

SUPREME COURT OF NOVA SCOTIA

Citation: Ross Estate v. Police Association of Nova Scotia, 2014 NSSC 42

Date: 20140203

Docket: Hfx No. 345007

Registry: Halifax

Between:

Marie Carmel Aline Taillefer Young, as Executrix
under the Last Will and Testament of Joseph W. Ross, Sr.

Plaintiff

v.

The Police Association of Nova Scotia

Defendant

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: January 9, 2014

Counsel: Peter Coulthard, Q.C. and Alexander Grant, for the plaintiff
Kiersten Amos and Julia Crabbe, for the defendant

Moir J.:

Introduction

[1] The estate of a deceased former employee seeks an order for summary judgment for sums his former employer agreed to pay for deferred salary. The employer resists on the bases of misrepresentations, breaches of fiduciary obligation, and under performance. The employee relies on the statutory prohibition against using set-off to avoid paying salary. The employer argues that the agreement for deferred payment of salary is rescinded for misrepresentation, and the amounts it agreed to pay are not salary in any case.

Facts Underpinning Claim

[2] Joseph W. Ross was the executive director of the Police Association of Nova Scotia from 1977 until 2006. He retired on December 31, 2006. Two years before his retirement he and PANS signed an agreement. It reads:

PURPOSE: Salary deferral of the Executive-Director of the Police Association of Nova Scotia, as described below.

RATIONALE: At the present time, the annual salary of the Executive Director of the Police Association of Nova Scotia is set at

\$99,672. This salary will remain the same for the years 2005 and 2006 ($\$99,672 \times 2 = \$199,344$). In order to balance the PANS budget for the year 2005, considerable budget cutbacks are required. PANS['] budget requirements for 2006 are currently unknown.

AGREEMENT: The parties agree to reduce the salary of the Executive-Director, Joseph W. Ross, to \$25,000 for the years 2005 and 2006, and defer payment of the remaining monies owing to Mr. Ross over the following six years (2007 to 2112 [*sic*] inclusive) at the rate of \$25,000 per year.

At the end of December 2006, should PANS be in a financial position to pay the remainder of the monies owing to Mr. Ross, the Board of Directors agrees to pay the monies owing in a lump sum payment at that time.

For the years 2005 and 2006, the substantive position of the Executive-Director will remain unchanged, however his duties will include, without necessarily being limited to, performing public relations functions, consulting services and assisting with the administration of PANS, whenever required.

For the years beyond 2006, should the Board of Directors agree to retain the services of Mr. Ross for consulting purposes, public relations purposes, or assisting the Association in recruiting other agencies, this consideration shall also be entertained at the end of December 2006.

This Agreement was written following a meeting of the Board of Directors held January 11, 2005, and reflects in more precise terms the intent of the motion, which reads: moved by Phil Claybourne, seconded by Kelly Oickle,

"to approve the recommendations relating to the salary deferral for the Executive-Director of the Police Association of Nova Scotia."

MOTION CARRIED

The agreement is dated February 28, 2005.

[3] Mr. David W. Fisher took over after Mr. Ross retired. Before that he had been general counsel of PANS, a position he held since 1986. Halfway through 2010, Mr. Fisher caused PANS to stop making payments under the February 28, 2005 agreement. The balance was \$62,500.

[4] PANS also discontinued Mr. Ross's extended healthcare, medical, and dental plan.

[5] Mr. Ross sued PANS for breach of the 2005 agreement and breach of a promise to maintain the health plan. PANS defended and it counterclaimed.

[6] The defence alleges that Mr. Ross mismanaged PANS since the year 2000. It also says that Mr. Ross's performance deteriorated and, in an answer to a demand for particulars, PANS dates the beginning of the deterioration to April 1, 1996 when Mr. Ross is alleged to have converted a key worker insurance policy owned by PANS to an annuity paid to Mr. Ross. The defence claims that the deterioration in performance led to calls for Mr. Ross to step down.

[7] The defence characterizes the 2005 agreement as being part of a "severance package" which Mr. Ross "unilaterally negotiated" "[i]n or around 2006." It says that Mr. Ross failed to disclose information to the PANS Board of Directors when he negotiated the package:

- "the terms of the Package" itself and the impact it would have "on financial health of PANS."
- the existence of the annuity "and other health and insurance benefits he would receive post-retirement that would be a financial cost to PANS."
- "the financial state of the PANS DB Pension Plan at the time the Package was negotiated."

[8] In 1995 or 1996, Mr. Ross caused a key person insurance policy on his life owned by PANS, but held by it for Mr. Ross's retirement benefits, to be converted to an annuity paid to him. The failures to disclose the annuity, and to disclose the financial state of the pension plan, to the Board of Directors when the severance

package was "ratified" amounted to misrepresentations, which "were known or ought to have been known to be false and upon which the Board relied to its detriment in ratifying the Package." As a result of the misrepresentations, "the Package negotiated with PANS is void and/or voidable and of no force and effect".

[9] Alternatively, the defence claims set-off.

[10] The counterclaim pleads breach of fiduciary duty and claims damages.

[11] Mr. Ross demanded particulars of the terms of the severance package.

PANS refused on this ground:

The demand is refused because the severance package ... arrangement is within the knowledge of and the possession of the Plaintiff Ross being a "Memorandum of Agreement".

This way, we are referred to an agreement between Mr. Ross and PANS signed on

June 17, 2006. The entire agreement reads:

Re: retirement of J. W. "Joe" Ross, Executive-Director, PANS

Effective January 1, 2007, the following provisions relating to the retirement of J. W. "Joe" Ross are agreed to:

1. Mr. Ross shall have access to the PANS office for the purpose of accessing research material in order to write the history of PANS.
2. In accordance with Article 3, Section 6 of PANS Constitution, Mr. Ross shall be made Honorary Member of PANS.
3. PANS shall continue to provide and pay all costs associated with the extended medical, dental care and life insurance group coverage on behalf of Mr. Ross.
4. PANS shall honour the Agreement between PANS and J. W. "Joe" Ross dated February 2, 2005 relating to the salary deferral of the Executive-Officer of PANS, which is in accordance with Appendix "B" of the Summary of Minutes on the Board of Directors held at the PANS office on January 11, 2005 (reference attached appendices).
5. To accept the notice of retirement of Mr. Ross, Executive-Director of PANS, effective December 31, 2006.

[12] Mr. Ross's estate moves for summary judgment on the balance claimed under the 2005 agreement only. The question is whether there is a genuine issue requiring trial before liability on the 2005 contract is determined. There are two possibilities, one which sees the alleged misrepresentations as capable of having induced the contract that makes PANS liable for \$62,500 and another which sees that some or all of the PANS claims, if proven, could be set off against the estate's claim under the 2005 contract.

[13] The theory in the PANS pleadings about a broader agreement capable of termination for the alleged misrepresentations was also put forward by Mr. Fisher when he swore an affidavit on the present motion and when he was cross-examined. The affidavit expands on the alleged misrepresentations:

Misrepresentations

26. At the time the 2005 Agreement was proposed, Ross failed to disclose to the Board material facts regarding the financial affairs of PANS including:
 - a) that PANS had purchased a Key Man Life Insurance Policy purchased in April 1974 with Ross as the insured life which was owned by PANS until such time as Ross retired or died ("Key Man Policy"); a copy of which is attached as **Exhibit "14"**.
 - b) that Ross had converted the Key Many [*sic*] Policy to a Sun Life Annuity to his benefit in September 1995 without authority from the Board to do so or notice to the Board that the conversion had been made;
 - c) that Ross was in receipt of the Sun Life Annuity and had been since 1995;
 - d) that PANS had not issued T4 slips to him for the capital and interest amounts of the annuity payments in the approximate amount of \$198,075.85;
 - e) that the fact APA had not issued proper T4 slips exposed APA to potential tax liabilities and penalties;
 - f) that when he negotiated his membership in the PANS Pension Plan, he did so under the false pretence that he did not have any retirement benefit promised to him through his employment;

- g) that the actuarial valuation effective 2003 showed a deficit which required PANS to pay money into the plan to cover the deficiency, which deficiency related to Ross as he was the only employee of PANS in the plan; a copy of which is attached as **Exhibit "15"**[;]
- h) that the financial situation of the PANS Pension Plan did not improve in the years following the 2003 valuation, and new and additional deficiency payments were required after the 2003 valuation;
- i) that PANS' failure to make contributions to the PANS Pension Plan as required exposed PANS to liability;
- j) that PANS was not reporting the pension debt in PANS financial statements as required, thus, allowing the financial status of the organization to be incorrectly stated;
- k) that PANS would have to report the full amount of any severance payment to him in 2007, and not in annual increments, which caused the organization serious solvency problems;
- l) that the 2005 Agreement, if accepted by PANS, would have a serious and adverse impact on both the financial health and solvency of PANS; and
- m) that Ross had mismanaged the financial affairs of PANS which gave rise to the financial problems PANS was experiencing as of the 2005 Budget.

[14] In cross-examination, Mr. Fisher said that he considered the February 2005 agreement to be "part of a severance package discussed over months". There is no mention of retirement in the agreement "but that was certainly the discussion at the time".

[15] Mr. Fisher did allow that the February 2005 agreement was made to reduce pressure on cash flow at a time when PANS was in financial distress. He said that it may also have been intended to alleviate complaints. It was Mr. Ross's fault that the Cape Breton police association was leaving PANS, which was the cause of the cash flow problem.

Principles of Summary Judgment

[16] Rule 13.04(1) is mandatory. It requires a judge to grant summary judgment when the judge finds that a claim or defence fails to raise a genuine issue for trial. If a claim or defence against which summary judgment is sought raises a genuine issue of law, the motions judge has a discretion under Rule 13.04(5) to determine the question or send it on for trial. If the claim raises a genuine issue of material fact, the judge has no discretion but to dismiss the motion and get on with directions under Rule 13.07. "Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts": *Burton Canada Co. v. Coady*, 2013 NSCA 95 at para. 87, point 10.

[17] In a number of decisions, including *Burton Canada Co. v. Coady*, the Court of Appeal interpreted Rule 13.04(1) as prescribing evidentiary burdens in cases where the parties are in disagreement about whether there is a material fact in need of a trial, the humdrum of seriously contested summary judgment motions.

[18] Because of this interpretation, "Summary judgment engages a two-stage analysis": *Burton Canada*, para. 87, point one. The second and third points in *Burton Canada* describe the two stages:

The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

[19] In some cases, it is difficult to see how a finding that there are no material facts in dispute leaves any room for a discussion about a real chance of success. If there is no material fact in dispute, what is left seems to be either a question of law, leading to the motion judge's discretion under Rule 13.04(5), or no question,

leading to summary judgment. So, one way of looking at the second stage is as the responding party's opportunity to show the uncontroverted facts provide that party with a real chance of success.

Are the Facts in Dispute Material to Mr. Ross's Claim for \$62,500?

[20] *Findings Necessary to Establish Claim.* These are simple and the evidence is uncontroverted:

- PANS employed Mr. Ross
- PANS and Mr. Ross agreed that PANS would pay Mr. Ross's salary for 2005 and 2006 over time.
- PANS stopped paying when the balance was \$62,500.

If there are facts in dispute that require a trial, they are material to the defences.

[21] There are three possibilities. 1) Damages for causes against Mr. Ross may be set off. 2) The contract under which Mr. Ross makes the claim for \$62,500 could have been rescinded. 3) His under performance could excuse payment.

[22] *Set-off*. Section 79A of the *Labour Standards Code* is part of a strong legislative statement of public policy against withholding wages. Wages is treated as a special debt by provisions such as the requirement in s. 79 for short pay intervals, the garnishee in s. 85 for collection of wages in dispute, the lien on the employer's assets in s. 88, and the prohibition of assignments of wages in s. 89. This policy is echoed by Parliament in the *Bankruptcy and Insolvency Act*, see ss. 60(1.3), 68.1, 81.3, 81.4, and 136(1)(d).

[23] Subsection 79A(1) reads:

An employer shall not, directly or indirectly, withhold, deduct or require payment of all or part of the employee's wages for the purpose of paying for a loss that occurs while the employee is working unless allowed by statute, court order or written authorization.

Even the employee's power to authorize set-off is limited to protect employees in retail from having to pay for shoplifters and from authorizing a set-off that takes wages below the minimum: s. 79A(2) and (3).

[24] I agree with the interpretations of s. 79A in *Hemeon v. Burnside Fleet Services Limited*, 2010 NSLST 3 and *Penney v 7009852 Canada Inc.*, 2011 NSLST 38. Wages are a special debt protected from set-off for any cause the employer may have against the employee, unless the employee authorizes, the Labour Standards Board orders, or a statute provides otherwise.

[25] None of the causes alleged by PANS against the late Mr. Ross can be set off against the \$62,500 if it is owing for wages.

[26] PANS answers this point by arguing that the sums due under the February 2005 agreement are not wages. The definition of "wages" in s. 2(u) of the *Labour Standards Code* includes "salaries ... for work or services measured by time, piece or otherwise". According to PANS the agreement is for severance, not salary.

[27] Mr. Fisher asserts that the agreement signed on February 28, 2005 is something other than, or more than, it appears to be. That does not make it so. The mere assertion cannot be the basis for concluding that there is an issue of material fact in need of a trial.

[28] This court has a responsibility to assess the contract, not as one assesses evidence to make a finding of fact, but to see if the assertion stands up to reason. This agreement is so clearly about salary that Mr. Fisher's assertion otherwise cannot found a genuine issue, not of law, not of material fact.

[29] The purpose of the February 2005 agreement is "[s]alary deferral". It recites that Mr. Ross's "annual salary" is \$99,672. It stipulates that "This salary will remain the same for the years 2005 and 2006". Then it provides

The parties agree to reduce the salary of the Executive-Director ... to \$25,000 for the years 2005 and 2006 and defer payment of the remaining monies owing to Mr. Ross over the following six years ... at the rate of \$25,000 per year.

Indeed, the agreement goes so far as to promise accelerated payment "should PANS be in a financial position to pay the remainder of the monies owing to Mr. Ross".

[30] To read this contract as meaning that the \$25,000 payments after 2006 are severance does violence to the words. The contract says that Mr. Ross accepts postponed payment of three-quarters of his salary earned in 2005 and 2006.

[31] Nothing justifies PANS' contradiction of the clear meaning of its contract. There is no justification for going behind the words. However, when one does look at underlying documents, they only confirm that the contract means what it says.

[32] Nor does the June 2006 agreement amend the February 2005 agreement or cause pause about the meaning and effects of the February 2005 agreement. The later agreement affirms, rather than amends: "PANS shall honour the Agreement ... dated February 2, 2005". Both agreements contradict PANS' present assertion that the February 2005 agreement was for severance. The later accepts Mr. Ross's resignation effective December 31, 2006 while allowing that payments were to be made in future "relating to the salary deferral of the Executive-Officer of PANS".

[33] The terms of the contract are clear. It is for postponement of payment of 2005 and 2006 salary. Therefore, there are no controverted facts needing a trial to tell whether s. 79A of the *Labour Standards Code* applies.

[34] *Misrepresentation*. The relation between the tort and the claim for salary is answered in the previous section. There can be none. Section 79A prohibits it.

[35] PANS also argues that the alleged misrepresentations allow it to terminate the February 2005 agreement. It says that "Mr. Ross made several material misrepresentations by omission ... which were material to the Board's decision to approve the [February 2005] Agreement." Further, "... in 2010, when it became aware of all the financial circumstances, which were not disclosed at the time the Agreement was proposed, PANS rescinded the Agreement."

[36] The difficulty with this theory is that it depends on broadening the February 2005 agreement far beyond its words.

[37] The Supreme Court of Canada adopted Lord Atkinson's statement of what constitutes rescission at para. 39 of *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. 60:

Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the

parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.

Further, at para. 47:

In summary, a misrepresentation, even one that was incorporated into the contract, gives the innocent party the option of rescinding the contract, i.e. to have it declared void *ab initio*. The misrepresentation must be "material", "substantial" or "g[o] to the root of" the contract.

[38] Mr. Ross had an employment contract with PANS over a period of nearly thirty years. The February 2005 agreement was not the employment contract. It was a collateral contract that provided PANS with cash flow relief at a time when it would, otherwise, have been unable to meet its liabilities as they came due.

[39] The alleged misrepresentations are so disconnected from the substance of the contract that there can be no material fact in need of trial on inducement or materiality.

[40] *Under Performance*. PANS' position amounts to this: had the PANS board known in early 2005 what it learned by 2010, it would have fired Mr. Ross. That

is to say, if Mr. Fisher had imparted the knowledge about under performance to his employer in 2005, instead of 2010, PANS would have terminated the employment.

[41] I am not aware of any law that supports a retroactive termination of employment. There is no material fact in dispute that requires a trial on any of the following:

- Mr. Ross was employed by PANS until December 31, 2006.
- By mutual agreement, he retired then.
- According to the February 2005 agreement he was owed three-quarters of his 2005 and 2006 annual salaries when he retired.

If Mr. Ross defaulted in the ways now alleged by PANS, the employer's remedy was to terminate for cause and sue in tort. The remedy could never have been to renege on past due salary.

Real Chance of Success

[42] For reasons similar to those discussed on the first stage, PANS' position also fails on the second.

[43] On the sole cause of the debt due to Mr. Ross under the February 2005 agreement, the only chance of success for PANS' defences rests on an interpretation of the agreement as having a much greater coverage than its words admit.

[44] There is no pleading for, and no evidentiary basis supporting, rectification. There is no pleading against binding effect. There is an assertion that the agreement is part of a severance package, an assertion that might avoid the prohibited off-set against wages or permit a broader context for material misrepresentation, but that assertion contradicts the clear words of a written agreement.

[45] The defences against the claim for past due salary under the February 2005 agreement have no chance of success.

Conclusion

[46] There is a strong public policy against withholding wages. That that is what PANS is doing with the late Mr. Ross's salary cannot genuinely be disputed.

[47] I will grant judgment in favour of the estate and against PANS in the amount of \$62,500, plus interest and costs.

J.