

“Double Dipping”: Court Allows Damages and Disability Benefits

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Two recent Ontario decisions have again raised the issue of whether wrongfully dismissed employees receiving disability benefits should be entitled to both damages in lieu of reasonable notice and disability benefits. These cases revisit interesting legal issues which were addressed in 1997 by the Supreme Court of Canada in *Sylvester v. British Columbia*.

In *Sylvester*, the Court held that long term disability benefits could be deducted from damages awarded to wrongfully dismissed employees in lieu of reasonable notice. In that case, the employer paid the disability benefits directly. The Court said that an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned if the employee had worked during the notice period. The Court stated that the issue of whether or not disability benefits are deductible depends on the terms of the employment contract and the intention of the parties. In *Sylvester*, the contract did not provide for the employee to receive both disability benefits and damages for wrongful dismissal, nor could such an intention be inferred from the facts.

The decisions in *McNamara v. Alexander Centre Industries Ltd.* and *Sills v. Children's Aid Society of the City of Belleville* appear to have narrowed the application of the decision in *Sylvester*. In these cases, the Ontario Court of Appeal allowed wrongfully dismissed employees to “double dip” and receive both damages in lieu of notice and disability benefits. In both cases, the disability benefits were paid by third party insurers, not the employer, while the employer paid all of the benefit premiums.

In *Sills*, a social worker was given 14.5 months working notice of termination and was offered an additional 3.4 months severance pay on termination. Within 2 months of receiving notice, Sills suffered from depression and was unable to work during the rest of the notice period. She received short term disability payments from the group insurer plus a top-up from her sick-leave bank. Later she received long term disability benefits and sued for wrongful dismissal. The trial judge found that the proper notice period was 19.4 months and credited the employer with 2.5 months which Sills worked after receiving notice. The Court found that Sills had earned the disability benefits as part of her compensation package and in the absence of a contrary intention, the disability benefits could not be deducted from the reasonable notice damages because Sills had contributed to the plan. The Court stated that an employer is not relieved of its obligation to pay damages for wrongful dismissal by virtue of the existence of a disability plan. The Court applied *Sylvester* and held that there was no evidence that the parties did not intend employees to be entitled to both damages and disability benefits. Sills had contributed to the benefits indirectly as “part of a trade-off in arriving at benefits and salary”. The trial decision was upheld by the Ontario Court of Appeal.

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In *McNamara*, the employee specifically negotiated full benefits in exchange for a lower salary at the time he was hired because his wife had health problems. The employer paid all of the premiums. McNamara was employed for 24 years when he suffered an illness. The employer immediately terminated his employment without notice or pay in lieu of notice. McNamara received long term disability benefits from the employer's insurer and sued for wrongful dismissal. At trial he was awarded 24 months' salary in lieu of notice with no deduction for the disability benefits which he had received. In upholding the trial decision, the Court of Appeal noted that the case differed from *Sylvester* in that an independent third party insurance carrier provided McNamara's disability benefits. McNamara had indirectly provided consideration for the benefits since, at the time he was hired, he had forgone a larger starting salary in exchange for a full benefits package. The Court said:

"It is one thing to be concerned, as the Court was in *Sylvester*, with double recovery where money comes from a single source, the employer. The concern should be significantly diminished when the double recovery flows from clear entitlement to two different and legitimate recoveries (damages for wrongful dismissal and disability benefits) and neither payor would be responsible for paying even a penny more than it should pay pursuant to its individual obligation."

The issue of double recovery will no doubt be the subject of more decisions and it may be some time before the matter is clarified. From an employer perspective, it seems unfair that even when the employer pays premiums, the courts may not deduct disability benefits from damages in lieu of reasonable notice. From the perspective of an employee who is not receiving disability benefits, it may seem unfair that a disabled employee who is dismissed may be entitled to both disability benefits and pay in lieu of reasonable notice.

Employers may be able to limit their potential liability by addressing this issue upon hiring. The cases consistently hold that evidence that the parties did not intend double recovery will be taken into consideration by the Courts. The employment agreement could state that in the event an employee is dismissed while receiving disability benefits (from the employer directly or from a third party insurer), the value of those benefits will be deducted from any pay in lieu of reasonable notice. By addressing this issue in the employment agreement, the maximum amount that a dismissed employee could

recover is an amount equal to the salary the employee would have earned had he or she not been wrongfully dismissed, regardless of whether or not the employee has received disability benefits.

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