

COURT OF APPEAL FOR ONTARIO

CITATION: Soave v. Stahle Construction Inc., 2023 ONCA 265

DATE: 20230418

DOCKET: C70375

Miller, Trotter and Favreau JJ.A.

BETWEEN

Roberto Soave

Plaintiff (Respondent)

and

Stahle Construction Inc.

Defendant (Appellant)

Justin Heimpel, for the appellant

Lesley K. Parsons and Danielle Thomas, for the respondent

Heard: February 14, 2023

On appeal from the judgment of Justice Linda M. Walters of the Superior Court of Justice, dated January 13, 2022.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Stahle Construction Inc. (“Stahle”), appeals a judgment requiring that it pay damages to the respondent, Roberto Soave, for having improperly terminated his long-term disability benefits coverage.

[2] Stahle is a general contractor in the construction industry. Mr. Soave started working for Stahle on October 7, 2013 as a construction site supervisor.

[3] As one of the terms of his employment contract, Mr. Soave was required to participate in Stahle's group benefits plan. Great West Life Insurance was the provider of long-term disability benefits. Mercon Benefits Services ("Mercon") was the administrator of the benefits plan. Mr. Soave's entitlement to benefits, including long-term disability benefits provided by Great West Life, were described in a booklet prepared by Mercon (the "Mercon Booklet"). Stahle and Mr. Soave were each to contribute 50 percent to the premiums for the benefits plan.

[4] Mr. Soave completed his work supervising one construction site around January 27, 2014. At that time, Stahle offered Mr. Soave work on another site. However, Mr. Soave turned down the work because he said he required surgery to address a hernia condition. Mr. Soave then stopped working and Stahle completed a Record of Employment that indicated that he was on a temporary leave due to medical illness.

[5] On March 13, 2014, before the hernia surgery was scheduled, Mr. Soave was involved in a serious motor vehicle accident. He suffered significant injuries. Following his accident, Mr. Soave tried to pay for medication purchased at a pharmacy through Stahle's benefits plan. The insurer contacted Stahle to inquire about Mr. Soave's status, at which point Stahle took the position that Mr. Soave

was no longer employed by the company and that he was therefore not entitled to any benefits. Mr. Soave subsequently applied for long-term disability benefits from Great West Life, but he was turned down on the basis that he was no longer actively working on the date of his accident.

[6] Mr. Soave brought an action against Stahle claiming that he continued to be employed by the company at the time he stopped working on January 27, 2014, and that the company had improperly terminated his benefits.

[7] The trial judge found that Mr. Soave had taken a “temporary medical leave” on January 27, 2014, and that he was still employed by Stahle at the time of his motor vehicle accident. She also found that Mr. Soave would have been entitled to long-term disability benefits and, on that basis, she ordered Stahle to pay Mr. Soave general damages in the amount of \$245,995.56 and special damages in the amount of \$2,935.

[8] On appeal, Stahle does not challenge the trial judge’s finding that Mr. Soave remained an employee on the date of his motor vehicle accident. However, Stahle appeals the trial judge’s finding that Mr. Soave was entitled to receive long-term disability benefits on the following grounds:

- a. The trial judge erred in denying Stahle’s request at trial to introduce an insurance policy by Great West Life, which it claims governs the entitlement to benefits in this case;

- b. The trial judge erred in failing to give any weight to Great West Life's letter explaining why it had denied long-term disability benefits to Mr. Soave; and
- c. The trial judge erred in her interpretation of the Mercon Booklet, which Mr. Soave relied on as setting out his entitlement to long-term disability benefits.

[9] For the reasons that follow, we do not give effect to the first and second grounds of appeal. However, we agree with Stahle that the trial judge erred in her interpretation of the Mercon Booklet and specifically in finding that Mr. Soave was eligible for long-term disability benefits at the time of his motor vehicle accident. Accordingly, we allow the appeal in part and remit the matter back to the trial judge or another judge of the Superior Court to be decided in accordance with these reasons.

[10] Each of the issues raised on appeal is addressed below.

**ISSUE 1: THE TRIAL JUDGE DID NOT ERR IN REFUSING TO ALLOW
STAHLE TO INTRODUCE THE GREAT WEST LIFE INSURANCE POLICY**

[11] At trial, in the context of Mr. Soave's cross-examination, Stahle sought to introduce the Great West Life insurance policy which it said applied in this case. Stahle had not disclosed the policy in its affidavit of documents, although Mr. Soave's lawyer had a copy of the policy in her files. Mr. Soave nevertheless

objected to the admission of the policy on the basis that, up to that point, the parties had relied on the Mercon Booklet as an accurate description of Mr. Soave's long-term disability benefits coverage. The trial judge ruled against admitting the policy on the basis of "trial fairness". She stated that she was concerned that Stahle never referred to the Great West Life policy or gave notice that it intended to rely on it.

[12] Stahle submits that the trial judge erred in making this ruling because she failed to apply the proper test for the admission at trial of documents not disclosed in an affidavit of documents. We find that there is no basis for interfering with the trial judge's ruling on this issue.

[13] Rule 30.08(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that, where a party fails to disclose a document in its affidavit of documents and the document is favourable to that party, the document can only be introduced at trial with leave of the court. Rule 53.08(1) sets out the test for granting leave in such circumstances, and it requires that the court be satisfied that (a) there is a reasonable explanation for the delay and (b) the admission of the document (i) will not cause prejudice that cannot be compensated by costs or an adjournment and that (ii) it will not cause undue delay of the trial.

[14] This court owes significant deference to the trial judge's exercise of her discretion in deciding whether to admit the Great West Life policy: *1162740 Ontario Limited v. Pingue*, 2017 ONCA 583, at para. 13.

[15] While the trial judge did not explicitly refer to the test under r. 53.08(1) of the *Rules of Civil Procedure*, it is evident that she considered the relevant factors and that her ruling was supported by the record before her. Specifically, she considered the issue of prejudice when she referred to trial fairness and Stahle's failure to disclose that it intended to rely on the Great West Life policy up to the time of Mr. Soave's cross-examination.

[16] Up to that point, the parties had proceeded on the assumption that the provisions in the Mercon Booklet applied. In his statement of claim, Mr. Soave referred to the description of the long-term disability benefits as set out in the Mercon Booklet. In its statement of defence, Stahle accepted that this was an accurate description of the applicable provisions for his entitlement to long-term disability benefits. As mentioned above, Stahle did not include the Great West Life policy in its affidavit of documents. Therefore, there was no opportunity for Mr. Soave to examine Stahle's representative on the Great West Life policy or its applicability to Mr. Soave. In addition, Stahle only sought to introduce the policy on cross-examination which meant that Mr. Soave's examination in chief had already proceeded on the assumption that the Mercon Booklet set out the accurate provisions addressing Mr. Soave's entitlement to long-term disability benefits.

Mr. Soave's trial strategy was built around the provisions in the Mercon Booklet. In the circumstances, it is hard to see how the introduction of the Great West Life policy at this late stage would not result in prejudice that would have caused undue delay in the proceedings.

[17] Stahle argues that the introduction of the Great West Life policy at this stage of the trial was unlikely to have caused delay in the proceedings because its terms were not significantly different from the terms set out in the Mercon Booklet. However, Stahle did not make the Great West Life policy available to the panel on appeal. There was no motion for fresh evidence before this court. Accordingly, it was not possible for the panel to assess whether there were any differences between the Great West Life policy and its description in the Mercon Booklet.

[18] In the circumstances, we see no error in the trial judge's decision not to admit the Great West Life policy.

ISSUE 2: THE TRIAL JUDGE DID NOT ERR IN GIVING NO WEIGHT TO THE GREAT WEST LIFE LETTER

[19] In May 2016, Mr. Soave applied to Great West Life for long-term disability benefits. Great West Life turned down his application. In its letter, Great West Life explained that Mr. Soave was not entitled to long-term disability benefits for his March 13, 2014 accident because he "was no longer actively at work for his employer as of this date".

[20] At trial, Stahle relied on this letter for the purpose of showing that Mr. Stahle did not meet the eligibility criteria for long-term disability benefits under the Great West Life policy.

[21] In her reasons, the trial judge gave little weight to the letter, explaining that it was not possible to know whether Great West Life was influenced by an earlier letter from Stahle advising the insurer that Mr. Soave had resigned from his position on January 27, 2014 or whether Great West Life had assessed the claim as though Mr. Soave remained employed by Stahle. She reasoned as follows:

The court is not in a position to know what, if anything, Great West Life would have done differently if the information they had was that Rob did not quit, he was still an employee at the date of his motor vehicle accident, and that on January 27, 2014 he had been granted a temporary medical leave of absence because of his hernia condition and the need for surgery.

It is also of concern that the court does not have the actual application Rob prepared and submitted to Great West Life.

Without that, this letter from Great West Life dated June 6, 2016, is of no assistance to the court in determining whether or not Rob met the definition of disabled at the time of the motor vehicle accident on March 13, 2014.

[22] We reject Stahle's argument that the trial judge erred in giving no weight to the letter. It is not the role of this court to reweigh the evidence at trial, unless the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10 and 22-23.

[23] In this case, it was entirely appropriate for the trial judge to give no weight to the Great West Life letter. As she explained, Stahle sought to rely on it without the benefit of any context that would explain what information Great West Life relied on when deciding that Mr. Soave did not qualify for long-term disability benefits. Notably, Stahle did not call a representative from Great West Life as a witness at trial.

[24] Accordingly, we see no error in the trial judge's treatment of the Great West Life letter.

ISSUE 3: THE TRIAL JUDGE ERRED IN FINDING THAT MR. SOAVE WAS ELIGIBLE FOR LONG TERM DISABILITY BENEFITS

[25] Stahle argues that, if the provisions in the Mercon Booklet governed, the trial judge nevertheless erred in finding that Mr. Soave was entitled to long-term disability benefits. In making this argument, Stahle submits that, even if Mr. Soave was still employed by Stahle after he stopped working on January 27, 2014, the trial judge failed to properly assess whether he met the eligibility requirements for receiving long-term disability benefits. We agree with Stahle.

[26] The Mercon Booklet addressed the circumstances under which an employee whose employment was temporarily interrupted could continue to be eligible for benefits. In addition, the Mercon Booklet set out the specific eligibility requirements for long-term disability benefits. In our view, the trial judge made

palpable and overriding errors in her interpretation and application of these provisions.

[27] In addressing this issue, we start with a review of the relevant provisions in the Mercon Booklet, followed by a discussion of the trial judge's errors in interpreting and applying those provisions in this case.

ELIGIBILITY FOR LONG-TERM DISABILITY BENEFITS UNDER THE MERCON BOOKLET

[28] Under the terms of the Mercon Booklet, Mr. Soave's benefit coverage only started after the end of any waiting period imposed by Stahle and required that he be "actively at work" on the date his coverage started:

Coverage Effective Dates

Coverage for you and your dependents starts on the effective date of your employer joining the plan, or on the date that any waiting period ends, provided that you are actively at work on that date. [Emphasis added.]

[29] The Mercon Benefit Booklet then addressed the circumstances under which coverage for an employee whose employment is temporarily interrupted is eligible for continued coverage. This includes circumstances where the employee is on a leave of absence or disabled. But these terms are qualified as follows:

Continuation of Coverage

If your employment is temporarily interrupted, under the following circumstances, your benefit coverage may be continued on a contribution basis. Please contact Mercon

Benefit Services regarding the continuation of your benefits during any of the following periods of leave.

Leave of Absence: You may continue your benefits under this plan, with the exception of disability benefits, for up to six months during a leave of absence elected by you with your employer's agreement. Prior to beginning the leave, you and your employer must agree to the scheduled start and finish dates.

...

Disability: You may continue your benefits while you are unable to work due to disability for up to 24 months from the date you become disabled. To be eligible for the continuation of benefits, you must either be in receipt of Workers' Compensation or Long Term Disability benefits, or be approved for waiver of premium under the Employee Life Insurance benefit. [Emphasis added.]

[30] The Mercon Booklet also sets out the eligibility requirements that apply specifically to long-term disability benefits.

[31] An employee is only eligible for long-term disability benefits following a qualifying period of 120 days of disability. At the end of this qualifying period, the employee has 180 days to provide notice of all long-term disability claims to Great West Life.

[32] The Mercon Booklet defines "disability" as follows:

In order to be considered disabled, you must be unable to perform the essential duties of your own occupation during the Qualifying Period and during the first two years immediately following the Qualifying Period. Thereafter, you will be considered to be disabled if you are unable to perform the essential duties of:

- any occupation for which you are qualified or may reasonably become qualified, by training, education or experience;
- any occupation for which you are receiving an income that is equal to or greater than the amount of monthly disability benefit payable under this provision, adjusted annually by the Consumer Price Index.

[33] The Mercon Booklet also specifies that an employee is not eligible to receive long-term disability benefits during a period when an employee is on a leave of absence:

You are not eligible to receive LTD benefits during any period that you are:

on a leave of absence during which you become totally disabled, unless your employer is required to pay benefits during this period as required by legislation, regulation or case law.

ERRORS IN THE TRIAL JUDGE'S REASONING

[34] The standard of review that applies to the interpretation of a contract is normally that of a palpable and overriding error, unless there are extricable errors of law, or the contract at issue is a standard form contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-54; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24.

[35] In this case, there is no information before the court as to whether the terms of the Mercon Booklet constitute a standard form contract. The terms are certainly

not unusual in the context of an employee benefit plan, including long-term disability benefits. However, even if we were to assume that this is not a standard form contract, we are satisfied that the trial judge made palpable and overriding errors in her interpretation of the eligibility requirements for long-term disability benefits.

[36] Mr. Soave stopped working on January 27, 2014. At that point, he was no longer entitled to benefits coverage unless he met one of the exceptions for continued coverage described in the Mercon Booklet. He also had to meet the eligibility requirements for long-term disability benefits to trigger that coverage.

[37] In her decision, the trial judge reasoned as follows in deciding that Mr. Soave was entitled to long-term disability benefits:

According to the Mercon benefit plan, an individual seeking a temporary leave of absence due to disability can continue their benefits on a contribution basis (50 percent paid by each of the employer and the employee) as long as they are in receipt of long-term disability benefits for a period of two years. There is a 120-day waiting period with an additional 180-day period during which an employee can apply.

I have accepted that Rob received his temporary medical leave on January 27, 2014. This would allow him until November 23, 2014, or 120 days, before which he would need to apply for long-term disability benefits.

By the time of the motor vehicle accident on March 13, 2014, Rob was still on his temporary leave; was still an employee; and should have been entitled to benefits under the plan.

After the date of the motor vehicle accident, if he had been permitted, Rob would have applied for LTD benefits in respect of permanent disability. Accordingly, the court must determine if Rob was permanently disabled within the meaning of the benefit plan. [Emphasis added.]

[38] The trial judge then went on to assess the question of whether Mr. Soave was permanently disabled in reference to his condition as of the date of the motor vehicle accident.

[39] Therefore, while the trial judge treated Mr. Soave's work interruption on January 27, 2014 as "a temporary medical leave", she accepted that Mr. Soave was entitled to long-term disability benefits as a result of the injuries he suffered in the motor vehicle accident.

[40] In our view, this reasoning constitutes a fundamental misreading of the eligibility requirements for long-term disability benefits in the Mercon Booklet. Specifically, while the trial judge found that Mr. Soave was on "a temporary medical leave", she did not consider whether his work was interrupted because he was on a leave of absence or because of disability and, more significantly, whether he met the eligibility requirements for long-term disability coverage. If she had properly interpreted the Mercon Booklet, she would have concluded that Mr. Soave could only be entitled to long-term disability benefits if he (a) was disabled within the meaning of the Mercon Booklet on the date he stopped working, or (b) became totally disabled during his leave of absence, and his employer was required by legislation, regulation or case law to pay benefits during that period. We arrive at

this conclusion based on a review of the provisions that apply to Mr. Soave's circumstances.

[41] The trial judge erred in focusing on the Continuation of Coverage provisions in the Mercon Booklet. While these provisions refer to "benefits" and "benefit coverage", it is clear from the context that these provisions do not address a disability that commences after an employee stopped working nor do they speak to disability coverage itself. These provisions address continued eligibility for other existing health benefit coverages.

[42] Specifically, under the Leave of Absence provision, employees can continue their "benefits" with the exception of disability benefits for a period of up to six months. Even if Mr. Soave had made his share of the contributions after he stopped working, he would not have been eligible under this provision for two reasons. This provision addresses continuation of benefits and not eligibility. More importantly, "disability benefits" are explicitly excluded from the benefits available to employees who are on a leave of absence.

[43] The Disability provision in the Continuation of Coverage section of the Mercon Booklet contemplates that an employee unable to work due to disability may continue their "benefits" for up to 24 months. Eligibility for continued coverage depends upon the employee already being in receipt of Worker's Compensation or Long-Term Disability Benefits. In other words, like the Leave of Absence

provision, the Disability provision addresses continuation of an existing benefit. Because the provision presumes the employee to already be in receipt of long-term disability benefits, it is evident that the intent of the provision is to address coverage for other benefits, such as dental benefits or life insurance – not coverage for long-term disability benefits.

[44] To determine whether Mr. Soave was entitled to long-term disability benefits after he stopped working, the trial judge should have considered the provisions of the Mercon Booklet that specifically address entitlement to long-term disability benefits rather than continuation of coverage. It is evident that Mr. Soave would qualify for long-term disability benefits if he was disabled within the meaning of the Mercon Booklet on the date he stopped working; in other words, if he stopped working due to his disability.

[45] As set out above, an employee is only entitled to long-term disability benefits after a period of 120 days of “disability”, after which they can apply for those benefits within the next 180 days. In this case, the trial judge treated the beginning of Mr. Soave’s waiting period as the date he stopped working but she considered whether he met the definition of disability in relation to his condition following his motor vehicle accident. However, as reviewed above, “disability” is a defined term in the Mercon Booklet. In order to assess whether Mr. Soave was disabled within the 120-day qualifying period between the date when he stopped working and the date of the accident, she would have had to assess whether he was disabled within

the meaning of the policy at the time when he stopped working. This is evident from the definition of “disability” which requires that a person be unable to perform the essential duties during the qualifying period.

[46] In addition, the trial judge failed to consider the provision in the Mercon Booklet that explicitly states that an employee on a leave of absence is not entitled to long-term disability benefits if they become totally disabled during this period unless the employer is required to pay benefits by legislation, regulation or case law. This provision is consistent with the leave of absence provision above which provides that an employee on a leave of absence is not entitled to disability benefits.

[47] It is clear from the terms of the Mercon Booklet that Mr. Soave was only eligible for long-term disability benefits if he met the definition of disability on the date he stopped working and throughout the 120-day qualifying period. Alternatively, if Mr. Soave was not disabled within the meaning of the Mercon Booklet on the date he stopped working, he may be entitled to long-term disability benefits if he became totally disabled during his leave of absence and his employer was required to pay benefits during that period “as required by legislation, regulation or case law”. However, on this last point, we note that no submissions were made on the issue and it is not evident whether any legislation, regulation or case law would apply in the circumstances of this case, but we do not foreclose the possibility given that this is explicitly provided for in the Mercon Booklet.

[48] In any event, we are satisfied that the trial judge erred in finding that Mr. Soave was entitled to long-term disability benefits, without considering if he was disabled on the date he stopped working or whether there was a requirement in legislation, regulation or case law for making such a finding.

REMEDY

[49] Pursuant to s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court has the power, amongst other matters, to make any decision the trial judge could have made or to order a new trial.

[50] In this case, there is some evidence about Mr. Soave's health status when he stopped working on January 27, 2014. But it would not be appropriate for this court to make a determination about whether he was disabled within the meaning of the Mercon Booklet on that date and whether he would thereby have qualified for long-term disability benefits based on his hernia condition at that time and throughout the subsequent 120-day qualifying period. Accordingly, the matter is remitted back to the trial judge or another judge of the Superior Court to make this determination.

DISPOSITION

[51] The appeal is allowed and the matter is remitted back to the trial judge or another judge of the Superior Court to reconsider the issue of whether Mr. Soave

qualified for long-term disability benefits under the Mercon Booklet in accordance with these reasons.

[52] As agreed between the parties, Stahle is entitled to its costs of the appeal in the amount of \$17,500 on a partial indemnity basis all inclusive. Given that the matter is being remitted back to the Superior Court and that the ultimate outcome is uncertain at this time, we leave the issue of the costs below to be decided by the judge to whom this matter will be remitted.

“B.W. Miller J.A.”
“Gary Trotter J.A.”
“L. Favreau J.A.”