COURT OF APPEAL FOR ONTARIO

CITATION: Brito v. Canac Kitchens, 2012 ONCA 61
DATE: 20120131
DOCKET: C53462

Cronk and Blair JJ.A. and Strathy J. (*ad hoc*)

BETWEEN

Frank Brito, Rene Figueroa, Bruno Lago, Albino Melo,
Luis Romero Olguin, Eduardo Sturla-Hortal,
Kim Ly Tien, Souheil (Sam) Wahab

Plaintiffs (Respondent)

and

Canac Kitchens, a division of
Kohler Canada Co., Compagnie Kohler Canada

Defendant (Appellant)

Dave J.G. McKechnie, for the appellant

Peter A. Grunwald and Peter Israel, for the respondent

Heard: January 26, 2012

On appeal from the judgment of Justice R.S. Echlin of the Superior Court of Justice, dated February 18, 2011.

Cronk J.A.:

(1) Introduction

[1] In July 2003, the appellant terminated the employment of the respondent, a 24-year long employee, from his job as a kitchen cabinet and door maker and wood workshop production lead-hand, without cause. The respondent was 55 years of age. To that point, he had spent his entire working career in Canada in

the appellant's employ. His job responsibilities included preparing, sanding and assembling cabinets and doors, collecting reports and supervising production in the wood shop.

[2] On dismissal, the appellant paid the respondent an amount equal to the minimum statutory requirement for pay in lieu of notice and severance (32 weeks salary), plus associated benefits for a period of eight weeks. The respondent found alternate employment with a start-up kitchen cabinet company within about two weeks. However, his compensation with his new employer was at a significantly lower rate than he had received with the appellant and no disability benefits were provided. In contrast, the appellant had provided both short-term disability (STD) and long-term disability (LTD) benefits to its employees under a company sponsored disability benefits plan (the "Plan").

[3] About one and one-half years after the respondent commenced his new employment, he was diagnosed with cancer of the larynx (left vocal cord). In early November 2004, he underwent surgery for the removal of his cancer. A course of post-surgical treatment, including chemoradiation and the insertion of a tracheostomy tube in the respondent's throat, followed.

[4] The respondent eventually sued the appellant for damages for wrongful dismissal and associated benefits, including STD and LTD disability benefits to which the respondent claimed he would have been entitled under the Plan but for

the wrongful termination of his employment. The trial judge held that the termination of the respondent's employment was wrongful and that the appropriate notice period was 22 months. He awarded the respondent damages for lost employment income for 22 months, STD benefits for 17 weeks, and LTD benefits thereafter, to age 65. He also awarded "ancillary" damages in the amount of $15,000 on account of what he viewed as the appellant's wrongful conduct in respect of the respondent's termination and the litigation.

[5] The appellant appeals from the award of damages for lost LTD benefits and the award of ancillary damages.

(2) The Plan

[6] The Plan provided that an employee met the definition of "total disability" for the purpose of LTD benefits if the employee was prevented, by restriction or lack of ability due to illness or injury, from performing "the essential duties" of:

> a) *his own occupation*, during the Qualifying Period and the two years immediately following the Qualified Period; and
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> b) *any occupation* for which the Employee is qualified, or may reasonably become qualified, by training, education or experience, after the two years specified in part a) of this provision. [Emphasis added.]

[7] The Plan also required an employee to submit to medical, psychiatric, psychological, functional, educational and/or vocational examinations or

evaluations by an examiner selected by the Plan administrator and, further, to participate in a vocational rehabilitation plan.

(3) Damages Award for Lost LTD Benefits

[8] The trial judge found that the respondent became disabled on November 6, 2004. The appellant accepts that by reason of that disability, the respondent was entitled to damages for STD benefits during the period from November 5, 2004 to March 4, 2005. However, the appellant asserts that the respondent was never "totally disabled" within the meaning of the Plan so as to qualify for disability benefits after November 1, 2005. Further, and in the alternative, the appellant says that there was no evidence at trial that the respondent will remain disabled until his 65th birthday, the date when LTD benefits would terminate in accordance with the provisions of the Plan.

[9] The trial judge rejected these arguments, concluding that the respondent had "discharged his evidentiary burden that he is, "totally disabled" by both *viva voce* evidence and medical evidence." Contrary to the appellant's submission, the trial judge's reasons, read as a whole, indicate that this finding reflected his conclusion concerning the respondent's overall evidentiary burden, both with respect to the respondent's STD benefits claim and his LTD benefits claim in its entirety. In my view, for the reasons that follow, this finding was open to the trial judge on the record before him.

[10] The first criterion for total disability under the Plan required that the respondent be unable to perform the essential duties of his own occupation during the "Qualifying Period" and the two years immediately thereafter. In the respondent's case, after the exhaustion of his STD benefits, this period ran from March 4, 2005 to March 4, 2007.

[11] As applicable to the respondent, the second criterion for total disability under the Plan required that the respondent be unable to perform the essential duties of any occupation for which he was or might reasonably become qualified – by training, education or experience – after March 4, 2007.

[12] There was evidence before the trial judge which, if accepted, supported the conclusion that the respondent was totally disabled within the meaning of the Plan from and after March 4, 2005 to the date of trial and was likely to remain so to age 65. This included evidence:

> (1) of the respondent himself that, following the removal of his tracheostomy tube in June 2005, he continued to be short of breath, his breathing never returned to normal, his strength was reduced, he tired easily, and he could not return to work due to: (a) exposure to work environment dust; (b) continued shortness of breath; (c) intermittent loss of his voice; and (d) continuing strength reduction;
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> (2) of the respondent's treating radiation oncologist, Dr. Bernard Cummings, that after 2005, the respondent developed a chronic condition of abnormal tissue growth on his voice box that impaired his breathing. This required three further

surgeries to the date of trial (November 2008, May 2009 and October 2009) to remove the inflammatory tissue, with the expectation of similar surgeries in the future. Further abnormal tissue below the respondent's vocal cord was detected in February 2010;

(3) of Dr. Cummings, that following the respondent's cancer surgery: (a) his voice box never returned completely to normal; (b) he never recovered to his pre-illness state of health; (c) he complained persistently of hoarseness, of variable quality or strength of voice and dryness in his throat; (d) he was required to avoid work in dusty and noisy environments where he would be required to communicate; (e) he had episodes of coughing tissue or discoloured secretions from his throat; and (f) he would not recover to the point where he could work in a dusty or noisy environment;

(4) of the respondent's treating surgical oncologist, Dr. Patrick Gullane, that although the respondent's initial therapy cured his cancer, the respondent was left with some deficits, including edema or swelling in his voice box and damage to his cartilage. Further, Dr. Gullane opined that he "would never recommend that [the respondent] work in a dusty or noisy industrial environment"; and

(5) of a vocational evaluation specialist, David Antflick, who offered his opinion that, given his limited education, training and experience and his inability to work in noisy, dusty industrial environments, the respondent, although qualified for such jobs as packaging, was not capable of any work after November 2004.

[13] The appellant called no medical or other expert evidence to counter this evidence electing, instead, to confine its defence to cross-examination of the respondent and his witnesses.

[14] In these circumstances, in my view, there was a firm evidentiary foundation for the trial judge's conclusion that the respondent met his burden to establish his total disability within the meaning of the Plan. This conclusion indicates that the trial judge accepted, as he was entitled to do, the evidence led by the respondent, in part described above, regarding his total disability.

(4) Alleged Mitigation Failure

[15] The appellant also argues that, contrary to the requirements of the Plan, the respondent failed to engage in job re-training efforts and to seek alternative employment following March 2005. As a result, the appellant says, the respondent failed to discharge his obligation to mitigate his loss of disability benefits.

[16] I disagree. As I have indicated, there was evidence at trial that the respondent was unable to work after March 2005 due to the restrictions imposed by his treating physicians on suitable work environments, his continuing condition, and his skills set. There can be no obligation to mitigate damages by finding alternate employment where the employee is totally incapable of working.

[17] Moreover, there was no evidence at trial that the respondent was requested and refused to submit to any examination or evaluation required or specified by the appellant or the Plan administrator. Nor was there any evidence that the respondent was ever requested and refused to participate in any vocational rehabilitation plan or that appropriate rehabilitative or vocational training courses were even available to, let alone rejected or ignored, by the respondent.

[18] In these circumstances, I agree with the respondent that it does not lie in the appellant's mouth to assert mitigation failure. I would not give effect to this ground of appeal.

(5) Punitive Damages Award

[19] In contrast, I agree with the appellant that the trial judge's "ancilliary" damages award cannot stand.

[20] The trial judge's reasons indicate that this award was based on what he characterized as "cavalier, harsh, malicious, reckless, outrageous and high-handed" conduct by the appellant in its treatment of the respondent on termination and during the litigation. The impugned award, therefore, was in the nature of punitive damages.

[21] However, the respondent did not claim punitive damages in his statement of claim and there is no suggestion that any related pleadings amendment was

obtained to advance such a claim. It is also conceded that the respondent did not seek or put this relief in issue at trial.

[22] As a result, in my opinion, whatever view one might hold of the appellant's conduct, it was not open to the trial judge to award punitive damages.

(6) Disposition

[23] Accordingly, for the reasons given, I would allow the appeal in part and set aside the trial judge's $15,000 award of punitive damages. In all other respects, I would not interfere with the trial judgment. The respondent has been substantially successful on this appeal. I would therefore award him some of the costs of the appeal, fixed in the total amount of $20,000, inclusive of disbursements and all applicable taxes.

Released: "Jan 31 2012"
"EAC"

"E.A. Cronk J.A."
"I agree R.A. Blair J.A."
"I agree G.R. Strathy J. (*ad hoc*)"