C.A. No. 130794

NOVA SCOTIA COURT OF APPEAL
Cite as:Nova Scotia Public Service Long Term Disability Plan v. MacDonald, 1997 NSCA 97

Freeman, Roscoe and Bateman, JJ.A.

BETWEEN:

TRUSTEES OF THE NOVA SCOTIA PUBLIC SERVICE LONG TERM DISABILITY PLAN	)	
Dennis James	)	for the Appellant
Appellant	)	
- and -	)	
	)	Walter O. Newton, Q.C.
	)	for the Respondent
TERRANCE MACDONALD	)	
Respondent	)	Appeal Heard: May 27, 1997
	)	Judgment Delivered: July 3, 1997

THE COURT: Appeal dismissed with costs fixed at $1500.00 per reasons for judgment of Freeman, J.A.; Roscoe and Bateman, JJ.A. concurring.

FREEMAN, J.A.:

The appellant, Trustees of the Nova Scotia Public Service Long Term Disability

Plan, seek clarification of the effective dates of amendments, made subject to a six-month transitional provision, which change the plan fundamentally from a non-indemnity to an indemnity program.

The amending agreement was dated April 6, 1992, and ratified by statute given royal assent June 30, 1992. An indemnity plan is intended to indemnify members for actual losses resulting from disability, as opposed to non-indemnity plans which pay an agreed amount to disabled members, even though they may recover monies from other sources and are not actually out of pocket. Under the new amended plan, but not the old, the trustees are subrogated to rights of disabled members against third parties, and lost wages recovered from third parties by members are deductible from LTD benefits paid under the plan. A plan can be an indemnity or non-indemnity plan as a result of contract, statute or common law.

The respondent, Terrance MacDonald, was a deputy sheriff covered by the plan when he was disabled as the result of an automobile accident on June 3, 1988. He brought action against the owner and driver, who admitted liability. Justice Donald M. Hall of the Supreme Court of Nova Scotia assessed damages on April 22, 1992, for $539,529.11 including loss of past and future income, general damages, pre-judgment interest and costs.

Mr. MacDonald had been paid LTD benefits of $75,183.99 under the plan to August 22, 1992. The Trustees sought to recover this, not by subrogation under the new amendments, which they acknowledged would be unconscionable, but under a common law right of subrogation. Justice Hall determined that the pre-amendment Plan was not an indemnity plan at common law, and therefore did not convey subrogation rights to the

trustees. His decision was dated June 5, 1996, prior to confirmation of that point by this court in **Trustees of the Nova Scotia Public Services Long Term Disability Plan v. Sylvia Flemming** (1996), 154 N.S.R. (2d) p. 397 (C.A.) which was decided October 24, 1996. On the strength of **Flemming** the Trustees abandoned their appeal on that issue.

Justice Hall determined that the recovery of third party damages for lost future income would be deductible from LTD benefits under the plan, but not before October 6, 1992, the end of the six-month transition period provided for by the amendments. The Trustees claim the damages should be deductible from the date of the amendments, April 6, 1992. The issue in this appeal therefore is the amount of the LTD benefits to which Mr. MacDonald had a right between April 6 and October 6, 1992. He has received them for the period April 6 to August 22, 1992. The Trustees limited their appeal on the merits to one question:

> Did the learned trial judge err in finding that the amendments to the LTD plan by Order-in-Council 92-499, dated May 12, 1992, approved by the Long Term Disability Plan Ratification Act S.N.S. 1992, c. 6 were effective October 6, 1992?

Section 9 of the original plan, which lists types of income which are to be deducted from the amount of long term disability benefits to which members are entitled, such as Canada Pension Plan or Workers' Compensation benefits, was amended by the addition of subsections (7) and (8) as follows:

> (7) The amount of income received by an employee from self-employment as set out in guidelines made pursuant to this plan;
>
> (8) the amount of earnings recovered through a legally enforceable cause of action against some other person or corporation.

A subrogation provision was added as follows:

> Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, and may maintain an action in the name of such employee against any person against whom such action lies . . .

Section 4 of the legislation provided:

> (4) Effective the sixth day of April, 1992, the Nova Scotia Long Term Disability Plan shall pay long term disability plan benefits in accordance with the Plan as amended pursuant to Sections 2 and 3 regardless of when a person was first entitled to receive benefits and regardless of any entitlement which arose prior to the sixth day of April, 1992.

The issue in this appeal results from the interpretation of the transition provisions in the amending agreement:

> Notwithstanding any provision of this Plan, as amended, any employee who, as of April 6, 1992, or within 6 months following that date,
>
> (a) met the definition of "disability" under the old Plan,
>
> (b) who is receiving benefits pursuant to the old Plan, and
>
> (c) who becomes disentitled to benefits as a result of the amendments to the old Plan,
>
> shall continue to receive the benefits set out in s. 7(1) of the Plan for a maximum of six months or until October 6, 1992, whichever occurs first.
>
> In addition, such employee who meets (a), (b) and (c) above shall be entitled to return to his/her own job until October 6, 1992, or a total of 36 months from the date of his/her disability, whichever occurs first.

The matter was heard before Justice Hall on December 8, 1995 and his decision

dismissing the claim with costs was dated June 5, 1996. He set out the relevant provisions of the plan, the amending agreement and the ratifying statute in careful detail in his decision, which is reported as **Nova Scotia Long Term Disability Plan (Trustees) v. MacDonald** (1996), 153 N.S.R. (2d) 321. He observed:

> In the end I believe that Mr. James conceded that the Trustees could not rely on the amendments as a vehicle for claiming to be subrogated to Mr. MacDonald's rights against the tortfeasor prior to October 6, 1992, and are not able to obtain recovery by that means for any amounts they paid to Mr. MacDonald prior to that date.
>
> In my view it is equally clear that the amendments apply to MacDonald as of October 6, 1992, despite the fact that his injury occurred prior to that date, due to the very clear terms of the amendments which were given the force of law by virtue of the ratifying legislation. The terms of the amending agreement and the legislation expressly provide that the amendments apply regardless of whether entitlement arose prior to April 6, 1992. Insofar as Mr. MacDonald is concerned these provisions would not apply retrospectively to him but would apply only to future benefits that he would otherwise have been entitled to receive after October 6, 1992. Accordingly, his entitlement to future benefits is subject to the amending provisions and his benefits may be reduced accordingly. In other words, the Trustees are subrogated to MacDonald's right to recovery as of October 6, 1992, by virtue of the amendments.

Mr. James submitted to the appeal panel that subrogation had not been claimed under the amendments, only at common law, and was not at issue in the appeal. Justice Hall may have been under a misapprehension on that point. As I understand the argument of the trustees, it is this:

> Applying the transitional provisions, as of April 6, 1992, Mr. MacDonald met the definition of "disability" under the old Plan and was receiving benefits pursuant to the old Plan. He did not, however, meet the third criterion in paragraph (c) of the transitional

provisions in that he was not a person "(c) who becomes disentitled to benefits as a result of the amendments to the old Plan." He continued to be entitled to benefits both before and after October 6, 1992, so long as he remained disabled. (There is no distinction in the amount of benefits under s. 7(1) between the old plan and the new or amended plan.)

What changed was the nature of the income that was to be deducted before he was paid the LTD benefits. The damages recovered for loss of future income from the third parties has to be taken into account, not by way of subrogation but in the calculation of the amount of the LTD benefits which he was to be paid after October 6, 1992 or, in the Trustees' submission, after April 6, 1992.

There is no evidentiary basis for determining how that calculation is to be made. Mr. MacDonald was awarded damages of $348,000 for lost future income. Presumably an actuarial calculation could be made to determine how much that represents as monthly income spread over Mr. MacDonald's assumed working lifetime. That monthly amount would then be deducted from each month's LTD benefit to which he would otherwise be entitled. Other alternatives are possible, and I make no finding in this regard. The point is that the impact of the award for lost future income on LTD benefits will be substantial however it is calculated. The issue is whether the starting point for the calculation is April 6 or October 6, 1992.

The position of the Trustees is that because there is no actual disentitlement to benefit, merely a change in the way the benefit is to be calculated, Mr. MacDonald does not meet the third criterion of the transitional provisions. This position is well reasoned and not without merit. However in my view it puts too fine a point on the matter.

The amending agreement was a document arrived at after negotiations in which the employees' union represented the members. The resulting language was broad: the transition provisions apply to any employee who met the definition of disability under the old plan and was receiving benefits under the old plan "who becomes disentitled to benefits as a result of the amendments to the old plan."

"Disentitled" is not a term or art. It simply means "not entitled." "Benefit" means a pension or "a monetary amount paid under a pension or other plan." Disentitlement to benefit can mean loss of entitlement to the whole or a part of a benefit. "As a result of the amendments to the old plan" means any amendments to the old plan, not merely, as the trustees urge, amendments to the definition of the disability in respect of which benefits are paid.

The purpose of the transitional provisions is to ease the impact of the amendments on members whose budgetary plans are thrown into disarray because they cease to receive benefits or become entitled to smaller amounts of benefit. The present situation should not be confused because Mr. MacDonald's assessment of damages followed the amendments by only a few days in April, 1992. He was entitled to receive damages for loss of future income from the date of the accident in 1988. If he had, in all likelihood he would have invested the award to provide him with a monthly income. Until the amendments to the plan, he would also have been entitled to LTD benefits calculated under the old plan. Both sources of income would have formed part of his family budget. If the LTD benefits were discontinued or sharply reduced, Mr. MacDonald would have experienced the same kind of dismay as a plan member whose benefits were discontinued or reduced because of a

change in the definition of his or her disability. The language used in the transitional provision is, in my view, sufficiently and perhaps deliberately broad enough to apply to members in both situations confronted with a reduction of income resulting from the amendments.

Justice Hall concluded:

> In my view the issue is unquestionably resolved in MacDonald's favour by virtue of the transition provisions. They state clearly and unequivocally that "notwithstanding any provisions of the plan, as amended," a person who was receiving benefits as of April 6, 1992, would be entitled to continue to receive the benefits for a further six months or to October 6, 1992, at the latest. MacDonald was disabled and entitled to benefits as a result of the amendments if they had applied to him. Accordingly, MacDonald was and is entitled to receive long term disability benefits under the Plan to October 6, 1992, without deduction for any amounts received from the third party attributable to loss to that date.
>
> MacDonald will continue to be entitled to benefits under the plan so long as he remains disabled. Any amounts received from the third party for loss of future employment income, of course, must be applied in reduction of such benefits. Whether there has already been full compensation may be a matter of arithmetic which I expect counsel will be able to resolve.

I am not persuaded that Justice Hall was wrong in this result.

. The appellants also seek a reduction in the costs awarded by Justice Hall because the matter proceeded on an agreed statement of facts, reducing court time. Justice Hall awarded costs under Tariff A, Scale 3 on an amount involved of $75,000 or some $6,125. There were two main issues at trial, common law subrogation and the

amendments, both of which put $75,000 in issue, forcing a defence by Mr. MacDonald. For the Trustees, there was not only the prospect of a recovery but the advantage of gaining a judicial interpretation of the Plan; from their point of view, what the matter lacked in complexity could well have been made up for by its importance. It is appropriate that they should pay reasonable costs. Unfortunately the fee tariffs do not adequately address this type of proceeding, which appears to fall between an application and a full trial. All things considered the costs awarded are, in my view, in the high range but not unreasonably so; I am not satisfied the judge proceeded on any wrong principle in

exercising his discretion. I would dismiss the appeal with costs which I would fix at $1,500.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.

C.A. No.130794

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

TRUSTEES OF THE NOVA SCOTIA
PUBLIC SERVICE LONG TERM

DISABILITY PLAN	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
TERRANCE MACDONALD	)	
	)	
	)	FREEMAN,J.A.
Respondent	)	
	)	
	)	
	)	