



Civil Resolution Tribunal

Date Issued: June 8, 2023

File: SC-2022-003626

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Estate of Kerry Alexander Winkler, deceased v. PBC Health Benefits Society, 2023 BCCRT 484*

B E T W E E N :

ESTATE OF KERRY ALEXANDER WINKLER deceased

APPLICANT

A N D :

PBC HEALTH BENEFITS SOCIETY and BLUE CROSS LIFE
INSURANCE COMPANY OF CANADA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. This is a dispute about long-term disability (LTD) benefits. Before his death, Kerry Winkler received non-taxable LTD benefits (Blue Cross benefits) under his employer's insurance policy with the respondent Blue Cross Life Insurance Company

of Canada (Blue Cross). Mr. Winkler simultaneously received Canada Pension Plan disability benefits (CPP benefits) which were subject to income tax. The Blue Cross policy undisputedly permits Blue Cross to deduct any CPP disability benefit amounts available to Mr. Winkler from his Blue Cross benefits.

2. The applicant, the Estate of Kerry Alexander Winkler, deceased, says Blue Cross and the other respondent, PBC Health Benefits Society (PBC), breached the insurance policy by deducting Mr. Winkler's gross CPP benefit amount from his Blue Cross benefits, rather than the net amount. The applicant says this resulted in the respondents being unjustly enriched. The applicant estimates that the respondents wrongfully deducted \$5,475.30 from the Blue Cross benefits, but the applicant reduced their claim in this dispute to \$5,000 to remain within the small claims monetary limit of the Civil Resolution Tribunal (CRT).
3. The respondents deny breaching the insurance contract and say Blue Cross was permitted to deduct Mr. Winkler's gross CPP benefit amount from his Blue Cross benefits. They say PBC is not a proper party to this dispute because it is not responsible for paying the Blue Cross benefits. The respondents say they do not owe the applicant anything.
4. The applicant is represented by a lawyer, David Brannen. Both respondents are represented by the same lawyer, Jonathan Lim.

JURISDICTION AND PROCEDURE

5. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act (CRTA)*. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Should the applicant's claims against PBC be dismissed?
 - b. Did Blue Cross breach the policy by deducting Mr. Winkler's gross CPP benefit amount from his Blue Cross benefits, rather than the net amount?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities. The applicant did not make reply submissions despite having the opportunity to do so. I have read all the parties' evidence and submissions but refer only to what I find relevant to explain my decision. For the following reasons, I dismiss the applicant's claims.

Should the applicant's claims against PBC be dismissed?

11. PBC did not file a Dispute Response, but the respondents are represented by the same lawyer who made the same submissions on behalf of both respondents. I am satisfied that PBC intended to participate in this dispute and that the applicant had notice of PBC's response to their claims and an opportunity to reply to it. So, I find PBC is not in default.
12. In their submissions the respondents say Blue Cross was responsible for paying Mr. Winkler's Blue Cross benefits under the policy, not PBC, so PBC is not a proper party to this dispute. As noted above, the applicant chose not to make reply submissions, so they did not respond to this issue. Based on the respondents' submissions and the evidence before me, I am satisfied that PBC is not responsible for paying Mr. Winkler's Blue Cross benefits under the policy. I dismiss the applicant's claims against PBC.

Did Blue Cross breach the policy by deducting Mr. Winkler's gross CPP benefit amount from his Blue Cross benefits, rather than the net amount?

13. On April 27, 2020, Blue Cross approved Mr. Winkler's claim for the Blue Cross benefits. Blue Cross calculated Mr. Winkler's monthly Blue Cross benefit at \$3,500 and started making payments on May 13, 2020. As of May 1, 2020, Service Canada undisputedly approved Mr. Winkler's claim for the CPP benefits. Mr. Winkler's gross monthly CPP benefit amount was \$1,313.09. The parties agree that Mr. Winkler received the gross amount of his CPP benefit but was required to pay income tax on it. None of this is disputed.
14. The policy states that when "other income benefits are available to the Employee", Blue Cross will deduct "any disability or retirement benefit under the Canada/Quebec Pension Plan" from the Blue Cross benefits. Starting on June 1, 2020, Blue Cross undisputedly deducted Mr. Winkler's gross monthly CPP benefit amount (\$1,313.09) from his monthly Blue Cross benefit amount (\$3,500). Mr. Winkler died on July 5, 2021.

15. As noted above, the applicant says the policy should be interpreted to permit Blue Cross to deduct only the net CPP benefit amount from Mr. Winkler's Blue Cross benefits. The respondents say the policy permits Blue Cross to deduct the gross CPP benefit amount.

Wording of the Insurance Policy

16. The applicant says that because the policy does not define "CPP disability benefit" or "available to the employee", the CRT must determine these definitions through principles of contractual interpretation. The respondents say the policy is clear and unambiguous because there is no requirement anywhere in the policy for Blue Cross to reimburse Mr. Winkler for the income tax he paid on the CPP benefits. I find that on a plain reading of the policy both interpretations are reasonable, so I must apply principles of contractual interpretation to resolve the ambiguity.

17. When interpreting contracts, the court will give effect to the clear language of the contract, and words of one provision should be considered in harmony with the rest of the contract. Similar insurance contracts should be interpreted consistently where possible (see *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at paragraph 64, and *McLean v. Canadian Premier Life Insurance Company*, 2013 BCCA 264 at paragraph 14).

18. The applicant submitted various dictionary definitions of the word "available" and says the definitions require a benefit to be accessible and capable of being used by the insured person. The applicant says the gross CPP benefit was not available for Mr. Winkler's use since he was required to pay income tax on it. The applicant says only the net CPP benefit was available to Mr. Winkler and ready for immediate use, so Blue Cross should only be permitted to deduct the net CPP benefit amount.

19. The applicant relies on the Ontario Court of Appeal's decision in *Bapoo v. Co-Operators General Insurance Co.*, 1997 CanLII 6320 (ON CA) for the court's interpretation of "available". In that case the plaintiff was injured in a car accident. His auto insurer was required to pay him a weekly non-taxable income benefit during the

period he was unable to work. The plaintiff also received taxable short-term disability income benefits through a group insurance plan with his employer (STD benefit). The group insurer deducted income tax before paying the STD benefit, so the plaintiff received only the after-tax or net amount of the STD benefit.

20. Under the statutory accident benefits schedule in force at the time, the auto insurance policy allowed the auto insurer to deduct any disability income benefits “received by or available to” the plaintiff from the weekly accident benefit. The court found the auto insurer was only entitled to deduct the net STD benefit amount. The court interpreted “available to” in that context to mean a benefit to which an insured is entitled, whether or not they have actually received the benefit. The court said this means an insured cannot avoid the deduction by not applying for the benefit. The court cited a Supreme Court of Canada case that the applicant relies on in this dispute for that principle, *Chu v. Madill*, 1976 CanLII 32 (SCC). The court in *Bapoo* interpreted “receive” to mean taken into possession.
21. The respondents say *Bapoo* is distinguishable from this dispute because in *Bapoo* the plaintiff received only the net STD benefit amount from his insurer whereas in this case Mr. Winkler received the gross CPP benefit. The respondents say the entire amount of the CPP benefit was “available” to Mr. Winkler when he received each payment, and the amount of his income taxes payable on the CPP benefits were only determined by his personal tax circumstances once his taxes were filed the following year. I agree with the respondents’ reasoning. I also find *Bapoo* is distinguishable because the court relied mostly on its interpretation of the words “received by” in coming to its decision, and those words are not in the policy at issue here.
22. Having found that *Bapoo* is unhelpful in resolving the ambiguity in the policy, I turn to the respondents’ submissions about the policy’s wording. They say the language of the policy favours their interpretation. They say the phrase “disability benefit under the Canada Pension Plan” in the policy is intended to be consistent with the *Canada Pension Plan Act* (CPPA), which governs the payment of CPP benefits. The term “benefit” is defined in section 2 of the CPPA as “a benefit payable under this Act and

includes a pension”. The term “pension” is also defined in section 2 of the CPPA as “a pension payable under this Act”. As the respondents note, under Part II, Division A of the CPPA, a payment under the CPPA as a result of a disability is a “disability pension”. Section 56 of the CPPA sets out the amount and calculation of a disability pension. As the respondents note, this section does not refer to any deductions for income tax payable on these benefits.

23. I find that on a plain reading of the words in the policy, both parties’ interpretations of the policy are reasonable. While I agree that the CPPA definitions are silent about making deductions, I find it is not clear from the policy that those definitions have been adopted into the policy. I find I cannot resolve the ambiguity in the policy by looking solely at the plain meaning of the words.

Intended Purpose and Commercial Reality

24. When the language of a contract has 2 possible interpretations, the ambiguity should be resolved by finding an interpretation reflecting the intent and reasonable expectations of the parties when they entered the contract. Such an interpretation should also be consistent with commercial reality and good sense (see *McLean*, at paragraph 14, and *Tercon*, at paragraph 64).
25. The applicant says the policy’s intended purpose was to provide employees with a \$3,500 tax-free benefit if they met the definition of total disability, which Mr. Winkler undisputedly did. The applicant says the CRT should imply a term in the policy that only the net CPP benefit amount should be deducted from the Blue Cross benefits in order to fulfill this intended purpose.
26. The respondents say the CRT should only imply a term if it “goes without saying” or is necessary for business efficacy, which is not the case here (see *McLean*, at paragraph 14). The respondents say the applicant’s interpretation of the policy is clearly inconsistent with commercial reality and good sense. They say that deducting the net CPP benefit amount would require it to initially deduct the gross CPP benefit amount, wait for Mr. Winkler or his estate to file his income taxes and receive his tax

returns, assess the tax information to determine the amount of income taxes paid on the CPP benefits, then reimburse Mr. Winkler or his estate for that amount.

27. Blue Cross submitted a statement from NC, the Director of Claims and Medical Underwriting at Blue Cross. NC said the applicant's interpretation of the policy would effectively require Blue Cross to pay Mr. Winkler's income taxes owing on the CPP benefits. NC said the process required to give effect to this interpretation is inconsistent with reasonable commercial practices, and it was not contemplated by Blue Cross when it issued the group policy to Mr. Winkler's employer.
28. I agree with the respondents. I find the applicant's interpretation of the policy would create a commercially unreasonable situation for Blue Cross that does not reflect the parties' true intent or reasonable expectations. I find it was not reasonable for Mr. Winkler to expect Blue Cross to effectively pay his income tax on his CPP benefits. I find the respondents' interpretation of the policy is consistent with commercial reality and good sense, and so any ambiguities in the policy are resolved through this principle of contractual interpretation.

Contra Proferentem

29. The applicant also says the respondents' interpretation of the policy offends the principle of "contra proferentem". This is a principle of contractual interpretation which, in these circumstances, means ambiguous terms in an insurance contract should be interpreted against the insurer.
30. The respondents say "contra proferentem" is to be applied only when other principles of contractual interpretation fail to resolve the ambiguities in a contract (see *McLean* at paragraph 15, and *Progressive* at paragraph 24). They say that since any ambiguities in the policy can be resolved through those other principles, "contra proferentem" does not apply here.
31. I agree with the respondents. I have already found that I prefer the respondents' interpretation of the policy, and that any ambiguities in the policy are resolved by

looking at the parties' intentions and commercial reality. So, I find it is unnecessary to apply the principle of "contra proferentem" here, and I decline to do so.

32. I prefer the respondents' interpretation of the policy, and I find Blue Cross was entitled to deduct Mr. Winkler's gross CPP benefit amount from his Blue Cross benefits. So, I find the applicant has not established that the respondents were unjustly enriched. I dismiss the applicant's claim.
33. Even if I had preferred the applicant's interpretation of the policy, I would have dismissed the applicant's claim for failing to prove damages. The applicant says they "conservatively estimated" that Blue Cross owes them \$5,475.30. However, the only evidence they submitted to support this claim is a comparative tax summary for Mr. Winkler for 2019 and 2020. I cannot determine from this document the amount of tax, if any, Mr. Winkler paid on his CPP benefits for 2020, and there is no evidence of what the applicant paid for 2021. I find the applicant submitted insufficient evidence to prove their claim.
34. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. Since the applicant was unsuccessful, I find they are not entitled to reimbursement of their CRT fees. None of the parties claimed any dispute-related expenses.

ORDER

35. I dismiss the applicant's claims and this dispute.

Sarah Orr, Tribunal Member