Cassels

Deal or No Deal? When is a Final Release Actually Final?

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A recent decision of the Ontario Superior Court of Justice illustrates the challenges employers can face when attempting to enforce a signed release. In *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2018 ONSC 4023 (CanLII), the Court was asked to consider on a motion for summary judgment on whether or not the release signed by Mr. Swampillai at the time of the termination of his employment barred him from pursuing a claim for long term disability benefits. Justice Cavanaugh found that Mr. Swampillai had signed the release under circumstances that were unconscionable and, as such, the release could not prevent him from pursuing a claim for long term disability (LTD) benefits. Mr. Swampillai was thus free to continue his action against his former employer, Royal & Sun Alliance Insurance Company of Canada (RSA) and Sun Life Assurance Company of Canada (Sun Life), who acted as the administrator of RSA's long term disability benefits program, even though the release signed by Mr. Swampillai specifically cited "long term disability benefits" as a released claim. So what went wrong for RSA? To understand the Court's decision, we need to review the circumstances that existed at the time that RSA and Mr. Swampillai negotiated the severance package.

Mr. Swampillai had worked for RSA as first a contract employee and then a permanent, full-time employee since 2001. He worked as a distribution clerk and in the mail room, with some physical demands like lifting and moving. In or around 2013, he developed certain medical conditions that prevented him from working in his role as a distribution clerk. He first went on short term disability leave and then transitioned to long term disability leave, where he remained for a period of two years. Like many LTD plans, RSA's LTD distinguished between being disabled from one's "own occupation" and "any occupation." After two years of disability, an employee would only qualify for continued LTD benefits if they could show that they were disabled from "any occupation." If not, they were expected to return to work in some capacity.

Unlike many employers, RSA was self-insured for long term disability benefits. RSA retained Sun Life to adjudicate employee claims for LTD but Sun Life was not responsible for paying these benefits. RSA relied on Sun Life to communicate with employees regarding their claims, collect and review medical evidence and make a determination as to eligibility for benefits.

In March of 2015, Mr. Swampillai was notified by Sun Life that his eligibility for LTD benefits would cease as of July 22, 2015, on the basis that he was not disabled from performing "any occupation." He was told he had until October 22, 2015, to appeal Sun Life's decision. On May 12, 2015, Mr. Swampillai appealed the decision and provided further medical information to Sun Life in support of his claim. On June 2, 2015, he received a second denial letter. Again, he was advised that he had until October 22, 2015, to appeal. On June 19, 2015, Mr. Swampillai retained a law firm to assist him with his claim for LTD benefits. Meanwhile,

RSA had conducted an evaluation as to whether or not it had alternative work for Mr. Swampillai that would fit his restrictions and had concluded that no such positions were available. Accordingly, it notified Mr. Swampillai by way of a letter dated June 24, 2015, that his employment with the company was being terminated. RSA offered Mr. Swampillai a severance package in exchange for a release of claims against the company. Notably, the June 24, 2015, termination letter from RSA confirmed that Mr. Swampillai's LTD benefits would end as of July 21, 2015, and the RSA release listed "long term disability benefits" among the released claims. Mr. Swampillai was given until July 22, 2015, to review the offer and sign the release. Mr. Swampillai sent portions of the severance offer to his lawyer, whose assistant advised that he should speak to an employment law specialist about the offer. Mr. Swampillai did not do so. However, he did negotiate a more favourable severance offer with RSA before eventually signing the release on July 14, 2015. Mr. Swampillai gave evidence via affidavit that prior to signing the release, he had notified RSA in a telephone call that he disputed Sun Life's decision regarding his entitlement to LTD benefits.

In June of 2017, Mr. Swampillai commenced an action against RSA and Sun Life for allegedly unpaid LTD benefits. RSA brought this motion for summary judgment, asking the Court to enforce the release and dismiss Mr. Swampillai's claim. Mr. Swampillai's counsel argued that the release was unconscionable and should be set aside. The test for showing that an agreement between two parties is unconscionable has four elements:

1. That the transaction was grossly unfair and improvident;
2. The alleged victim did not have independent legal advice or other suitable advice;
3. There was an overwhelming imbalance in bargaining power caused by the alleged victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility or other similar disability; and
4. The other party knowingly took advantage of this vulnerability.

All four of these elements must be present for the agreement to be set aside. In considering whether Mr. Swampillai had met all four parts of the test, Justice Cavanaugh reviewed all of the circumstances that existed at the time Mr. Swampillai accepted RSA's severance offer and signed the release and came to the following conclusions:

1. The amount offered to and accepted by Mr. Swampillai in exchange for signing a release was, in the circumstances, "grossly unfair and improvident" because the severance package contained no payment for the lost LTD benefits. "This is not a situation where a claimant wishes to assert a claim that had never before been made, after a settlement. The example offered by RSA, a human rights complaint, would be such a claim. Even though no money was specifically allocated to such a claim in RSA's severance package, the release would be effective to bar such a claim in the circumstances. The LTD claim is different. This is because RSA and Sun Life knew that Mr. Swampillai was suffering from a disability which made him incapable of performing the duties of his own occupation with RSA. RSA and Sun Life knew that Mr. Swampillai was appealing the denial of his LTD benefits by Sun Life according to the "any

occupation" definition of disability. Sun Life had been provided with medical information in support of Mr. Swampillai's appeal. Sun Life knew that Mr. Swampillai had been told that the denial would not become final until October 22, 2015. No one from RSA, or from Sun Life, discussed with Mr. Swampillai whether he intended to continue his appeal of the denial of his LTD benefits." (para 49). Justice Cavanaugh held that the settlement of Mr. Swampillai's LTD claim on these terms was grossly unfair, particularly when Sun Life and RSA knew he had appealed the loss of those benefits.

2. Mr. Swampillai did not have independent legal advice or other suitable advice. Justice Cavanaugh found that the brief discussion with Mr. Swampillai's lawyer's legal assistant wherein he was told to speak with an employment lawyer was not sufficient to constitute legal advice. There appeared to be no evidence before the Court as to whether or not Mr. Swampillai obtained "other suitable advice" in connection with the severance offer, although he did end up negotiating a more favourable package for himself.
3. There was an overwhelming imbalance of power between RSA and Mr. Swampillai. Justice Cavanaugh acknowledged that there is an inherent imbalance in power between employers and employees and that this alone will not be enough to set aside a signed release. However, he found that Mr. Swampillai's vulnerability was "extraordinary" because Mr. Swampillai was in a vulnerable financial position due to the looming expiry of his LTD benefits and because he suffered from health issues that prevented him from performing his own occupation. Justice Cavanaugh also noted that Mr. Swampillai was particularly vulnerable because RSA had taken the position in its termination letter that if he did not accept its severance offer, he would receive only his "minimum entitlements" under employment standards legislation.
4. Finally, Justice Cavanaugh found that RSA had knowingly taken advantage of Mr. Swampillai's vulnerability. Although he acknowledged that he could not know the actual intent of the RSA employees managing Mr. Swampillai's termination, Justice Cavanaugh determined that he could infer their intent from their actions. Again, he noted that RSA "must have known" that Sun Life's decision was not final until October 22, 2015, and that Mr. Swampillai would be without income once his approved claim expired on July 21, 2015. He also relied heavily on the fact that RSA made no effort to ask Mr. Swampillai if he intended to appeal the Sun Life decision after receiving the second denial of claim on June 2, 2015. On cross-examination, the RSA representative affirmed that she had expected Sun Life to deal with Mr. Swampillai on his claim for benefits and did not feel it was her role to do so. "By failing to alert Mr. Swampillai, either directly or through Sun Life, that he was required to abandon his claim for LTD benefits as part of the severance package that it offered, RSA knowingly took advantage of Mr. Swampillai's vulnerability." (para 69)

As Mr. Swampillai had satisfied the Court that all four elements of the unconscionability test had been met, he was permitted to pursue his claim for LTD benefits despite the signed release.

The implications of this decision could be troubling for employers, most particularly the findings regarding Mr. Swampillai's "extraordinary" vulnerability and the importance Justice Cavanaugh placed on the fact that RSA did not specifically advise Mr. Swampillai as to the impact of his release on his LTD claim. Most employers are rightly very wary of providing employees with anything that could be construed as legal

advice. Further, the termination letter specifically stated when Mr. Swampillai's LTD payments would end and the release stated that by accepting RSA's severance offer, Mr. Swampillai was releasing any claim to LTD benefits. Many would have regarded that as sufficient notice that the claim could not continue after the release was signed. With respect to the vulnerability assessment, the fact that Mr. Swampillai was about to lose a source of income and was experiencing health issues are factors that are commonly present at the time that severance negotiations are taking place.

Employers may be well advised to specifically recommend that employees obtain independent legal advice before signing a release of claims and to review their talking points and templates to determine if changes are needed to mitigate the risks presented by this decision. We also recommend reaching out to legal counsel before implementing the termination of any employee who is on or coming off of a disability claim, particularly where there may be a claim arising from the denial of benefits or accommodation issues.

If you have questions or concerns regarding this topic, please contact the author of this article, Laurie Jessome, or any other member of our Employment & Labour Group.

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