CITATION: Fernandes and Peel Educational, 2015 ONSC 3753
COURT FILE NO.: CV-09-03521-00
DATE: 2015-06-18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: REMY FERNANDES AND
PEEL EDUCATIONAL & TUTORIAL SERVICES LIMITED C.O.B. as MISSISSAUGA PRIVATE SCHOOL

BEFORE: Lemon J.

COUNSEL: Gary Bennett, Counsel for the Plaintiff

Heather Laidlaw, Counsel for Peel Education & Tutorial Services Limited

HEARD: May 15, 2015

E N D O R S E M E N T

THE ISSUES

[1] Mr. Fernandes sued Mississauga Private School for wrongful dismissal. The trial was heard over May and June of 2014 and I gave Judgment on November 12th, 2014, *Fernandes v. Peel Educational*, 2014 ONSC 6506. I dismissed the claim against the defendant Gabrielle Bush and she takes no part in this proceeding.

[2] I found that Mr. Fernandes had been wrongfully dismissed. I awarded him 12 months salary in lieu of notice. With respect to his claim for long term benefits, I said:

> [207] *Egan v Alcatel Canada Inc.,* [2006] OJ No 34, stands for the proposition that:
>
> > Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable.
>
> [208] The acts of Mississauga prevented Mr. Fernandes from making that claim and, accordingly, they are liable for his losses.
>
> [209] The plaintiff seeks the total amount of $226,000 with respect to this claim. Little argument was presented on the calculation of that figure. While I have sufficient evidence to calculate this amount, I do not have sufficient input from counsel to be sure of those calculations.
>
> [210] Two documents that summarize the terms of the policy were made exhibits however I do not have the terms of the insurance policy itself. From what I have, Mr. Fernandes' benefits would have continued until he reached age 65. He was born January 1, 1952 and is therefore 62 years of age. He is presently disabled and, on a balance of probabilities, I find that he will not be "gainfully employed in any job", as set out in the policy, before 65.
>
> [211] From the various exhibits, I believe that I can calculate that his monthly benefits would be $2000.00 per month and that this benefit would not attract tax. But, without submissions on this point, I could be wrong.

> [212] I do not think that I should attempt to calculate a capitalized value without assistance from counsel.
>
> [213] If counsel cannot agree on the calculation of these damages, I am content to hear argument on this point or receive written submissions, whichever is agreeable to the parties. Counsel shall advise within 30 days of the release of this judgment.

[3] I completed my reasons for judgment with:

> [223] If the parties cannot agree on costs, written submissions may be made to me after the determination or resolution of the benefit claim. Those submissions shall be no more than three pages (not including any offers to settle or bills of costs).

[4] Since that time, Mississauga has obtained new counsel. Discussions apparently ensued and some delay was necessarily the result. A further hearing was agreed upon and counsel agreed that:

1. The letter from Matthew Williamson dated April 22, 2015, shall be provided to Justice Lemon for the purpose of assisting him with the [long term benefit] determinations remaining to be made in this proceeding.

2. Counsel shall request Matthew Williamson to provide a second letter, which will also be provided to Justice Lemon for the purpose of assisting in his determinations.

3. There is no need for *viva voce* evidence.

4. The issues that are to be argued before Justice Lemon are the following:

i. Is the plaintiff obliged to produce dockets in support of the bill of costs? and

ii. Is the plaintiff entitled to receive the wrongful dismissal damages (12 month's salary) at the same time he is receiving the LTD benefits? (the "double dipping" issue).

5. The Matthew Williamson letters may be referred to and may assist the court on the issue of double dipping but are not determinative of the issue of the appropriateness of double dipping in this case.

[5] Submissions were heard on May 15, 2015; the following is my determination of those issues.

DISABILITY BENEFITS DEDUCTION

[6] Based on Mr. Williamson's letters, the parties agreed that the disability benefits are either $123,851.66 or $116,250.06. The difference of $7,601.60 is the net amount of disability income that would overlap with the 12-month notice period as found by me. The issue between the parties is whether $7,601.00 should be deducted from the damages otherwise payable by Mississauga.

Position of the Plaintiff

[7] Mr. Fernandes submits that his disability benefits should not be set off against his wrongful dismissal damages. He paid for the premiums for his

disability benefits and it would be unjust for Mississauga to receive a credit or set off against disability benefits that were financed by Mr. Fernandes.

[8] Absent an express provision in the employment contract precluding double recovery, it is reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow his employer to avoid responsibility for a wrongful act. See: *Sills v. Children's Aid Society of Belleville (City),* [2001] O.J. No. 1577, 53 O.R. (3d) 577 (Ont. C.A.) [Sills] at paras. 45 and 46; *McNamara v. Alexander Centre Industries Ltd.*, [2001] O.J. No. 1574, 53 O.R. (3d) 481 (Ont. C.A.) [McNamara].

Position of the Defendant

[9] The defendant submits that the disability payments should be payable on the termination of the 12 months' salary for wrongful dismissal but not before.

[10] To allow the disability benefits to be paid at the same time the full salary was paid for the notice period would amount to double recovery going over and above the objective of making the plaintiff 'whole' for his losses. Whether the damages are based in contract or tort, Mr. Fernandes should not be put into a better position than he would have been had the tort not been committed, nor the contract breached. It is fundamentally inequitable to award double payment

against a single defendant. It is submitted that to require an employer to do so would require a specific contractual provision to be set out in the employment contract.

[11] Mississauga submits that it is not seeking to take advantage of payments made by a third party under a contract of insurance to reduce its obligation to pay wrongful dismissal damages. Rather, it is only seeking to compensate the plaintiff for his losses.

[12] Mississauga relies on the Supreme Court of Canada decision in *Sylvester v. British Columbia* [1997] 2 S.C.R. 315, [1997] S.C.J. No. 58. There, the plaintiff was a government employee who was terminated during a period when he was receiving disability benefits from a third party insurer. He was successful in his wrongful dismissal action and was awarded damages for lost wages in lieu of notice. At trial, the disability payments were deducted from the wrongful dismissal damages. The Court confirmed this deduction.

[13] Justice Major found that the question of deductibility turns on the terms of the employment contract and the intention of the parties. The Court held that the disability contract was to be considered as an integral component of the employment contract. As here, “this contract did not provide for the respondent to

receive both disability benefits and damages for wrongful dismissal and no such intention can be inferred" (para .13).

ANALYSIS

[14] In many ways, it is difficult to reconcile *McNamara, Sills,* and *Sylvester*. In my view however, they turn on their facts. Here, the significant fact is that there is no insurer paying the benefits. Barring the deduction, Mississauga would be required to pay both the disability income and the employment income. None of the authorities that I have been provided, nor any that I could find, require an employer to pay both the wrongful dismissal and the benefit payments. See: *Sylvester; Egan v. Alcatel Canada Inc.* [2006] O.J. No. 34, 206 O.A.C. 44 (C.A.).

[15] The authorities that permit a plaintiff to receive both wrongful dismissal damages and long term disability benefits can be distinguished on the basis that the employee had been receiving benefits from a third party insurer and the employer was seeking to take advantage of the payments already paid by the insurer to reduce the damages to be paid.

[16] In *McNamara*, the Ontario Court of Appeal stated that the concern with double recovery 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 more than it should pay pursuant to its individual obligation.

[17] That is to say, in other reported cases where the deduction was not allowed, the disability insurer had been making payments under its contractual obligations. Those payments were separate and apart from the legal obligation of the employer. Here, there are no payments by the insurer nor will there be in the future. There have been none in the past.

[18] The contract in this case required Mr. Fernandes to join the comprehensive health plan instituted by Mississauga after the one-year probationary period. It provided that Mississauga would only pay him for ten sick days annually. Although Mississauga acknowledges that Mr. Fernandes paid for the insurance premiums, no evidence was tendered at trial to support a finding that the parties intended Mississauga to pay both salary and disability payments at the same time; the contract speaks directly against such an intention.

[19] Mr. Fernandes is to be placed in the position that he would have been in had the contract not been breached. He would have received employment income by way of notice from Mississauga and then would have received his long-term benefits from his insurer; he would not have received both from Mississauga. He has paid for disability benefits and he shall receive them from Mississauga after his employment income ends a year after his termination. He should not receive more benefits than for which he paid.

[20] For those reasons, Mr. Fernandes' benefit claim shall be quantified at $116,250.06.

BILL OF COST DOCKETS

The Issue

[21] The plaintiff has delivered a bill of costs for fees and disbursements in excess of $208,000.00.

[22] Rule 57.01(5) of the *Rules of Civil Procedure* provides that:

> After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service.

[23] Form 57 A provides, in part:

> In support of the claim for fees, attach copies of the dockets or other evidence.
>
> In support of the claim for disbursements, attach copies of invoices or other evidence.

[24] There are no dockets attached to the bill of costs of the plaintiff. There is no "other evidence" provided by the plaintiff.

Position of the Defendant

[25] Mississauga seeks to have Mr. Fernandes' counsel provide his dockets to support the bill of costs. It relies on the decision of Marrocco, J. in *Animal House Investments Inc. v. Lisgar Development Ltd.*, 179 A.C.W.S. (3d) 1065 [*Animal House*]. There, it was decided that:

> (a) The party against whom costs are ordered is entitled to documentation, such as dockets and invoices;
>
> (b) Dockets should be provided when requested and where the costs are significant; and

(c) Privileged or sensitive information can be deleted from the dockets.

[26] In *Juras v. Carbone,* [1999] O.J. No. 5017, 93 A.C.W.S. (3d) 963 [*Juras*], Quinn J. expressed the view that counsel is entitled to dockets on request to assist in submissions as to the general reasonableness of the costs being sought. Above all, the process is to arrive at a global figure that is fair to all parties. If requested, "dockets should be provided in respect of virtually all trials and in motions where the costs involved are significant (in excess of $5,000 is a common bench mark)".

[27] The defendant submits that dockets are required here because:

(a) Present defence counsel had no involvement in the case until after the trial, and accordingly no experience whatsoever as to the events that occurred from a cost perspective;

(b) On the basis of what has been submitted, the plaintiff is in violation of the *Rules* requiring 'dockets or other evidence';

(c) The plaintiff was not successful on all claims advanced. In particular, the action against the defendant Gabrielle Bush was dismissed; the claim for "intentional and negligent infliction of emotional and mental distress, mental suffering and psycho-

traumatic disability in the amount of $500,000.00 was dismissed, as was the claim for bad faith, aggravated damages, Honda and punitive damages"; and

(d) Under all of the circumstances, counsel for the defendant is in no position to make reasoned submissions on the question of costs, should they be ordered, without the production of proper dockets from the plaintiff.

Plaintiff's Position

[28] Mr. Fernandes submits that this is not an appropriate case to order the production of dockets. Such an order, it is submitted, would not provide the simplest, least expensive or most expeditious method of fixing the costs of the trial.

[29] Rule 57.01(5) provides that, after a trial, a party who is awarded costs shall serve a bill of costs on the other parties in the form of Form 57A. Rule 57.01(5) does not indicate the form of evidence to be tendered at a costs hearing. Form 57A requires either the dockets or other evidence.

[30] In *Animal House*, Marrocco J. gave the plaintiff the choice to produce either dockets or other evidence in support of the fees it was claiming. Mr.

Fernandes' detailed bill of costs with supporting invoices is "other evidence" in support of the fees and disbursements he will be claiming.

[31] Mr. Fernandes' draft bill of costs complies with Rule 57 and Form 57A by providing the following types of evidence:

a. It itemizes the claim for fees and disbursements;

b. It sets out the services provided at each stage of the litigation and the cost for the stage of the litigation, along with the total hours spent in that stage of the litigation and the hourly rate charged for those hours spent;

c. It indicates the names of the lawyers, students-at-law and law clerks who provided the services in connection with each item;

d. It states the name of each lawyer who is charging for fees; and

e. It provides the years of experience of each lawyer charging the fees.

[32] The evidence contained in Mr. Fernandes' bill of costs is derived from his privileged and confidential dockets. As such, it avoids the time consuming process of redacting the dockets.

[33] This case should be distinguished from *Juras*. The present bill of costs has provided Mississauga with enough evidence to properly assess the costs that will be sought when the trial has been completed.

[34] The fact that Mississauga chose to change legal counsel prior to the conclusion of the trial is not a compelling reason to force Mr. Fernandes to produce his privileged and confidential dockets.

[35] In *Juras*, Quinn J. stated the court should not indulge in a detailed analysis of dockets, but instead adopt a general, pragmatic approach, with an eye to the weight and feel of the case.

Analysis

[36] The day before the hearing, plaintiff's counsel provided a further bill of costs. That was filed on consent at the hearing. It is 16 pages, plus copies of all disbursement receipts. There is no dispute between the parties as to the disbursements.

[37] In submissions, but without evidence, the plaintiff's counsel advises that there is nothing in his new bill of costs that is not otherwise in his dockets, less confidential information.

[38] Counsel for the defendant, also without evidence, submits that she is not able to properly respond to the bill of costs because she was not counsel at trial.

[39] While I cannot rely on either of those submissions without an evidentiary background, the bill of costs is so detailed that I cannot imagine that there is much left to be obtained from the dockets. I cannot imagine what further information is necessary in order for counsel to respond to this bill of costs. On this record, I am not keen to require the plaintiff to go through the laborious process of providing all of those excised documents. That appears to be unnecessary when considering the materials already provided.

[40] However, the Rule and the cases are clear that dockets "or other evidence" is required. The bill of costs cannot be the "other evidence" to attach to the bill of costs. Besides dockets, "other evidence" could be an affidavit. I can imagine that this could lead to cross-examinations. That would lead to undertakings and refusals. That would lead to motions for undertakings and refusals. All for a process that, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties": see *Boucher v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3d) 291, at para. 24. The rule requires that the courts devise and adopt the simplest, least expensive and most expeditious process for fixing costs.

[41] Here, however, on balance, driven by the Rules and precedents, and with $199,000 in fees in issue, the production of dockets is not unreasonable. I will

therefore reluctantly require the plaintiff to provide the dockets to support the bill of costs. Having said that, I do not wish to add to a list of precedents that might be read as requiring dockets or other evidence in all cases. I can imagine that such a rule would not lead to the simplest, least expensive and most expeditious process for fixing costs.

[42] The plaintiff's counsel may redact all privileged or otherwise sensitive information. If a dispute arises concerning a particular redaction, the unredacted docket will be produced to me without production to the defendant and I will determine whether the redacted information must be disclosed.

[43] Costs of this hearing shall be part of the costs submissions.

[44] My initial endorsement was that both parties could provide cost submissions of no more than three pages. Given the substantial request for costs, and these added issues, the costs submissions shall be no more than ten pages (not including any offers to settle or bills of costs). The plaintiff shall provide his submissions first and the defendant second. There shall be no reply unless requested. I will leave it to the parties to work out the schedule but both submissions shall be to me no later than July 31, 2015.

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Lemon J.

DATE: June 18, 2015

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RE: REMY FERNANDES and PEEL EDUCATIONAL & TUTORIAL SERVICES LIMITED C.O.B. as MISSISSAUGA PRIVATE SCHOOL and GABRIELLE BUSH

BEFORE: LEMON J.

COUNSEL: Gary Bennett, Counsel for the Plaintiff

Heather Laidlaw, Counsel for the Defendant

ENDORSEMENT

Lemon J.

DATE: June 18, 2015