin's claim that he qualifies for LTD benefits because he is totally disabled, Manulife agreed

to pay LTD benefits to Mr. Kerwin in the amount of $7,497.76 a month on a non-taxable basis until he turns 65 years of age. This acceptance of coverage and agreement to pay these benefits is subject to the terms and conditions of the Manulife policy with AT & T.

[8] Manulife paid Mr. Kerwin for the first two weeks in October 2015 that he was entitled to receive LTD benefits. However, Manulife stopped making those payments once it learned that AT & T had paid Mr. Kerwin a significant amount as a retirement package. Manulife has recently resumed making LTD payments to Mr. Kerwin effective October 13, 2017.

[9] Manulife takes the position that Mr. Kerwin was not entitled to receive LTD benefits during the intervening 1.97 years because the amount he had been paid by AT & T for his retirement package is deductible from LTD benefits payable under the Manulife policy. The specific language of the policy in this respect is found on page 16 (the "policy deduction"), and reads as follows:

> Amount of Disability Benefit
>
> The Amount of Disability Benefit payable is the Benefit Amount shown in the Benefit Schedule, less any amount of benefits the Employee receives, or is entitled to receive, from the following sources for the same or related Disability:
>
> a) Canada or Quebec Pension Plans, excluding dependent benefits; and
>
> b) Workers' Compensation or similar coverage;

c) any government motor vehicle automobile insurance plan or policy, unless prohibited by law.

d) any group, association or franchise plan;

e) any retirement or pension plan;

f) **earnings or payments from any employer, including severance payments and vacation pay;**

g) self-employment;

h) any government plan, excluding Employment Insurance Benefits.

The benefit amount payable will be further reduced so that the Employee's total income from All Sources does not exceed 85% of the Employee's pre-disability Earnings if this Benefit is taxable, or 85% of the Employee's pre-disability Net Earnings if this Benefit is non-taxable.

All Sources include those stated above and any benefit the Employee is entitled to receive from Canada or Quebec Pension Plans' dependent benefits.

[10] Mr. Kerwin is represented by Mr. Frank Burns of the law firm Lofranco Corriero. Between the time of his termination from employment on September 29, 2015 and February 4, 2016, Mr. Kerwin negotiated a retirement package with AT & T through Mr. Burns. On February 4, 2016, Mr. Kerwin reached a settlement for a lump sum of $314,843, parts of which were withheld for income tax and remitted to Canada Revenue Agency.

[11] Mr. Kerwin did not disclose the receipt of his retirement package from AT & T to Manulife until it was revealed by Mr. Burns toward the end of 2016.

[12] Manulife takes the position that the full amount of the settlement that Mr. Kerwin negotiated and received as a retirement package must be set off against those LTD benefits Manulife would have otherwise paid to him. Under that policy, Mr. Kerwin was entitled to receive 60 per cent of his monthly pre-termination salary as a monthly benefit, which equals a payment of $7,847 a month. However, that entitlement is subject to a second limiting condition that the monthly payment cannot exceed 85 per cent of the net amount he had been paid by AT & T each month before termination. This left his LTD benefit payable each month in the amount of $7,497.76, tax free.

[13] Accordingly to Manulife's calculations, this policy deduction from the LTD benefits otherwise payable to Mr. Kerwin justified withholding LTD payments until October 13, 2017.

[14] Mr. Kerwin takes the position that he was paid a lump sum settlement by AT & T as a retirement package. The lump sum was not defined in nature. Mr. Kerwin argues that he was paid this lump sum in exchange for his agreement not to bring an action against AT & T, including any claims he could have made for pay in lieu of notice, moral damages, and any claim under the Canada Human Rights Code. Mr. Kerwin argues that he is therefore entitled to all LTD benefits that Manulife has not paid to him since October 2015, without deduction.

ANALYSIS

[15] It is mandated under Rule 20 and emphasized by the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] S.C.J. No. 7 that a motion for summary judgment must be granted by the court whenever there is no genuine issue requiring a trial. The court defined the circumstance in which there will be no genuine issue requiring a trial as that where the motion judge is able to reach a fair and just determination on the merits where the summary judgment procedure:

> (1) allows the judge to make the necessary findings of fact;
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> (2) allows the judge to apply the law to the facts; and
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> (3) is a proportionate, more expeditious and less expense means to achieve a just result.

[16] Mr. Kerwin's claim for uninterrupted LTD payments under the Manulife policy for AT&T employees is contractual in nature, and forms the basis for this action. At the heart of this motion is the legal question whether there is evidence on which to find that Manulife had grounds to deduct the amount Mr. Kerwin received from AT& T after the termination of his employment there from the LTD benefits otherwise payable to him under the policy.

Manulife's Position

[17] Manulife relies on the decision of the Court of Appeal in *Ruffolo v. Sunlife*, [2009] O.J. 1322 as authority for its position that the Court will recognize the deduction of certain amounts received, even though they are not disability income payments, from benefits payable under the policy if the nature of those deductions are specifically described. This makes those specifically described amounts, even though they may not be disability income payments by nature, deductible from benefits otherwise payable as a matter of contract.

[18] Manulife also relies upon the decision of the Nova Scotia Court of Appeal in *Nova Scotia Public Service LTD Plan Trust Fund v. McNally*, [1998] N.S.J.367 to argue that, once a person is shown to have received a sum pursuant to a settlement which could be set off against insurance benefits, the onus shifts to that person to account for the apportionment of the settlement amount to establish that no portion of it falls within an exception under the policy to pay benefits.

[19] In the alternative to its submissions that the amounts Mr. Kerwin received from AT&T as a retirement package is properly considered a policy deduction, Manulife submits that the law generally abhors double recovery where a party receives a certain payment from his employer while at the same time making a

claim for the same loss against a third party: *Ratych v. Bloomer*, [1990] S.C.J. No. 37 (SCC).

Mr. Kerwin's Position

[20] Mr. Burns argues that it is Manulife that has the onus to prove that the amount received by Mr. Kerwin as a lump sum fits in whole or in part within one of the specific policy deductions. He refers to *Skinner v. Goulet et al.*, [1999] O.J. 3209 and to *Cromwell v. Liberty Mutual Insurance Co.* (2008), 89 O.R. (3rd) 352 as authority. In *Cromwell*, Justice Lofchik of this Court stated at paragraphs 40-42 that:

> 40 Applying that reasoning to the present case, Sun Life was not obliged, under the terms of its policy to pay a lump sum with respect to future payments. There is no evidence before me that the lump sum paid was in any way calculated taking into account the future value of those payments but was rather arrived at on the basis of the amount of money available under the authority of the person authorizing the settlement. I also consider that the Release delivered also released claims against Sun Life with respect to mental stress, aggravated and punitive damages for which Sun Life denied liability in the Release. On that basis, the payment does not qualify as "net weekly payments for loss of income...under any income continuation benefit plan".
>
> 41 I am fortified in this view by the fact that the Concise Oxford Dictionary, 10th Edition, provides that the word "under" means, "as provided for by the rules of; in accordance with". The same dictionary defines "pursuant to" to mean "in accordance with". Thus the use of the word "under" in s. 7(1) of the Statutory Accident Benefits Schedule has the same meaning as the words "pursuant to" as interpreted in the *Tsiaprailis* decision.
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> 42 Based on the foregoing I find that the defendant is not entitled to a deduction in respect of the $160,000.00 lump sum payment paid by Sun Life.

[21] Mr. Burns further argues that LTD payments are by nature income replacement benefits. They are intended to indemnify an employee for loss of income during his period of disability. Funds received by an employee for severance or upon termination from employment are inconsistent with the purpose of the group insurance plan as a contract of indemnity. A package, however it is characterized, is a collective payment made on the cessation of employment, and is not a payment intended to replace or indemnify the income that employee would otherwise earn.

[22] No action was ever commenced by Mr. Kerwin against AT& T. Therefore, no representative from AT & T was ever examined for discovery. The only documents that evidence the nature of Mr. Kerwin's package came from the disclosure made by AT & T to Manulife pursuant to a consent given by Mr. Kerwin for AT & T to make that disclosure.

[23] Mr. Kerwin states that he did not commence a legal action against AT & T despite threatening to commence legal proceedings because he received the package in exchange for his agreement to forego commencing any proceeding. He relies on the decision of the Supreme Court of Canada in *Tsiaprailis v. Canada*, [2015] 1 S.C.R. 113 for the submission that a settlement that does not describe the breakdown of its component parts is not taxable as income.

[24] Mr. Kerwin also relies on the decision of this Court in *Canada Life Assurance Co. v. Donohue*, 1999 Carswell Ont. 3038 (SCJ). In *Donohue*, the insurer applied for a declaration that the integration provision of the group policy issued to Mr. Donohue's employer applied to a lump sum payment he received as severance pay. Severance pay was not specifically mentioned as a source of income that was subject to integration with benefits payable under the policy.

[25] After reviewing the authorities relating to contractual interpretation in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery and Insurance Co.* (1997), [1980] 1 S.C.R. 888, Justice Lalonde found that as the exclusion did not specifically mention severance pay, Canada Life had not made it clear that payment of this nature qualified for integration. In the result, Justice Lalonde declined to consider that the severance pay that Mr. Donohue received should be integrated, or deducted from LTD payments.

[26] In the alternative, Justice Lalonde found that the severance pay that Mr. Donohue received was neither continuation of salary or income from any employment: *Henderson v. Canadian General Life Insurance Company* (1994), 2 C. C.E. L. (2nd) 39.

[27] Mr. Kerwin takes the position that the same principles apply in this case.

Discussion

[28] The actual language used by Manulife in its group insurance plan for AT & T and its employees expressly provides that the amount of a disability benefit payable is the benefit amount shown in the benefit schedule, *less any amount of benefits* the employee receives, or is entitled to receive, from various sources *for the same or related disability*. The sources are then specifically set out, which includes the following:

> f) earnings or payments from any employer, including severance payments and vacation pay;

[29] The landscape regarding the deductibility of payments received from other sources from amounts payable under an insurance policy has generally been altered by the decision of the Court of Appeal in *Cobb v. Long Estate*, 2017 ONCA 717. *Cobb v. Long Estate* was an appeal decided in the context of a claim for damages where accident benefits were deducted as collateral benefits under an automobile insurance policy, among other issues. At paragraph 55, Justice MacFarland stated on behalf of the Court that:

> [55] For these reasons, *s. 267.8(1)* of the *Insurance Act* requires deduction of all income replacement SABs, and all payments in settlement of claims for income replacement SABs, that the plaintiff receives before trial from the total of all damages awarded at trial for past and future income loss arising from the same incident.

[30] In *El-Khodr v. Lackie*, 2017 ONCA 716 released the same day, the Court of Appeal provided greater insight into the principle of broadly matching source payments against statutory deductions. Justice MacFarland described it this way in paragraph 35:

> [35] In my view, strict qualitative and temporal matching requirements should not be applied to s. 267.8 for two chief reasons: (a) the policy rationale 2017 ONCA 716 (CanLII) underlying *Bannon* is not relevant to the current statutory scheme; and (b) *Bannon* may no longer be good law in this province.3 Like the approach that this court adopted with respect to the deductibility of pre-trial benefits in *Basandra v. Sforza*, 2016 ONCA 251, 130 O.R. (3d) 466, and which is the subject of the appeal in the *Cobb* case, the assignment and trust provisions of the Insurance Act require the court to match benefits that will be received after trial to the broad, enumerated statutory categories only in a general way.

[31] At paragraph 60, Justice MacFarland described how an insurer is required only to match statutory benefits that fall generally into the "silos" created by section 267.8 of the *Insurance Act* with damages for similar loss in a tort case:

> [60] I agree with Sanderson J. that the present legislation does, to a limited extent, import a matching requirement. The court is required only to match statutory benefits that fall generally into the "silos" created by s. 267.8 of the Insurance Act with the tort heads of damage. Income awards are to be reduced only by SABs payments in respect of income loss and health care awards only by SABs payments in respect of health care expenses. The latter item is, I suggest, deliberately broad enough to cover all manner of expenses that relate to health care and would include medications, physiotherapy, psychology sessions, assistive devices and the like. All manner of other expenses that are covered by SABs and that do not fall under the income category or the health care category fall into the "other pecuniary losses" category.

[32] Although the appeals in *Cobb v. Long Estate* and *El Khodr v. Lackie* were concerned with the deductibility of collateral benefits under automobile policies, I consider the approach taken by the court is of general application

when dealing with a policy deduction, subject to the specific language in the policy and the context in which a claim arises.

[33] Manulife refers to Mr. Kerwin's record of employment and the payroll record from ADP that shows income was paid to him as part of the settlement. It argues that income tax was withheld and remitted to Canada Revenue Agency from that settlement, and that a certain amount of the settlement was directed to Mr. Kerwin's RRSP to defer tax as though it was income. Manulife refers to the letter from Mr. Burns dated November 28, 2016 from Mr. Burns to Mr. Orellana at Manulife, in which he enclosed the settlement documents between Mr. Kerwin and AT & T.

[34] It is clear from the materials filed on the motion that Mr. Kerwin first claimed that he was entitled to 30 months' pay in lieu of notice. Mr. Kerwin later modified this position for negotiating purposes to 21 months. There was also evidence in those materials that negotiations took place about resolving the notice claim for 19 months' pay. Unfortunately AT & T did not include a definitive statement in the settlement documents of what notice period, if any, was used as a basis for the amount paid.

[35] AT & T was content to have its termination letter to Mr. Kerwin dated September 29, 2015 revised and re-dated on February 4, 2016 to reflect the final

terms of the settlement reached. Mr. Kerwin signed a release, also in revised form, on the same date. Both Manulife and Mr. Kerwin rely on their documents as critical evidence on this motion. Unfortunately, their documents provide the basis for argument to both sides, and leave nothing definitive for the court to make the necessary finding of fact.

[36] For instance, the revised letter from AT & T has the word "severance" struck out in several places to leave the word "package" standing alone. Mr. Burns argues that this shows the "lump sum" nature of the payment, without its characterization in whole or in part. However, the term "severance" remains in other places. Other features resemble a settlement package for a discharged employee to receive his monthly salary for a number of months as a lump sum, suggesting an income replacement or indemnity arrangement.

[37] The Release itself provides no answer. Mr. Jermane relies upon the language of the Release to include all claims, including severance pay and salary in lieu of notice. Mr. Burns refers to the revisions that take out the term "severance" in order to argue that the Release was given to embody Mr. Kerwin's agreement to waive all claims generally. Mr. Jermaine counters this argument by pointing to the second page of the Release where it states that Mr. Kerwin is giving up claims under the *Canadian Human Rights Code*, and acknowledges he has no grounds to make a claim in any event.

[38] It is clear from a broad reading of the Manulife policy that a "payment" received by an employee from an employer as one of the designated sources is a "benefit" that could be deducted from the amount of LTD benefits payable by Manulife. This is how Manulife reads the policy. However, the policy deduction is subject to the qualification that the net amount of the disability benefit is payable, once the amount of the benefits the employee receives from a designated source "for the same or related disability" have been deducted from the amount of LTD benefits payable under the policy.

[39] From the language found in the policy, it is open for the court to interpret the policy to mean that the employee must be receiving payments from the employer under subparagraph (f) either as a disability payment, such as short term disability payments, or for income replacement purposes. This is demonstrated by the other sources described as exclusions when this part of the policy is read as a whole. However, as payments excluded from sources that must be deducted also include severance payments and vacation pay, I interpret the policy to mean that the employee does not necessarily have to remain employed for income of this nature to be a policy deduction. The payment the employee might receive could include future severance payments and vacation pay on a contractual or statutory basis, paid or payable upon termination of the employment relationship.

[40] There have been no examinations for discovery in this action. There were no cross-examinations on the affidavits filed on this motion for summary judgement. There were no affidavits filed by Mr. Orellana from Manulife who negotiated the settlement with Mr. Burns. There was no affidavit from Jackie Kot, *Human Resources Country Manager- Canada* for AT & T, or from Catherine Pollock, counsel for AT & T at Faskin Martineau DuMoulin LLP who finalized the package for Mr. Kerwin. Conversely, Mr. Burns has given no evidence as a witness about the components of the package he negotiated with AT & T on behalf of Mr. Kerwin. Mr. Burns could not file an affidavit because he is currently counsel for Mr. Kerwin in this action against Manulife. As counsel, he cannot testify as a witness and act as an advocate at the same time.

[41] I am not confident that I have sufficient evidence on the current record to make findings of fact on which to apply the law in order to make a just adjudication of the action on the merits. I therefore conclude that the basis upon which Mr. Burns negotiated Mr. Kerwin's retirement package with AT & T, in its entirety or in its component parts, is a genuine issue requiring a trial.

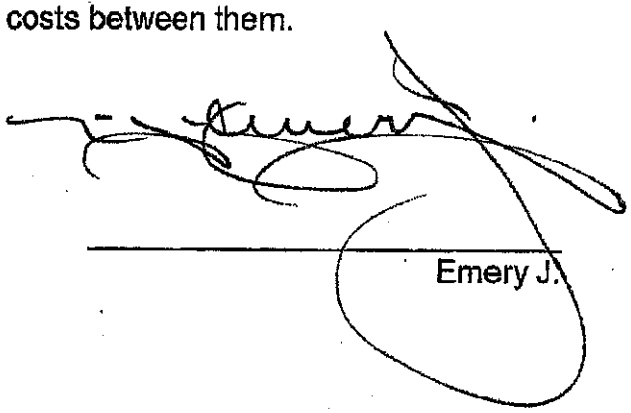
[42] Manulife's motion for summary judgment is therefore dismissed.

[43] As this motion was brought early in the life of the action, it would make no sense for me to remain seized of the action within the spirit of the direction given

in *Hryniak*. The litigation will take its course as evidence is disclosed and developed over the conduct of the action.

[44] The parties are urged to resolve the costs of the motion, if possible. If Mr. Kerwin requires a ruling on costs, his counsel shall file written submission by December 8, 2017. Manulife shall then have until December 15, 2017 to file responding submissions. No submissions in reply shall be permitted, without leave. All written submissions shall consist of no more than three pages, not including any time dockets or offers to settle. All written submissions may be made by fax to my Judicial Assistant, Ms. Melanie Powers, at 905-456-4834 in Brampton.

[45] If no submissions are received by December 15, 2017, the parties shall be deemed to have resolved the issue of costs between them.



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