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**COURT OF APPEAL FOR ONTARIO**

**RE:** VALERIE DEYONGE (Plaintiff/Appellant) – and – LIBERTY  
MUTUAL INSURANCE COMPANY (Defendant/Respondent)

**BEFORE:** BORINS, LANG and JURIANSZ JJ.A.

**COUNSEL:** Maurice W. Pilon for the (plaintiff/appellant)

Glenn P. Christie and Allyson M. Fischer for the (defendant/  
respondent)

**HEARD:** September 9, 2004

On appeal from the judgment of Justice Romain W.M. Pitt of the Superior Court of  
Justice dated January 26, 2003.

**ENDORSEMENT**

[1] The trial judge gave judgment in favour of the plaintiff awarding her damages under the defendant's disability insurance plan (the "plan") and damages for wrongful dismissal. The plaintiff appeals the limitation he placed on her long-term disability ("LTD") benefits and his assessment of the amount of notice to which she was entitled upon termination. The defendant was both the plaintiff's employer and her insurer. The defendant cross-appeals the trial judge's finding that the plaintiff was entitled to short-term disability benefits based on her total earnings rather than on her base pay.

[2] The plaintiff brought an application to introduce fresh evidence, which is dismissed. We are not persuaded the proposed evidence was pertinent to the issues raised in this appeal.

[3] The trial judge ruled that the plaintiff was totally disabled from January 2000 and continued to be disabled at the time the defendant terminated her employment without cause in August 2000. No appeal is taken from these findings.

[4] The trial judge inferred the plaintiff would have recovered from her disability had she sought psychiatric and neurological medical assistance. He indicated that December 31, 2000, was a reasonable projected date of her recovery. Consequently, he found she

had failed to mitigate her losses and held that her entitlement to LTD benefits under the policy terminated on December 31, 2000. As there was no evidence to support the inference made by the trial judge, the finding cannot stand. The plaintiff is entitled to a declaration that at the date of her termination she was entitled to LTD benefits in accordance with the disability insurance plan.

[5] The trial judge found that the plaintiff was entitled to twelve months salary in lieu of notice. In arriving at that assessment, he relied in part on his finding regarding mitigation that we have set aside. Accordingly, considering the plaintiff's long period of service and the other factors set out in *Bardal v The Globe and Mail*, [1960] 24 D.L.R. (2d) 140 (Ont. H.C.J.), we find the appropriate period of notice to be eighteen months resulting in an award of \$136,606.00.

[6] The plan provides an employee is entitled to benefits where an illness or injury commences prior to termination of employment. As defendant's counsel submitted, that provision makes it clear that entitlement to benefits is not defeated by termination of employment. However, we are of the view it also supports the trial judge's finding that the parties intended employees to have separate entitlements to both severance pay and disability benefits.

[7] With respect to the question of short-term benefits, the plan, on our reading, uses the term "salary" in the same way as "earnings". Accordingly, we would not disturb the trial judge's finding that the plaintiff was entitled to benefits calculated on her base pay and commissions. The trial judge correctly found that the plaintiff was entitled to judgment for the shortfall in the amount of \$33,270.06.

[8] The cross appeal is dismissed with costs.

[9] The appeal is allowed with costs and the judgment is varied to grant the plaintiff a declaration that she was disabled in accordance with the terms of the defendant's disability insurance plan from August 2000, in the amount of \$5,312.52 monthly, and \$136,606.00 in lieu of notice.

[10] Taking into account the defendant's success on the fresh evidence application, costs of the appeal and cross-appeal are fixed in favour of the plaintiff on a partial indemnity basis in the amount of \$18,000 inclusive of costs and disbursements.

"S. Borins J.A."

"S.E. Lang J.A."

"R.G. Juriansz J.A."