

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Wightman Estate v. 2774046 Canada
Inc.,***
2006 BCCA 424

Date: 20060929
Docket: CA033485

Between:

**The Estate of Sam Wightman, Deceased, by the Executor Christina Wightman,
and the said Christina Wightman**

Appellants
(Plaintiffs)

And

**2774046 Canada Inc., NLK Enterprises Inc., NLK Group GP Inc., and Jaakko
Poyry NLK Inc.**

Respondent
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

M. Tevlin and B. Curtis

Counsel for the Appellants

M. Korbin

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia
8 June 2006

Place and Date of Judgment:

Vancouver, British Columbia
29 September 2006

Written Reasons by:

The Honourable Mr. Justice Smith

Concurred in by:

The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine

VANCOUVER

SEP 29 2006

COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] It has long been a tenet of our law that a contract may be brought to an end by operation of law and the parties discharged from further performance if, without the fault of either party, the circumstances in which it was expected to be performed have changed so radically that performance would be impossible or at least something fundamentally different than was initially contemplated. In such circumstances, the contract is said to be frustrated.

[2] This appeal raises the question of the applicability of this doctrine to an employment contract that provided insurance for payment of long-term disability benefits to a totally disabled employee for the remainder of his working life. The appellant contends that a contract of employment can never be frustrated by the disabling sickness of an employee if the contract provides for such long-term disability benefits. She submits that the doctrine requires an unforeseen supervening event for its operation and that, contrary to the conclusion of the trial judge, the contract of employment in this case was not frustrated by the employee's sickness since, by including such benefits in their contract, the employer and employee had contemplated and provided for this event.

[3] For the reasons that follow, I do not agree. That the parties have foreseen the possibility of a particular supervening event and have made some provision for it in their contract does not necessarily preclude frustration of the contract upon the happening of the event. The critical question is whether the parties have provided

that their contractual relationship will continue despite the radical change in circumstances brought about by the event.

[4] Here, although it is true that the parties contemplated the possibility of the employee's disabling sickness and hedged their respective losses with long-term disability insurance purchased by the employer, they did not provide that the employment relationship would continue indefinitely despite this new circumstance. Rather, their contract provided that the long-term disability benefits would be paid whether or not the employment contract should be brought to an end by the employee's sickness. Accordingly, the trial judge did not err in concluding on the facts as he found them that the employee's sickness frustrated the contract and discharged the parties from further performance.

Background

[5] This is an appeal from a judgment of Mr. Justice Halfyard of the Supreme Court of British Columbia after a summary trial conducted pursuant to Rule 18A of the *Rules of Court*, B.C. Reg. 221/90, by which he dismissed an action brought by the executor of the estate of Sam Wightman claiming damages for failure to give reasonable notice to Mr. Wightman of the termination of his employment and for breach of an alleged oral agreement to continue to pay his salary after he was dismissed. The appellant seeks an order that the trial judgment be set aside and that judgment be entered for damages for failure to give reasonable notice. The appellant does not appeal from the dismissal of her claim on the alleged oral

contract. The respondents have cross appealed from the trial judge's conditional findings in respect of damages.

[6] Mr. Wightman died of a heart attack on 30 March 2004 at the age of sixty-one following surgical implantation of a heart pacemaker. The appellant, his widow and executor of his estate, brought the underlying action against three companies that stood in succession as his employer over a period of twenty-eight years. For convenience, I will refer to these companies collectively as "the Employer".

[7] Mr. Wightman began working for the Employer on 1 December 1975 under an oral contract of employment of indefinite term. Although such a contract may be terminated by either party at any time without cause, reasonable notice of termination must be given and damages may be awarded for the failure to do so.

[8] The Employer provides engineering and consulting services, primarily to businesses in the forest products industry. Mr. Wightman was a senior project manager at the time of his dismissal. He was a hard-working, competent, and valued employee who loved his work.

[9] Unfortunately, Mr. Wightman experienced a number of serious health problems. First, he required a kidney transplant in 1984. Later, he developed angina, arthritis in his hips, and gout. He took short-term disability leave from work in 1996 and 1997 and then, in 1997, he was diagnosed with severe coronary artery disease. Next, his kidney function deteriorated and it was discovered in March 2000 that his body was rejecting his transplanted kidney. His several conditions worsened

progressively until he was unable to continue to work and, on 18 February 2002, he went on sick leave. He never returned to work.

[10] Mr. Wightman was a beneficiary of an employees' group benefits plan, purchased and paid for by the Employer. The plan provided insurance coverage for the employees, including life insurance, survivor benefits, and both short-term and long-term disability insurance. During his period of sick leave, Mr. Wightman received short-term followed by long-term disability benefits in the amount of two-thirds of his salary as provided in the plan.

[11] In the fall of 2003, the second- and third-named respondents negotiated a sale of the assets of the business to the fourth-named respondent. The purchaser agreed to hire only some of the employees and it was a term of the sale that the vendors would terminate the employment of the remainder, who comprised about one-third of the work-force. This group included Mr. Wightman, whose employment was terminated on 11 December 2003.

[12] Although his employment was terminated, Mr. Wightman continued to receive the long-term disability benefits until he died, since the group benefits plan provided for their payment until he ceased to be disabled as defined in the plan, until he reached age sixty-five, or until his earlier death.

[13] It is common ground that the terms of the group benefits plan are incorporated in Mr. Wightman's employment contract. Thus, the disability benefits, although paid by the plan underwriter, discharged the Employer's contractual obligation to Mr. Wightman.

[14] The Employer admitted that Mr. Wightman was dismissed without notice and without cause. The Employer's defence to the wrongful dismissal action was that it had been discharged from performance of the contractual obligation to give reasonable notice because, at the time of the dismissal, the contract of employment had been frustrated by the serious, lengthy, and ongoing sickness that prevented Mr. Wightman from working.

The Trial Judgment

[15] The trial judge, whose reasons for judgment are available at 2005 BCSC 1393, found that Mr. Wightman remained totally disabled from working when he was dismissed. He described Mr. Wightman's condition at that time and the outlook for his return to work as follows:

[103] As of December 11, 2003, the date of his dismissal, Mr. Wightman was still totally disabled from working. He was 61 years of age. During his disability leave, Mr. Wightman's conditions relating to his kidney, hips, angina and gout had worsened. He had developed two further significant problems, in that his carotid artery disease had become symptomatic, and he was being adversely affected by his parathyroid gland.

[104] As of December 11, 2003, Mr. Wightman would not be able to work until such time as he could successfully undergo coronary bypass surgery and then, kidney re-transplantation surgery. By that date, Mr. Wightman had not yet decided whether he would take the risk of heart surgery, and of course no date for potential heart surgery had been scheduled.

[16] The trial judge framed the issue in this way:

[105] The employer must prove on the balance of probabilities that Mr. Wightman's incapacity, looked at before the purported dismissal, was of such a nature, or it appeared 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.

[17] The trial judge took this statement from the decision in **Marshall v. Harland & Wolff Ltd.**, [1972] 2 All E.R. 715, [1972] 1 W.L.R. 899 (N.I.R.C.), which was accepted as authoritative by both sides at trial. In **Marshall**, an employee who became disabled due to illness after twenty-three years of service was terminated without notice after an eighteen-month absence. Sir John Donaldson (as he then was) concluded, for the court, that the termination was wrongful. In so doing, he set out the essential question and suggested the following guidelines for determining whether incapacity due to sickness brings an end to a contract of employment for an indefinite period terminable by notice, at 718-19:

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? In considering the answer to this question, the tribunal should take account of:

(a) *The terms of the contract, including the provisions as to sickness pay* - The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to

make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

(b) *How long the employment was likely to last in the absence of sickness* - The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.

(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.

(d) *The nature of the illness or injury and how long it has already continued and the prospects of recovery* - The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) *The period of past employment* - A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.

These factors are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account. . . Any other factors which bear on this issue must also be considered.

[18] The trial judge focussed on the degree and duration of Mr. Wightman's incapacity. He said,

[106] In my opinion, in this case the most important factor of the five factors referred to in the *Marshall* case, is the following:

“(d) The nature of the illness or injury and how long it has already continued and the prospects of recovery

The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.”

[19] He concluded that the employment contract was frustrated at the date of dismissal by reason of Mr. Wightman’s medical disability. Accordingly, he dismissed the wrongful dismissal action, stating,

[107] At the time of his dismissal, Mr. Wightman had been totally disabled from working for more than 21 months. His prospects for recovery from the conditions that disabled him from working were uncertain at best. I infer, on the balance of probabilities, that his disability, at the time of his dismissal, was 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.

...

[109] In my opinion, as of the summer or fall of 2003, there was no reasonable possibility that Mr. Wightman would be able to return to work by the end of 2004. In my opinion, the length of Mr. Wightman's incapacity, the increasing degree of his incapacity to work, and the likelihood that the incapacity would continue for a further lengthy period of time, support the conclusion that, before the time when he was dismissed, Mr. Wightman was permanently disabled, within the meaning attributed to that term in the relevant authorities.

[110] Accordingly, the defence of frustration has been proved, and the cause of action based on breach of the employment contract must be dismissed.

The First Ground of Appeal

[20] The appellant submits as her primary ground of appeal that the trial judge erred in treating the employment contract as frustrated by Mr. Wightman's total disability. She contends that he should have relied on factor (a) in the *Marshall* decision and concluded that, since the contract provided for long-term disability benefits, it remained in effect at the time of the dismissal. Accordingly, she submits, the contract required reasonable notice of dismissal and Mr. Wightman was entitled to damages in lieu thereof. Although the trial judge referred to this submission in his reasons for judgment, he did not address it directly.

[21] It is common ground that the doctrine of frustration can apply to employment contracts in cases where an employee is unable to work because of a disabling illness: see *Dartmouth Ferry Commission v. Marks* (1903), 34 S.C.R. 366 at 374-75. In such cases, the question is whether the disability prevents the performance of the essential functions of the employee's job for a period of time sufficient to say that, in a practical or business sense, the object of the employment has been frustrated: see *Jackson v. Union Marine Ins. Co.* (1874), L.R. 10 C.P. 125 at 145, [1874-80] All E.R. Rep. 317 (Ex. Ch.); *Yeager v. R.J. Hastings Agencies Ltd.* (1984), [1985] 1 W.W.R. 218 at 240, 5 C.C.E.L. 266 (B.C.S.C.).

[22] In light of the appellant's submission that frustration cannot apply in this case, it is necessary to say something about the juridical basis of the doctrine.

[23] The theoretical underpinning of the doctrine has evolved from its earliest expression. Initially, many judges applied an implied-term theory. For example, in