



What's New in HR Law

Unsettled Settlements: Ontario Court Invalidates Release for Long-Term Disability Claims

September 14, 2018

BOTTOM LINE

In *Swampillai v Royal & Sun Alliance Insurance Company of Canada et al*, the Ontario Superior Court of Justice applied the doctrine of unconscionability to declare a Release between an employee and employer unenforceable as it related to the employee's long-term disability ("LTD") claims. The decision casts doubt as to when settlements and Releases with former employees will be enforceable.

Facts: The employee accepted a separation package offer by the employer and in return provided a full and final release of all claims against the employer. The Release included a term releasing the employer from liability for payment of LTD benefits.

The employee, Joe Swampillai, worked at Royal & Sun Alliance Insurance Company of Canada ("RSA") as a distribution clerk in the distribution room and mailroom. His job had physical demands such as lifting and moving. English was his second language. During the course of his employment, the employee was diagnosed with degenerative disc disease, spinal stenosis of his

lumbar spine, and osteoarthritis. He was unable to work and went on short-term disability (“STD”) leave.

The employee went on STD leave for a period of six months, receiving disability benefits from the administrator of the benefit plan, Sun Life Assurance Company of Canada (“Sun Life”). The employee then applied and received LTD benefits for two years on the basis that he could not perform his “own occupation”. After those two years, the employee’s LTD claim was terminated by Sun Life on the basis that he no longer met the “any occupation” definition for eligibility to receive LTD benefits.

The employee hired a personal injury law firm to represent him with respect to the denial of his LTD claim. The employer then offered the employee a severance package, which included minimum employment standards entitlements and an additional 26.5 weeks of pay in exchange for a full and final Release of all claims against the employer. The Release included liability for payments related to “benefit coverage under the Company’s applicable plans and/or policies ... including short-term or long-term disability benefits”.

The employee sent the Release to his personal injury lawyer, who advised the employee to seek advice from an employment lawyer. The employee accepted the severance offer and signed the Release without obtaining further legal advice. Less than two years after executing the Release, the employee commenced an action for payment of his LTD benefits and related relief against both RSA and Sun Life. RSA and Sun Life brought summary judgment motions to dismiss the employee’s action.

The Determination: The Ontario Superior Court found that the Release signed by the former employee was unconscionable and unenforceable as it related to his claim for LTD benefits

The Court applied the doctrine of unconscionability in deciding whether the Release was enforceable. The Court found that an agreement, such as a Release, will be unconscionable where there are the following four elements:

1. the agreement resulted in a grossly unfair and improvident transaction;
2. the victim lacked independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the 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.

On the first element, the Court accepted that the transaction was grossly unfair because the severance package contained no payment for the loss of his LTD benefits. Second, there was no evidence that the employee received independent legal advice, despite being represented by a personal injury lawyer and being advised to speak with an employment lawyer. Third, the Court noted that “there is an inherent imbalance in power between employers and employees”, and that the vulnerability was “extraordinary” due to the employee’s financial position following the expiry of the LTD benefits and his inability to work. Fourth, the Court found that the employer made no effort to ask the employee if he intended to appeal the Sun Life decision to deny his

claim after receiving the second denial from Sun Life and before executing the Release with RSA. Finally, the Court stated: *“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.”*

The Court determined that the employee satisfied all of the elements of the test for unconscionability, and held that the Release was unenforceable as it related to the employee’s LTD claim. The employee was permitted to pursue his claim for LTD benefits at trial despite the signed Release.

Notably, RSA has appealed this decision to the Ontario Court of Appeal.

Check the Box

In light of this decision, employers should consider the following when preparing full and final releases to mitigate possible risks of a release being found unenforceable:

- expressly notify employees that the release will preclude them from pursuing or continuing with any ongoing claim for disability benefits, at least as against the employer;
- offer a monetary amount or benefit in exchange for the release of ongoing LTD claims;
- recommend that employees obtain independent legal advice before signing a release; and
- be aware that even if an employee signs a release and subsequently becomes disabled during the statutory notice period under the Employment Standards Act, 2000, there is a risk that the employee may still be permitted to pursue a claim for disability benefits under the employer’s disability benefits plan.

Forum: Ontario Superior Court of Justice

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Citation: [*Swampillai v Royal & Sun Alliance Insurance Company of Canada et al*, 2018 ONSC 4023](#)

Need more information?

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