

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Freeman, JJ.A.

Cite as: Downey v. Canadian Broadcasting Corporation, 1994 NSCA 112

BETWEEN:

GRAHAM DOWNEY

Appellant

George W. MacDonald, Q.C.
and Noella M. Martin
for the Appellant

- and -

CANADIAN BROADCASTING
CORPORATION

Respondent

Martin C. Ward
for the Respondent

Appeal Heard:
June 14, 1994

Judgment Delivered:
June 27, 1994

THE COURT:

The appeal is dismissed with costs which are fixed at \$2,500. plus disbursements, as per reasons for judgment of Chipman, J.A.; Matthews and Freeman, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was employed by the respondent as a stagehand at television station CBHT, Halifax from October, 1964 until he was laid off on March 31,

1985.

The appellant's statement of claim is brief:

"1. The Plaintiff, Graham Downey, resides in Halifax in the County of Halifax, Province of Nova Scotia, and at all times material hereto was an employee of the Defendant, Canadian Broadcasting Corporation.

2. The Defendant, Canadian Broadcasting Corporation, is a Crown Corporation and at all times material hereto was the employer of the Plaintiff at its television station, C.B.H.T., in Halifax, aforesaid.

3. The Plaintiff was an employee of the Defendant during the period 1964 to the 1st day of April, 1985. On or about the 18th day of February, 1977, to April 1st, 1977, a new Long Term Disability plan ("LTD plan") was introduced to employees. The Plaintiff states that during this period and in particular between January, 1977 to and including April 1st, 1978, the Plaintiff was absent from work due to an illness. The Plaintiff claims that at no time was he sent any information on this plan and further states that upon his return to work, he was not approached to enroll in this plan during this grace period. The Plaintiff claims that as a result of the Defendant failing to inform the Plaintiff of this plan, the Plaintiff has suffered extreme financial loss as the Plaintiff became permanently disabled commencing on April 1st, 1985.

4. The Plaintiff claims that the Defendant took no steps to enroll the Plaintiff in the new long-term disability plan and further claims that if the Defendant did take steps to advise the Plaintiff, the Defendant mailed the package to the wrong address and failed to properly follow-up. All of which has caused the Plaintiff great financial loss.

5. The Plaintiff claims that the Defendant had a chance to rectify its mistakes and deliberately chose not to enroll the Plaintiff on or about March 1st, 1984 as the Plaintiff was engaged at the time in litigation with the Defendant. As a result of the Defendant's action in deliberately not correcting its mistake, the Plaintiff suffered extreme financial loss.

6. The Plaintiff claims against the Defendant as follows:

- (a) The Defendant enroll the Plaintiff in the new LTD disability plan put into effect on or about April 1st, 1977;
- (b) The Defendant compensate the Plaintiff for the shortfall in payments due to not being enrolled in the plan plus lost opportunity in not having increased funds;

- (c) The Plaintiff claims general damages;
- (d) The Plaintiff claims exemplary damages;
- (e) The Plaintiff claims costs in this action;"

The respondent is a federal enterprise. Its labour relations are governed by the Canadian Labour Code, R.S.C. 1985, c. 2. There was at all material times a collective agreement in force between Canadian Union of Public Employees (CUPE) and the respondent to which the appellant was subject and by which he was bound. The collective agreement made provision by Article 38 for disability income plans. Such a plan providing for short and long term disability was introduced by the respondent during one of the appellant's absences from employment. The plan was underwritten by Great-West Life Assurance Company.

As well, the CBC had a corporate pension plan funded by the Corporation. It permitted the retirement of employees for medical reasons. This plan pre-dated and later co-existed with the employee funded disability income plan provided for in the collective agreement. The disability criteria under the CBC pension plan appear to be less stringent than those of the disability income plan, although disability for the purposes of the CBC plan is, in the last analysis, determined by "the opinion of the president of the Corporation" based on medical information supplied by an applicant.

For a variety of reasons which need not be detailed, the appellant's coverage in the disability income plan did not come into force until his application was approved effective January 1, 1985. In these proceedings, the appellant took the position that he was at the time of his lay-off on March 31, 1985 permanently disabled within the meaning of that term in the plan and would have been entitled to long term

disability but for the fact that he had not completed the necessary 12 months of employment following his enrollment. He contended that his enrollment was wrongfully delayed by the respondent.

On April 25, 1985, the appellant filed a grievance against the respondent through CUPE. The complaint reads:

"The Union and Graham Downey grieve that he was unjustly laid off by the Corporation. The position that he occupied was declared redundant although the programs he was assigned to were still in production, therefore the position is still required. The Corporation has also violated the Collective Agreement with regards to article 9 discrimination. Graham also feels there has also been unfair treatment by the Corporation to exclude him from the disability insurance plan in 1981.

In order to settle this grievance the Union demands that the Corporation, admit to a violation of the Collective Agreement. The Griever be reinstated in the position he occupied on March 31, 1985 without no loss of salary or seniority."

Extensive negotiations followed for a period of nearly a year between the appellant, with the assistance of CUPE, and CBC. During this time the appellant, in company with a union representative was permitted to attend at the offices of the respondent to view its file pertaining to him.

On April 17, 1986, the appellant's grievance was settled between CUPE and CBC on the following terms:

- "1. Downey was to be placed on the C.B.C. pension plan retroactive to April 1, 1985. Downey was to sign the necessary forms.
2. C.B.C. waived recovery of any monies paid to G. Downey including lay-off for March 31, 1985.
3. Downey was to receive "without prejudice" a lump

sum of \$9,820.

4. The grievance was withdrawn.
5. No further outstanding claims exist against the CBC by G. Downey.
6. Downey's future rights shall be subject to the provisions of the C.B.C. pension plan.
7. Downey's monthly disability benefit would be calculated pursuant to all pensionable services with a minimum monthly amount stated.
8. C.B.C. "shall make up the difference" until Downey is placed on Canada Pension Plan disability benefits."

The appellant executed the pension forms necessary to activate the agreement and he accepted the benefits of the package which was arranged for him.

On January 15, 1991, the appellant commenced these proceedings. As can be seen from the statement of claim, the case is based on the respondent's failure to enroll him in the disability insurance plan provided by Great-West Life.

The matter was tried before Gruchy, J. who, in his written decision dated May 4, 1993, stated that there were three issues.

(1) Where the employment relationship was governed by a collective agreement, whether the court's jurisdiction was preempted by its arbitration provisions.

(2) Whether the C.B.C. was under a duty of care to enroll the appellant in the disability plan and if so, was the duty breached and if so, whether damage resulted.

(3) Whether C.B.C. and the appellant settled the matter by their agreement of April 17, 1986.

Gruchy, J. resolved all of these issues adversely to the appellant. After hearing argument of counsel and reviewing the entire record, I am of the opinion that he was correct in his resolution of the third issue and therefore it is not necessary to explore the first two issues.

Gruchy, J. found as a fact that the appellant had authorized CUPE to negotiate the settlement on his behalf, that he had approved of it and took full advantage of the benefits accruing to him under it. These findings were not shown to be erroneous and they were fully supported by the evidence.

The subject matter of the grievance included the same cause of action asserted in these proceedings. Moreover, it is clear from the text of the settlement reached that the negotiations embraced an even wider area, so that all matters of dispute between the parties were on the table. This is clear from the fifth item of settlement:

"No further outstanding claims exist against the CBC by G. Downey."

I would dismiss the appeal with costs. On argument, both counsel agreed that an appropriate amount for costs would be \$2,500. plus disbursements, and I would order that amount to be paid by the appellant to the respondent.

Chipman, J.A.

Concurred in:

Matthews, J.A.

Freeman, J.A.