CITATION: Swampillai v. Royal & Sun Alliance Insurance Company of Canada, 2018 ONSC 4023
COURT FILE NO.: CV-17-577041
DATE: 20180626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOE SWAMPILLAI Plaintiff	)	*Naphtali Silverman*, for the Plaintiff
– and –	)	
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA and SUN LIFE ~~INSURANCE~~ ASSURANCE COMPANY OF CANADA Defendants	)	*Stephen Simpson* and *Charlotte Watson*, for the Defendant, Sun Life Assurance Company of Canada *Thomas A. Stefanik*, for the Defendant, Royal & Sun Alliance Insurance Company of Canada
	)	**HEARD:** March 28, 2018

REASONS FOR JUDGMENT

CAVANAGH J.

Introduction

[1] The plaintiff Joe Swampillai brought the within action for payment of long term disability benefits and related relief against his former employer, Royal and Sun Alliance Insurance Company of Canada ("RSA"), and against Sun Life Assurance Company ("Sun Life") which provides administrative services to RSA in respect of the long term disability benefits that RSA provides to employees.

[2] RSA and Sun Life defended the action, including on the ground that Mr. Swampillai executed a full and final release in favour of RSA on July 14, 2015 which includes a release of any claim for long term disability benefits. As a result, RSA and Sun Life plead that Mr.

Swampillai is not entitled to make any claim against RSA for disability benefits or against Sun Life for the administration of those benefits.

[3] After receiving the statements of defence, Mr. Swampillai amended his statement of claim to plead the doctrine of unconscionability. Mr. Swampillai pleads that this doctrine applies such that the release, as it relates to long term disability benefits, should be set aside and declared unenforceable.

[4] RSA and Sun Life have brought motions for summary judgment dismissing the action on the ground that the release is binding and enforceable and bars Mr. Swampillai's claim for long term disability benefits. Mr. Swampillai opposes the motions for summary judgment. Mr. Swampillai submits that the release, insofar as it applies to release his claim for long term disability benefits, should be set aside and declared unenforceable because it is unconscionable.

[5] The parties agree that it is proper for me to decide on this motion for summary judgment whether the release as it applies to Mr. Swampillai's claim for long term disability benefits should be set aside and rendered unenforceable. If the release is set aside and declared unenforceable as it relates to Mr. Swampillai's claim for long term disability benefits, the action will proceed to trial. If the release is valid and enforceable as it relates to Mr. Swampillai's long term disability benefits claim, the motions for summary judgment must be granted and the action must be dismissed.

[6] For the following reasons, I conclude that the release signed by Mr. Swampillai on July 14, 2015 must be set aside and declared unenforceable as it relates to Mr. Swampillai's claim for long term disability benefits, based upon the application of the doctrine of unconscionability. The motions for summary judgment by RSA and by Sun Life are dismissed.

Factual Background

[7] Mr. Swampillai worked for RSA from August 7, 2001 to December 2, 2007 under fixed term contracts without employee benefits. From December 3, 2007 until his employment was terminated effective July 22, 2015, Mr. Swampillai was employed by RSA and he received benefits. Mr. Swampillai worked for RSA as a distribution clerk in the distribution room and helping in the mail room. His job had physical demands such as lifting and moving. Mr. Swampillai speaks and understands English, although it is not his first language.

[8] In 2013, Mr. Swampillai was diagnosed with degenerative disc disease, spinal stenosis of his lumbar spine and osteoarthritis. According to his evidence, he was unable to work without suffering from severe pain, and he was also suffering from depression.

[9] During the relevant time frame, RSA had in place an "Administrative Services Only" agreement with Sun Life under which Sun Life adjudicated claims by RSA employees who claimed entitlement to long term disability ("LTD") benefits.

[10] Under the terms of RSA's Long Term Disability Plan, there is what is called an "own occupation" clause in which an employee's eligibility for LTD benefits would be adjudicated by Sun Life on the basis of whether the employee was capable of performing the duties of his/her

current occupation with RSA. After the initial two (2) year "own occupation" period, Sun Life would then assess whether the employee was totally disabled from performing any work.

[11] In 2013, Mr. Swampillai received short-term disability benefits prior to applying for long term disability benefits. The short-term disability benefits under his contract of employment with RSA were paid as salary continuation and were for a maximum period of six (6) months.

[12] In June 2013, a member of the human resources department at RSA submitted a "Plan Sponsor's Statement Claim for Long Term Disability Benefits" on behalf of Mr. Swampillai. On or about September 20, 2013, an employee of Sun Life sent a letter to Mr. Swampillai approving his claim for long-term disability benefits effective July 22, 2013. For approximately the next two years, until July 2015, Mr. Swampillai received LTD benefits.

[13] On March 31, 2015, Mr. Swampillai received a letter from Sun Life advising him that he did not meet the definition of disability for the "any occupation" eligibility for LTD benefits, and that his LTD benefits would therefore cease on July 22, 2015. The letter also stated, among other things, that Mr. Swampillai could appeal the decision and that the appeal period ends on October 22, 2015 after which time the decision will be considered final. On May 12, 2015, Mr. Swampillai did appeal the decision to cease paying his LTD benefits and he provided updated medical information to Sun Life.

[14] On June 2, 2015, Mr. Swampillai received a second denial letter from Sun Life advising that Sun Life was maintaining its decision to close his claim effective July 22, 2015. The letter stated that the appeal period to appeal the decision would end on October 22, 2015, after which time Sun Life's decision will be considered final.

[15] On June 19, 2015, Mr. Swampillai retained a law firm, Sokoloff Lawyers, to represent him with respect to the denial of LTD benefits.

[16] By letter dated June 24, 2015, RSA confirmed that Mr. Swampillai's employment would cease effective July 22, 2015. RSA offered Mr. Swampillai a severance offer which included Mr. Swampillai's minimum employment standards entitlements based upon employment from December 3, 2007 and, in addition, a further amount representing an additional 26.5 weeks' pay, a total of 43.2 weeks, in exchange for Mr. Swampillai agreeing to sign the form of full and final release which was attached to the June 24, 2015 letter.

[17] The form of release that was enclosed with RSA's June 24, 2015 letter included language that would release RSA from liabilities which relate to Mr. Swampillai's employment or the termination of his employment including payments related to "benefit coverage under the Company's applicable plans and/or policies ... including short term or long term disability benefits ..."

[18] RSA's letter pointed out to Mr. Swampillai that "you will continue to receive your Long Term Disability benefits until July 21, 2015". Mr. Swampillai was given until July 22, 2015 to sign the release. The letter stated that if he did not sign the release, the offer would expire and Mr. Swampillai would only receive his "statutory minimum entitlements".

[19] Mr. Swampillai emailed a copy of the first page of the June 24, 2015 letter to an assistant at Sokoloff Lawyers and he advised in his covering email that "[t]his is the final Settlement of RSA". Mr. Swampillai's evidence is that he did not believe that RSA's offer had anything to do with Sun Life or his LTD benefits. He then met with the assistant at Sokoloff Lawyers in person to get advice about negotiating more money to take into account his earlier years with RSA, from 2001 to 2007. Mr. Swampillai was advised that Sokoloff Lawyers do not practice employment law, and that he could go find another lawyer if he wanted help with this matter. He did not retain another lawyer.

[20] In a telephone discussion, Mr. Swampillai spoke to a representative of RSA about the calculation of his termination package. He expressed concern that RSA had only calculated the termination payment based on his employment from 2007 until 2013 when, in fact, he had worked for RSA since 2001. Following this conversation, RSA decided to enhance Mr. Swampillai's severance package and provided to him a restated severance offer in a letter dated July 14, 2015. The increased severance package amounted to a total payment of 60.2 weeks of current base salary, plus an additional lump-sum amount in the amount of $3,718.25 for loss of benefits, plus the other provisions that had previously been offered to Mr. Swampillai in the June 24, 2015 letter. The text of the form of release that was presented to Mr. Swampillai on July 14, 2015 was the same as the text of the original release that was presented to him on June 24, 2015. Mr. Swampillai was given until July 29, 2015 to accept the offer and sign and return the release. He was told that if he did not do so, the offer would expire and only his statutory minimum entitlements would be provided to him.

[21] Mr. Swampillai executed the release on July 14, 2015 and his signature was witnessed by his wife. He commenced this action on June 13, 2017.

Analysis

[22] The issue on these motions is whether the release should be set aside and rendered unenforceable as it relates to Mr. Swampillai's claim for LTD benefits on the ground that it is unconscionable.

[23] In *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573 the Court of Appeal expressed the principles that apply to the doctrine of unconscionability in circumstances involving termination of an employment relationship. In *Titus*, the plaintiff was employed as an in-house lawyer and he was dismissed. His employer offered a settlement package that provided for three months' salary in lieu of notice, provided he signed a release, and the plaintiff accepted and signed the release on the spot. The plaintiff later sued his former employer claiming that the settlement and release were unconscionable. The trial judge held that the release was not binding, and awarded damages based upon a notice period of ten months. The Court of Appeal set aside the trial judgment and, in its reasons, explained the approach to be taken when a court considers whether a contract should be set aside as unconscionable:

> [36] A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not

enough to cast the mantle of unconscionability over the shoulders of the other party: see Fridman, *The Law Contract in Canada* (Fifth Edition), p. 320.

[37] In *Black v. Wilcox* (1976) 12 O.R. (2d) 759 at 762 (C.A.), Evans J.A. discussed the foundations of unconscionability in a similar fashion:

> In order to set aside the transaction between the parties, the Court must find that the inadequacy of the consideration is so gross or that the relative positions of the parties are so out of balance in the sense of gross inequality of bargaining power or that the age or disability of one of the controlling parties places him at such a decided disadvantage that equity must intervene to protect the party of whom undue advantage has been taken.

[38] In a recent case dealing with the doctrine of unconscionability in a wrongful dismissal context, *Cain v. Clarica Life Insurance Co., supra*, Côté J.A. reviewed the leading cases and academic commentary and concluded, at para. 32:

> Those authorities discuss four elements which appear to be necessary for unconscionability…
>
> 1. a grossly unfair and improvident transaction; and
> 2. victim's lack of independent legal advice or other suitable advice; and
> 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other similar disability; and
> 4. other party's knowingly taking advantage of this vulnerability.

[24] Mr. Swampillai submits that all four elements of the *Titus* test are present in this action. RSA and Sun Life submit that none of the four elements are present. Sun Life supported the submissions made by RSA in relation to unconscionability.

Was the transaction grossly unfair and improvident?

[25] Mr. Swampillai submits that in this case, if his LTD benefits had not ceased or if he had been successful in disputing the denial of his LTD benefits and remained medically entitled to receive ongoing benefits, he would have been potentially entitled to continue to receive benefits until the age of 65 with a value of over $300,000. At the time that the release was signed, Mr. Swampillai was engaged in a process with Sun Life to appeal its denial of his LTD benefits. He submits that his LTD claim, in respect of which he had retained legal counsel to represent him, was a viable claim when the release was signed, and that the severance package which he received as part of the transaction in which the release was given included nothing in consideration for a release of this claim. Mr. Swampillai submits that, in these circumstances, the transaction in respect of which the release was given was grossly unfair and improvident.

[26] RSA submits that it was open to Mr. Swampillai to assess the merit of his LTD claim and to give up this claim as part of an overall settlement. RSA submits that it would be entirely speculative for me to try to assess the merits of a claim for LTD benefits and find that his claim had sufficient merit such that I should conclude, because Mr. Swampillai gave up his LTD claim, the transaction is grossly unfair. RSA also submits that it is incorrect to say that there was no consideration for the release of the LTD claim simply because there was no specific allocation of money for this claim as part of the settlement.

[27] In order for me to assess whether the transaction was grossly unfair and improvident, I examine the circumstances surrounding the transaction as well as the terms of the transaction.

[28] I first consider the circumstances that existed in the period of time before Mr. Swampillai was notified that his employment would be terminated.

[29] Under the Administrative Services Contract between Sun Life and RSA, RSA appointed Sun Life as its agent to act as the Plan Administrator and Sun Life agreed to so act. Sun Life, RSA's agent, fully knew the circumstances that existed with respect to Mr. Swampillai's LTD claim. Sun Life was authorized by RSA to deal directly with Mr. Swampillai in relation to his LTD claim. According to the evidence of Tanja Velic who swore an affidavit on behalf of RSA, the medical information submitted to Sun Life by employees making claims for LTD benefits was kept confidential from RSA, and the extent of RSA's knowledge of an employee's medical condition was that RSA would be advised by Sun Life whether an employee's application had been granted. According to Ms. Velic, if, as and when an employee was adjudged by Sun Life to be capable of returning to work, with or without restrictions, Sun Life would so advise RSA.

[30] Mr. Swampillai had applied to Sun Life for LTD benefits in July 2013 and Sun Life determined that he qualified for LTD benefits under the applicable eligibility requirements. Mr. Swampillai received a letter dated September 20, 2013 from Sun Life advising that his claim for LTD benefits had been approved effective July 22, 2013. This letter included advice from Sun Life that RSA's long term disability benefits are self-insured, that RSA has the sole legal and financial liability for these benefits and funds the claims from its net income, retained earnings or other financial resources, and that Sun Life provides administrative services only, which include claims processing and case management services. These LTD benefits were paid from July 22, 2013 to July 22, 2015.

[31] Mr. Swampillai was advised by Sun Life by letter dated April 7, 2015 that his LTD benefits would be terminated on July 22, 2015 because of the change in definition for eligibility for continuing benefits after 24 months. RSA is not mentioned in Sun Life's April 7, 2015 letter. Mr. Swampillai sent new medical evidence to Sun Life on May 12, 2015. On June 12, 2015, Mr. Swampillai received another letter from Sun Life advising that he did not meet the definition of disability for "any occupation" and confirming that his LTD benefits would cease on July 22, 2015. He was notified by Sun Life that he would have until October 22, 2015 to appeal Sun Life's decision, after which it would be considered final. RSA is not mentioned in Sun Life's June 2, 2015 letter. Mr. Swampillai retained legal counsel to represent him with respect to his claim for denied LTD benefits on or about June 19, 2015, although there is no evidence that either Sun Life or RSA was informed of this representation at the time.

[32] It is clear that in the period of time just before Mr. Swampillai was notified by RSA that his employment would be terminated, he was actively engaged with Sun Life in pursuing a claim for LTD benefits. Mr. Swampillai had provided medical evidence to Sun Life to support this claim, including updated medical evidence as recently as May 12, 2015. He had retained legal counsel to represent him in respect of this claim. There is no dispute that this claim, if successful, would have substantial value, in excess of $300,000, and this would have been known to Sun Life and RSA.

[33] Although RSA provided evidence that medical information submitted by employees to Sun Life was kept confidential from RSA, RSA knew that Mr. Swampillai's medical condition was such that he was incapable of performing the duties of his current occupation with RSA. In fact, before deciding to terminate Mr. Swampillai's employment, RSA had investigated whether there were any sedentary vacancies that matched Mr. Swampillai's skills and experience, and it decided that he did not have the ability to perform any work that was available. During the period of time leading up to RSA's decision to terminate Mr. Swampillai's employment, RSA also knew that Mr. Swampillai was nearing the end of the two-year "own-occupation" period. It was clear to both Sun Life and RSA in the period of time leading up to RSA's decision to terminate Mr. Swampillai's employment that, because of his disability, Mr. Swampillai was not capable from performing the duties of his current occupation with RSA. The dispute with Mr. Swampillai involved his eligibility for LTD benefits under the "any occupation" definition of disability.

[34] I next address the factual circumstances in relation to notification by RSA to Mr. Swampillai that his employment was terminated, and the negotiations with respect to the severance package that was offered by RSA.

[35] RSA sent to Mr. Swampillai by courier a letter dated June 24, 2015 advising him that his employment with RSA would cease effective July 22, 2015. Sun Life had advised Mr. Swampillai in its June 2, 2015 letter that it was willing to review new records and reports that he may obtain as part of the appeal process. Sun Life had informed Mr. Swampillai that its decision would be considered final after October 22, 2015. Therefore, at the time that Mr. Swampillai was notified by RSA of the termination of his employment and offered a severance package, he had just been informed by Sun Life that his claim for LTD benefits would not be final until October 22, 2015.

[36] Ms. Velic acknowledged on her cross-examination that during the period of time when she was talking to Mr. Swampillai concerning RSA's severance offer, she knew that if Mr. Swampillai signed the release, he would be waiving his long-term disability claim.

[37] RSA also knew that Mr. Swampillai did not accept the decision made by Sun Life that he did not qualify for ongoing LTD benefits under the "any occupation" eligibility standard that would apply after the expiry of the period two-year during which the "own occupation" standard applied. Ms. Velic gave the following evidence in this respect on her cross-examination:

98. Q. Did you ever ask Joe, in any of your telephone conversations with him, what his intentions were with regards to appealing his long-term disability claim?

A. I believe at the time me and Joe spoke, when I was to deliver his letter, he had already appealed Sun Life's decision. So I already knew that he had appealed.

99. I'm just asking if you ever asked him what his intentions were with regards to disputing the denial of his long-term disability benefits.

A. I – I can't recall for 100 percent if I did or did not.

100. Q. You'd agree with me that that would probably be an important question to ask him?

A. It's something that Sun Life would deal with.

[38] RSA does not disagree that asking Mr. Swampillai about his intentions concerning disputing the denial of his LTD claim would be important. RSA's position is that this is something that Sun Life would deal with. But when Ms. Velic was asked how Sun Life would do so, she gave the following evidence:

101. Q. But Sun Life didn't negotiate this termination package, correct?

A. No.

102. Q. So how would Sun Life have asked that?

A. They would provide him with an option to appeal at the time of decline.

103. Q. The denial letter that I put forward to you a minute ago that's –

A. Mm-hmm.

104. Q. - in front of you, --

A. Mm-hmm.

105. Q. -- if you go to the second page of it it says, "The appeal period ends on October 22nd, 2015 to appeal our decision."

A. Okay.

106. Q. You'd agree with me that October 22nd is a number of months after June 2015?

[Mr. Stefanic]: Well, Counsel, it speaks for itself and she didn't – RSA did not write this letter so I don't know ---

By Mr. Silverman

107. Q. I understand. Well, it is extremely relevant because -- you would agree with me that based on this letter Joe could have continued appealing

his denial of his long-term disability benefits until October 22nd? You'd agree with me?
A. Yes, based on this.

108. Q. And yet, despite the fact that he still had time, based on this letter, to appeal the decision, you did not ask him what his intentions were and if you wanted to continue appealing. You'd agree with me, correct?
[Mr. Stefanic]: She's already answered that.

[39] Although RSA left it to Sun Life to discuss with Mr. Swampillai what his intentions were with respect to disputing the denial of his LTD benefits when he was asked to sign the release, Sun Life was not put into a position to do so. Sun Life did not know about the release until after the litigation commenced. In this respect, Janette Voisin, Sun Life's representative who provided affidavit evidence in support of the defendants' motion, gave the following evidence on her cross-examination:

65. Q. I understand. Did you personally, or any employee of Sun Life, ever negotiate a settlement with Joe with respect to his LTD benefits?
A. No.

66. Q. When did Sun Life first see the draft release that Joe eventually signed?
A. After litigation had started, so in the summer this year, I first received a copy in an e-mail and as an attachment from our lawyer.

67. Q. Was the copy that you received sent to you from RSA? Did Sun Life actually have a copy of the release in their possession before this litigation commenced?
A. No.

68. Q. So it's fair to say that no one from Sun Life ever had any discussions with Joe about his rights of signing the release because they never knew he signed it?
A. Correct.

[40] RSA's June 24, 2015 letter confirmed that Mr. Swampillai's employment would cease effective July 22, 2015. The letter addressed long term disability benefits in paragraph 1, and stated that Mr. Swampillai would continue to receive his LTD benefits until July 21, 2015. This information is consistent with what Sun Life had already informed Mr. Swampillai. However, according to the information that Sun Life had provided, this decision would not become final until October 22, 2015. RSA's letter does not state that, in order to receive the separation payments and other parts of the severance package, Mr. Swampillai was required to abandon his appeal of Sun Life's decision. Sun Life is not mentioned in RSA's letter. RSA's letter stated that the severance package was conditional upon Mr. Swampillai signing the full and final release that was enclosed and, if he did not do so, only his statutory minimum entitlements would be provided to him.

[41] RSA's June 24, 2015 letter stated that he would be paid 43.2 weeks of his current base salary in respect of his termination consisting of minimum entitlement to statutory termination pay in lieu of notice representing eight weeks of his current base salary, minimum entitlement to statutory severance pay representing 8.7 weeks of his current base salary and an additional amount representing 26.5 weeks of his current base salary.

[42] RSA accepts that the separation payments described in RSA's June 24, 2015 letter did not take into consideration Mr. Swampillai's years of service with RSA from 2001 to 2007 during which, according to Ms. Velic's evidence, Mr. Swampillai had been engaged by RSA on fixed term contracts without employee benefits. Mr. Swampillai contacted Ms. Velic on July 10, 2015 and asked RSA to take into consideration his years of service from 2001 to 2007 and, upon reviewing this request, RSA agreed to enhance the severance package to accommodate it. RSA sent a restated letter to Mr. Swampillai dated July 14, 2015 in which the separation payments were calculated based upon an additional 17 weeks of base salary. The letter stated that the combined payments which represent 62.2 weeks of Mr. Swampillai's current base salary "are inclusive and exhaustive of any and all entitlements you may have to termination pay, severance pay and reasonable notice, whether in accordance with applicable employment standards legislation, at common law or otherwise".

[43] RSA accepts that its final offer to Mr. Swampillai did not include any money with respect to his LTD claim. Ms. Velic confirmed this on her cross-examination:

> 142. Q. Thank you. As part of the final offer that was made to Joe, that would have been Tab G of your material, was any money offered to Joe with respect to his future long-term disability benefits after July 2015?
>
> A. I'm sorry, after which date?
>
> 143. Q. After the date of July 21st, 2015 -- that was the date when he would have stopped receiving LTD, correct?
>
> A. Correct.
>
> 144. Q. Was any money offered to Joe as part of this termination package with respect to long-term disability benefits after July 21st, 2015?
>
> A. No, because his LTD claim was denied after that date.

[44] Mr. Swampillai submits that in these circumstances, where he received nothing in exchange for releasing his rights in relation to his appeal from Sun Life's denial of his LTD benefits, a substantial claim, the transaction was grossly unfair and improvident.

[45] In response, RSA submits that for me to take Mr. Swampillai's dispute of the denial of his LTD claim into consideration would involve pure speculation, and that I should assess whether the transaction was grossly unfair without regard to the circumstances surrounding Mr. Swampillai's LTD claim. RSA submits that it would be incorrect for me to conclude that no consideration was given for the release of the LTD claim, and that it is not necessary to break down a payment made on a settlement to allocate amounts for each possible claim that could be made. RSA offers as an example that there was no money allocated to settlement of a claim

based upon a human rights complaint and, nevertheless, such a claim is included in the release and would be released as part of the settlement.

[46] In support of its submissions, RSA refers to passages from the *Titus* decision at paras. 41 and 44 in which the Court of Appeal addressed the argument that the settlement in that case was grossly unfair because the period of notice provided for in the settlement was far less than the period that the trial judge had found to be reasonable. The Court of Appeal held that the fact that ten months is a reasonable notice period does not mean that three months was grossly unfair, observing that if he accepted, the plaintiff would receive the money immediately, have an opportunity to mitigate damages by seeking new employment, and avoid the delay, costs and uncertainty of litigation. The Court of Appeal held that it was reasonable for the employer to propose a release in the context of a reasonable settlement offer and it was then up to the plaintiff to accept, reject or renegotiate any component of the offer, including the release. RSA submits that the same considerations apply to this case. I disagree.

[47] In *Titus*, the parties were addressing one matter in dispute, the amount to be paid in lieu of notice of the termination of the plaintiff's employment. The plaintiff, a lawyer, knew that that the offer that was presented to him provided for payment in lieu of notice of three months, and he accepted the offer with his eyes open. In this case, on the other hand, at the time that he received notification of his dismissal, Mr. Swampillai had two significant claims. The negotiations between Mr. Swampillai and RSA after RSA's June 21, 2005 letter addressed only the payments to be made for statutory termination and severance pay and for payment in lieu of common law notice, and whether Mr. Swampillai's years of service from 2001 to 2007 should be taken into account in the calculations of these payments. Mr. Swampillai's other claim, for LTD benefits, was not addressed in RSA's letter (other than by confirming, as Sun Life had already advised, that the LTD benefits would continue until July 21, 2015 and through language in the form of release that was enclosed). The fact that the form of release required by RSA would bar Mr. Swampillai from pursuing his appeal of the denial by Sun Life of LTD benefits was not discussed with Mr. Swampillai by RSA or by Sun Life before he signed the release. The facts in *Titus* are very different than the facts in this case.

[48] I agree with RSA that the settlement of Mr. Swampillai's claims arising from the termination of his employment, including the release of the LTD claim, cannot be set aside based upon a total failure of consideration. However, I do not agree that, in these circumstances, the overall settlement, by the inclusion of the release of the LTD claim for no additional monetary payment, was not grossly unfair and improvident.

[49] 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. RSA's position is that this was something that Sun Life would deal with. Sun Life's evidence is that it did not discuss settlement of Mr. Swampillai's LTD claim with him, and that it did not find out about the release until after this litigation had started.

[50] In these circumstances, I conclude that the settlement of Mr. Swampillai's LTD claim on terms that provided for payment of nothing in exchange for a release of this claim as part of an overall settlement of claims in respect of the termination of his employment with RSA, in circumstances where RSA and Sun Life knew that Mr. Swampillai was appealing the denial of his LTD benefits, was grossly unfair. I also conclude that for Mr. Swampillai to release his claim for LTD benefits in these circumstances was clearly improvident.

Did Mr. Swampillai lack independent legal advice or other suitable advice?

[51] RSA submits that Mr. Swampillai did seek legal advice in relation to the transaction from Sokoloff Lawyers. RSA submits that after Sokoloff Lawyers suggested that he seek advice from an employment lawyer, Mr. Swampillai decided not to do so, and that this was his choice to make. RSA submits that, whether or not Mr. Swampillai consulted a lawyer at Sokoloff Lawyers, he had an opportunity to seek legal or other suitable advice. RSA submits that Mr. Swampillai cannot satisfy the requirement of showing a lack of independent or other suitable advice.

[52] Mr. Swampillai submits that he did not receive legal advice with respect to the release before it was signed. Sokoloff Lawyers were retained before RSA sent the June 24, 2015 letter for the purpose of providing representation to him in relation to his LTD claim. He contacted Sokoloff Lawyers again, after receiving RSA's letter, to obtain legal advice in respect of negotiating an increase in the separation payments to reflect his service with RSA as a contract worker. Mr. Swampillai never received advice in this regard. I do not accept Sun Life's submission that the fact that an assistant at Sokoloff Lawyers informed Mr. Swampillai that the firm did not practice employment law and that he could go find another lawyer if he wanted help with the matter means that Mr. Swampillai received "other suitable advice".

[53] Mr. Swampillai's evidence is that RSA's June 24, 2015 letter did not mention anything about waiving his rights to dispute the denial of his LTD benefits. He was negotiating the LTD claim with Sun Life, not RSA. His evidence is that he did not put his mind to the fact that he was negotiating anything other than his severance package with RSA. Mr. Swampillai's evidence is that he did not closely read the release because he viewed it as a legal document that was a "more legalese" version of the June 24, 2015 letter. He did not think that the release had anything to do with his dealings with Sun Life, and he did not think it had anything to do with the denial of his LTD benefits.

[54] Mr. Swampillai did not receive legal advice or other professional advice with respect to the release and, specifically, he did not receive such advice in relation to the effect of the proposed settlement terms, including the release, on his LTD claim. In the circumstances, particularly given that RSA knew that Mr. Swampillai was appealing the denial of his LTD claim

and did not mention this issue in the course of negotiations concerning the settlement of Mr. Swampillai's entitlements upon the termination of his employment, I do not consider it to be unreasonable for Mr. Swampillai, given the state of mind that he reasonably would have had in the circumstances, not to have obtained legal advice.

[55] Mr. Swampillai has satisfied the requirement of proving a lack of independent legal or other suitable advice.

Was there an overwhelming imbalance in bargaining power?

[56] RSA submits that this case is no different than any case that involves settlement of an employee's claims arising from termination of his or her employment. RSA submits that Mr. Swampillai was given a reasonable period of time to review the proposed settlement terms, including the release, before accepting these terms. RSA points out that Mr. Swampillai even negotiated improved terms with RSA, and that this shows that there was not an overwhelming imbalance in bargaining power. RSA also submits that the decision in *Titus* requires that the imbalance in bargaining power must be caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, deafness, illness, senility, or similar disability, and that any imbalance in bargaining power in this case was not caused by any of these factors.

[57] Mr. Swampillai submits, citing *Titus* at para. 46, that there is an inherent imbalance in bargaining power between an employer and an employee when the former terminates the employment of the latter. In *Titus*, MacPherson J.A. quoted from the decision of Iacobucci J. in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 where, at para. 95, he wrote "[t]he point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection." In *Titus*, the plaintiff relied upon this general vulnerability and, in addition, specific vulnerability because of the plaintiff's personal circumstances. MacPherson J.A. held that the generalized vulnerability of all terminated employees was diminished in that case by the fact that the plaintiff was a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including the law relating to wrongful dismissal. MacPherson J.A. held at para. 49 that, in short, the plaintiff "knew well his position and his options (accept, reject, negotiate)". MacPherson J.A. also addressed the evidence in relation to the alleged specific vulnerability and concluded that, in the circumstances, the plaintiff had not proven that there was an overwhelming imbalance in bargaining power.

[58] Mr. Swampillai relies upon the general vulnerability of an employee at the time the employment relationship ruptured. He also relies on the evidence that not only was his employment being terminated, he had just been informed by Sun Life that his LTD benefits, which had been his only source of income for almost two years, were being terminated unless he was successful in appealing that decision. Mr. Swampillai also relies upon the language of the July 14, 2015 letter from RSA in which he was advised that the severance offer was conditional upon him signing the release and returning it by no later than July 29, 2015, failing which "this offer shall expire and only your statutory minimum entitlements shall be provided to you". Mr. Swampillai submits that this advice that if he did not accept RSA's offer he would receive only the minimum statutory payments, and not the additional 43.5 weeks of salary, magnified the

precariousness of his financial situation, and made him particularly vulnerable in the circumstances.

[59] In addition, Mr. Swampillai relies on the fact that he had corresponded with Sun Life exclusively in relation to his LTD benefits for almost two years and, yet, the name Sun Life was not included anywhere in the July 22, 2015 letter or in the form of release that was enclosed. Mr. Swampillai submits that even though Ms. Velic did not disagree that it would be important for someone to discuss with Mr. Swampillai his intentions with regards to disputing the denial of his LTD benefits, no one did so, and the only reference to the release of these benefits is in the 19th line of a 20 line paragraph in the form of release that was enclosed with the June 25 and July 15, 2015 letters from RSA.

[60] In this case, the general vulnerability of Mr. Swampillai at the time his employment relationship with RSA ruptured was not diminished by other circumstances, as was the case in *Titus*. Unlike the circumstances in *Titus*, Mr. Swampillai did not know his position and his options - to accept, reject, or negotiate - in respect of his LTD claim. Mr. Swampillai was in a vulnerable financial position, and he was suffering from health impairments that were sufficiently severe that he had qualified for LTD benefits for two years, under the "own occupation" definition of disability. RSA knew that Mr. Swampillai had qualified for LTD benefits and that he was appealing the denial of these benefits by Sun Life under the "any occupation" definition of disability that would apply after July 22, 2015. Mr. Swampillai had just been told by Sun Life that his LTD benefits would end on July 22, 2015, and that this decision would be considered final on October 22, 2015 unless it was successfully appealed before this date. Mr. Swampillai's financial circumstances were made even more precarious because he was told that RSA's July 22, 2015 severance package would be reduced to eliminate the payments of 43.5 weeks of salary, that were in addition to the statutory minimum payments for termination and severance pay, if it was not accepted as presented.

[61] The decision of the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Company*, 2005 ABCA 437 was cited by MacPherson J.A. in his decision in *Titus* in which he described the necessary elements for unconscionability. In *Cain*, Côté J.A., when he addressed whether there was an overwhelming imbalance in bargaining power based upon the evidence in that case, made the following observations:

> [61] Maybe the appellant employer was somewhat more competent than the respondent employee in such matters. Doubtless it had more money in the bank. Maybe the appellant did gain some advantage from consulting its lawyers more often (although no one has suggested to us what that advantage could have been).
>
> [62] But unconscionability or related doctrines do not require complete equality of bargaining power. If they did, very few contracts would survive, and still fewer between an employer and an employee would.
>
> [63] To upset a bargain, there must be a great disparity in bargaining power (and use made, advantage taken, of it): see the cases cited in Part F above.

The cases in Part F of his decision are those that Côté J.A. had cited in support of his description of the necessary elements for unconscionability that were quoted in *Titus*.

[62] I agree with these observations of Côté J.A. in *Cain*. However, this is not, as RSA submits, an ordinary case involving the negotiation of a severance package of an employee whose employment has been terminated. The circumstances that I have described in relation to Mr. Swampillai's LTD claim and his particular vulnerability in relation to this claim make this case an extraordinary one. Given these circumstances, I conclude that Mr. Swampillai has proven that there was an overwhelming imbalance in bargaining power between Mr. Swampillai and RSA at the time that his employment relationship with RSA was terminated.

Did RSA knowingly taking advantage of Mr. Swampillai's vulnerability?

[63] As set out in *Titus*, the fourth element that is necessary for unconscionability is the other party knowingly taking advantage of the vulnerability of the party seeking to set aside a contract.

[64] This element was considered by Lederer J. in *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053 who noted at para. 32 of his decision that "[i]t is impossible to look into the minds of the various officials responsible for the acts of [the employer] to find proof that they set out to take advantage of the vulnerability of [the plaintiff]. But it can be implied from their actions and approach to the termination." In this case, the determination of whether RSA knowingly took advantage of Mr. Swampillai's vulnerability can be inferred from the actions that it took and its approach to the termination of Mr. Swampillai's employment.

[65] At the time that the decision was taken to dismiss Mr. Swampillai, RSA knew that he had been receiving LTD benefits under the benefit plan that was administered by Sun Life for almost two years. RSA knew that Mr. Swampillai had appealed the decision of Sun Life to end his LTD payments effective July 22, 2015. This means that RSA must have known that Sun Life's decision was not final, because it was subject to appeal and the time to appeal would not expire until October 22, 2015. RSA knew that unless Sun Life changed its mind before its decision became final, Mr. Swampillai would soon be without a source of income. Sun Life had advised RSA that it had decided to deny Mr. Swampillai's LTD benefits after July 22, 2015 and, according to Ms. Velic's evidence, because Mr. Swampillai's LTD benefits were ending and RSA had no role for him to come back to, it decided to offer him a severance package.

[66] In these circumstances, RSA offered Mr. Swampillai a severance package that provided only for payments for statutory termination and severance pay, payment in lieu of common law notice, and a small amount for the cost of benefits at the end of the statutory notice period, without alerting him to the fact that the release that he would be required to sign in favour of RSA called for him to release his claim based upon Sun Life's denial of LTD benefits.

[67] In respect of this element of unconscionability, I regard as significant the answer given by Ms. Velic of RSA, when it was put to her on cross-examination that it would have been important for RSA to ask Mr. Swampillai what his intentions were with regard to disputing the denial of his LTD benefits. She did not respond that there was no requirement for RSA to raise this, and that it was up to Mr. Swampillai carefully read the release and to protect his own

interests. Ms. Velic responded that this was "something that Sun Like would deal with". I regard this answer as a reasonable acknowledgment that, in these circumstances, someone, either RSA or its agent, Sun Life, was required to raise with Mr. Swampillai that the release called for him to abandon his LTD claim and that, if he was medically unable to work again, his recourse against RSA for LTD benefits would be forever foreclosed.

[68] It would have been clear to RSA that a release by Mr. Swampillai of his LTD claim would have significant consequences for him. RSA, nevertheless, did not inform Sun Life that it had decided to dismiss Mr. Swampillai and require a release that called for him to give up his appeal of Sun Life's denial of his LTD claim under the "any occupation" definition of disability. Without this information, Sun Life could not act in the way that Ms. Velic suggested that it should, by asking Mr. Swampillai about his intentions concerning his LTD claim. RSA took no steps to determine from Sun Life whether it had done so, and Sun Life did not find out about the release until after this litigation commenced.

[69] 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.

[70] Mr. Swampillai has satisfied the four elements that are necessary to establish that the release, as it relates to Mr. Swampillai's LTD claim, is unconscionable.

Disposition

[71] For the forgoing reasons, the release as it relates to Mr. Swampillai's LTD claim is set aside and declared unenforceable. The motions for summary judgment brought by RSA and by Sun Life are dismissed.

[72] The parties have agreed that the successful party is entitled to costs fixed in the amount of $10,000. I therefore fix costs in the amount of $10,000 payable by the defendants to Mr. Swampillai within 30 days.

Cavanagh J.

Released: June 26, 2018

CITATION: Swampillai v. Royal & Sun Alliance Insurance Company of Canada, 2018 ONSC 4023
COURT FILE NO.: CV-17-577041
DATE: 20180626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOE SWAMPILLAI

Plaintiff

– and –

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA and SUN LIFE ~~INSURANCE~~ ASSURANCE COMPANY OF CANADA

Defendants

REASONS FOR JUDGMENT

Cavanagh J.

Released: June 26, 2018