

White et al., Executors of the Estate of Dowsley  
v. Viceroy Fluid Power International Inc.

[Indexed as: Dowsley Estate v. Viceroy  
Fluid Power International Inc.]

34 O.R. (3d) 57  
[1997] O.J. No. 2360  
Docket: C8682

Court of Appeal for Ontario,  
McMurtry C.J.O., Catzman and Laskin JJ.A.  
June 10, 1997

Employment -- Wrongful dismissal -- Damages -- Deductions --  
Damages awarded for wrongful dismissal to be reduced by amount  
of workers' compensation benefits received by plaintiff during  
reasonable notice period.

In its appeal from a judgment for the plaintiff in a wrongful  
dismissal action, the defendant employer raised the issue of  
the deductibility of workers' compensation benefits from the  
award of damages for wrongful dismissal.

Held, the appeal should be allowed in part.

Workers' compensation benefits received during the reasonable  
notice period are deductible from damages awarded for wrongful  
dismissal. The suggestion for counsel for the plaintiff that  
such benefits should not be deductible as the period of  
reasonable notice should not commence until the period of  
payment of those benefits had expired and the employee was able  
to return to work was rejected. The submission was unsupported  
by any authority and would occasion serious prejudice in cases  
where injured and wrongfully dismissed employees were never  
capable of returning to employment.

Salmi v. Greyfriar Developments Ltd. (1985), 36 Alta. L.R. (2d) 182, 17 D.L.R. (4th) 186, [1985] 4 W.W.R. 463, 7 C.C.E.L. 80 (C.A.); White v. F.W. Woolworth Co. (1996), 139 Nfld. & P.E.I.R. 324, 433 A.P.R. 324, 22 C.C.E.L. (2d) 110 (Nfld. C.A.), folld

Cunningham v. Wheeler, [1994] 1 S.C.R. 359, 88 B.C.L.R. (2d) 273, 113 D.L.R. (4th) 1, 164 N.R. 81, [1994] 4 W.W.R. 153 sub nom. Shanks v. McNee, Cooper v. Miller (No. 1); McKay v. Camco Inc. (1986), 53 O.R. (2d) 257, 11 O.A.C. 356, 24 D.L.R. (4th) 90, 11 C.C.E.L. 256 (C.A.); Ratych v. Bloomer, [1990] 1 S.C.R. 940, 39 O.A.C. 103, 69 D.L.R. (4th) 25, 107 N.R. 335, 30 C.C.E.L. 161, 3 C.C.L.T. (2d) 1; Sylvester v. British Columbia (1997), 146 D.L.R. (4th) 207, 212 N.R. 51, 97 C.L.L.C. 210-012, 73 O.R. (2d) 448n (S.C.C.), consd

Other cases referred to

Industries de Caoutchouc Mondo (Canada) Lte v. LeBlanc (1987), 17 C.C.E.L. 219 (Que. C.A.)

APPEAL from a judgment for the plaintiff in an action for damages for wrongful dismissal.

Howard A. Levitt, for appellant.

Christopher J. Dockrill, for respondents.

BY THE COURT: -- The appellant raised three issues on the argument of this appeal, relating to:

- (a) the deductibility of workers' compensation benefits from the award of damages for wrongful dismissal;
- (b) the length of the notice period; and
- (c) the rate of prejudgment interest and the manner of its

calculation.

We called upon counsel for the respondents only with respect to the first of these issues, and this endorsement is limited to that issue.

Following the argument, the court advised counsel that we proposed to withhold our disposition of this appeal pending the decision of the Supreme Court of Canada, then under reserve, in *Sylvester v. British Columbia*, which raised a similar issue. That court released its decision in that case on May 29, 1997 [now reported 146 D.L.R. (4th) 207, 212 N.R. 51], holding that disability payments received by an employee during the notice period pursuant to a short term illness and injury plan established by his employer were, in the circumstances of that case, deductible from the amount of his damages for wrongful dismissal. Speaking for the court, Major J. expressly said (at para. 12 [p. 211 D.L.R.]) that decisions involving unemployment insurance benefits and workers' compensation benefits were not helpful in deciding that case because such benefits are statutory and distinguishable as such.

Appellate courts in three provinces have addressed the issue of deductibility of workers' compensation benefits: *Salmi v. Greyfriar Developments Ltd.* (1985), 7 C.C.E.L. 80, 36 Alta. L.R. (2d) 182 (C.A.); *Industries de Caoutchouc Mondo (Canada) Lte v. LeBlanc* (1987), 17 C.C.E.L. 219 (Que. C.A.); and *White v. F.W. Woolworth Co.* (1996), 22 C.C.E.L. (2d) 110, 139 Nfld. & P.E.I.R. 324 (Nfld. C.A.). In *Salmi* and *White*, such benefits received during the notice period were held to be deductible from damages awarded for wrongful dismissal; in *Leblanc*, such benefits were held not to be deductible.

We respectfully agree with the conclusion reached in the *Salmi* and *White* cases. The obiter suggestion in the decision of this court in *McKay v. Camco Inc.* (1986), 53 O.R. (2d) 257 at p. 269, 24 D.L.R. (4th) 90, on which counsel for the appellant relied, appears to have been overtaken by the analysis of the relevant principles in the subsequent decisions of *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, and *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1.

While those cases, unlike the present case, involved the assessment of damages for negligence against a tortfeasor, the application of the principles which they enunciate is consistent with the conclusion reached in the Salmi and White cases and with the result in Sylvester.

We reject the justification, suggested by counsel for the respondents, for the refusal to deduct workers' compensation benefits from damages for wrongful dismissal on the basis that the period of reasonable notice should not, as a matter of law, commence until the expiration of the period of payment of those benefits and the employee's ability to return to employment. While that submission would benefit the appellant in the present case, it is unsupported by any authority and would occasion serious prejudice in other cases to injured and wrongfully dismissed employees who are never capable of returning to employment.

Accordingly, the appeal is allowed to the extent that the damages awarded by the trial judge should be reduced by the amount of the workers' compensation benefits received by the respondent during the period of reasonable notice found by the trial judge.

Having regard to the division of success on the issues raised by counsel for the appellant, we would make no order as to the costs of the appeal.

Appeal allowed in part.