SUPREME COURT OF NOVA SCOTIA

Citation: Benjamin-Harvie v Nova Scotia (Public Service Long Term Disability Plan), 2009 NSSC 201

Date: 20090629
Docket: Ken No. 227430
Registry: Kentville

Between:

Dena Benjamin-Harvie

Plaintiff

v.

The Trustees of the Nova Scotia Public Service Long Term Disability Trust Fund

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: June 14, 2009, in Kentville, Nova Scotia

Counsel: Derrick J. Kimball and Sharon L. Cochrane, counsel for the plaintiff/applicant
Colin D. Bryson, counsel for the defendant/respondent

By the Court:

I Introduction

[1] The plaintiff Dena Benjamin-Harvie sues for disability insurance benefits. The defendant Public Service Long Term Disability Trust Fund ("Plan") says the action is barred because of her earlier unsuccessful appeal to a medical appeal board ("MAB") set up under the terms of the Plan.

[2] This motion by the plaintiff is for a determination of whether, as a matter of law pursuant to 2009 *CPR 12*, the action is barred by *res judicata* by reason of the earlier administrative appeal.

[3] The Plan, the issue of *res judicata*, and the analytical framework for this decision are the same as that set out by the Nova Scotia Court of Appeal in *Wright* v. *Nova Scotia (Public Service Long Term Disability Plan)*, 2006 NSCA 101.

[4] The analysis of Cromwell, J.A., in *Wright* is accepted by both parties and the Court as the proper framework for consideration of this motion, modified to reflect that the motion is for determination of an issue of law whereas the appeal in *Wright* followed a trial.

[5] The Plan that was the subject matter of the litigation in *Wright* is the same Plan relevant to this motion. I incorporate and adopt the portions of the *Wright* decision that set out and interpret the provisions of the Plan.

II Factual Background

[6] The factual background is contained in three affidavits, upon which there was no cross-examination. Ms. Benjamin-Harvie's May 28, 2009, affidavit (re-sworn June 16, 2009) establishes the following:

a) She worked with the Nova Scotia Department of Justice from 1986 to 1999 in a 40-hour per week, Monday to Friday, job. Her last employment was as a Maintenance Enforcement Officer described by her as a sedentary position that "involves sitting at a desk, working on a computer and answering telephones. I would also have to retrieve and return files".

b) She suffered ankylosing spondylitis and irritable bowel syndrome and, on the advice of her family doctor, stopped work on October 7, 1999.

c) She was paid disability benefits under the Plan for 30 months (March 7, 2000 to September 6, 2002) under the "own occupation" definition in the Plan. Effective June 2000, she began receiving a CPP disability pension.

d) Before September 6, 2002, she was advised that her continued entitlement would require establishing the more stringent definition of disability; that is, an inability to engage in any occupation she was fit for through education, training, experience or rehabilitation, that would pay not less than 80% of the current rate of her former position. In October 2002, she was advised that she did not meet the threshold eligibility, and of her right to appeal.

e) On September 17, 2002, she appealed to the Plan's administrator and filed further medical information. On April 28, 2003, the administrator denied the claim and a hearing before

the MAB was scheduled for September 30, 2003. The MAB consisted of a single medical doctor, Dr. Colin F. Davey.

f) The hearing was held the day after the notorious Hurricane Juan hit Halifax. The plaintiff, her husband and her union representative, Odette MacLeod, did appear at the hearing but the Plan administrator failed to appear because of the storm. The Board, with the consent of all parties, proceeded to hear the plaintiff, her husband and the union representative. It was agreed that the administrator would file its submissions in writing, with a copy to the plaintiff.

g) The plaintiff received the administrator's written submissions. She was not advised that she could respond to them and she did not do so.

h) There was no information before the MAB about the current rate of pay of the plaintiff's former position or any other occupations for which she was or may become fit through education, training, experience or rehabilitation.

i) In a lengthy written decision the MAB denied her appeal.

[7] The affidavit of the Plan's Director of Benefits states that he has attended several MAB hearings, including several with Odette MacLeod. The union official, including in particular Ms. MacLeod, typically acted as the representative of the appellant, much like a lawyer - assisting in the presentation and making arguments for the appellant. Ms. MacLeod refused to discuss with him her role was in this particular case.

[8] The response affidavit of Sharon L. Cochrane, co-counsel for the plaintiff:

a) Attached Ms. Benjamin-Harvie's discovery evidence regarding the MAB hearing;

b) Attached a form of the plaintiff's supervisor, dated February 3, 2000, which described her job as: management of case file (update information, data entry, client inquiries, and mail) - 20%; enforcement of files (administrative actions, case decision, court preparation) - 65%; client service (mail, inquiries and appointments) - 15%. In an eight-hour day, she would spend seven hours sitting, one-half hour standing, and one-half hour walking (with no squatting or bending except for filing purposes). In describing what modified duties or transitional light duties would be available to assist in a return-to-work program, the supervisor wrote: "All duties require constant use of and sitting at a video display work station. Only possibility is short periods of time with large breaks or other work in between. No other [?] available."

c) Stated that she communicated with the Nova Scotia Barristers' Society respecting the status of Odette MacLeod in 2003 and now, and was advised that Ms. MacLeod was a "non-practising member" in 2003 and is currently a "resigned member".

III. MAB Decision

[9] Dr. Davey's decision, on nine typed pages, can be broken into five parts.

[10] First, he noted the presence of the plaintiff, her husband and union rep (Ms. MacLeod); the absence of the administrator due to the hurricane; the permission and consent to proceed in the absence of the administrator with written submissions to follow from him. He noted that the criteria for total disability changed from the "her own occupation" to "any occupation" for the purposes of the appeal.

[11] Second, he reviewed in detail her job-related medical history and diagnoses. She ceased employment with a primary diagnosis of ankylosing spondylitis and secondary diagnosis of irritable bowel syndrome. He referred to several medical reports, including: Dr. Kimberly Powell, her family physician; Dr. Deidre MacLean, to whom Dr. Powell referred her in 2000; Dr. Sylvie Ouellette (rheumatologist); Dr. Loane who reviewed her history for the Plan administrator in March 2000; Dr. Powell's responses of September 2000 and May 2001; the functional capacity evaluation ("FCE") conducted by Kings Physiotherapy on November 1 and 2, 2001 (which concluded that the plaintiff demonstrated tolerances for work at a sedentary level for up to four hours per day); an updated rehab report of February 28, 2002; Dr. Diane Wilson's (rheumatologist) reports of March and April 2002; Dr. Wadden's report of July 2002; Dr. Boswell's review of August 20, 2002; x-rays of August 29, 2002; Dr. Bakowsky's (rheumatologist) review of December 2002; Dr. MacLean's April 2002 (sic. 2003) report; and Dr. Boswell's review of April 2003 (which found no evidence of disability from sedentary level activity).

[12] Third, he set out in detail the evidence and submissions made by the plaintiff, her husband and union representative at the hearing. These included Ms. MacLeod's submissions: disputing Dr. Wilson's diagnosis and Dr. Powell's reports of February and September 2000; her view that the FCE of November 2001 was based on months of rest, exercise, and self-care; that ankylosing spondylitis was a progressive disease based on Dr. Dunn's August 22 x-ray report; that CPP accepted her disability claim; and Dr. Bakowsky's opinion. He summarized both Mike Harvie's evidence as to the plaintiff's history of symptoms and the change in her life, and the plaintiff's evidence including her own review of her history, and physical symptoms. He summarized the plaintiff's answers to questions he asked.

[13] Fourth, he outlined the administrator's written submissions dated September 30, 2003(attached to the plaintiff's affidavit) as follows. The impairment caused by the diagnosis must be severe enough to render the person unable to perform the regular duties of their occupation such that they cannot be reasonably accommodated at work. While the original application showed limits to sitting and standing, the employer was prepared to make accommodations in this regard. Dr. Ouellette's findings showed that she was within a normal range of motion and Dr. Loane's view was that when her disease was in remission the impairment was minimal and that she was not permanently disabled. The FCE showed tolerance for sedentary level work for up to four hours a day, while avoiding heavy lifting and trunk rotation. The updated rehab report suggested gradual return to work. Dr. Wilson saw no evidence of active disease and questioned the ankylosing spondylitis diagnosis.

[14] Based on this, the Plan administrator decided to proceed on a gradual return-to-work program and provided a schedule. In April 2002 Dr. MacLean of the rehab centre noted normal range of motion and no active synovitis. The administrator submitted that the evidence was insufficient to show total disability and that her medical treatment and exercise program had improved her level of functioning. She could be accommodated, with recognition of her limitations, at her work and she remained employable in her own or any occupation.

[15] Finally, Dr. Davey outlined the legal analytical frame work for his decision and applied it to the medical evidence.

[16] For his analytical framework:

a) first, he defined the relevant terms: impairment, disabled, handicapped, and accommodation.

b) Second, he described the legal question he had to answer as follows:

> If an impaired individual is not able to accomplish a specific task or activity despite accommodation, or if no accommodation exists that would enable the completion of the task, then that individual is both handicapped and disabled. However, an impaired individual that can accomplish a specific task with or without accommodation is neither handicapped nor disabled about that task. . . . An impaired individual is not necessarily disabled if they have sufficient ability or capacity to meet the demands or requirements of a particular position or occupation.

c) Third, he stated that the plaintiff's physician's responsibility was to evaluate a patient's health status and determine the presence or absence of an illness or loss of function. The MAB's responsibility was to decide if the results of the examinations and testimony at the hearing constitute an impairment. If so, did that impairment cause disability sufficient to meet the criteria in the Plan Guidelines.

[17] Applying that legal framework, he identified several preliminary issues and an ultimate issue. The ultimate issue was whether the plaintiff, as of the date the definition changed (September 6, 2002), remained disabled from any occupation. To get to that issue, he posed several preliminary issues.

[18] The first issue was to confirm the diagnosis. He accepted the diagnosis of ankylosing spondylitis.

[19] The second issue was to determine what impairment resulted from this disease. He found her range of motion and strength was normal; there were no signs of inflamation in the joints; the FCE determined she was capable of working a four-hour work day at a sedentary level; this was consistent with her present occupation. There were accommodations in place due to her sitting intolerance, with minimal lifting, twisting or bending of the spine. The willingness of the employer to take measures - to allow her to have short periods of desk work followed by longer periods of rest, were reasonable accommodations; the graduated return-to-work program seemed reasonable and was modifiable based on the patient's progress.

[20] The third issue related to the fact that the plaintiff qualified for a CPP disability pension. He found that the guidelines and definitions for a CPP disability pension differed markedly from those in the Plan. He further stated that those symptoms related to the depression and anxiety that she experienced, and which resulted in a sleep disturbance and fatigue, could and should be addressed by her family doctor.

[21] For the ultimate issue, he concluded that she was capable for working at her <u>own</u> or any other occupation, at a sedentary level with the necessary restrictions on lifting, sitting and standing times.

[22] This decision was based on his assessment of the medical evidence before him and the reasonable accommodations that her employer was prepared to put forward for her return to her own occupation on a graduated basis.

IV Analysis

A *Civil Procedure Rule 12*

[23] The plaintiff brings this motion for the determination of a question of law pursuant to new *Civil Procedure Rule 12*.

[24] The *Rule* appears not to require that the parties agree on all of the facts relevant to the questions as a precondition to the motion. Further, the *Rule* appears to permit the separation of a question of law from the other issues, before the trial or hearing, for the purpose of reducing the length and expense of the proceeding.

[25] The defence in this case includes a plea that the action is barred by *res judicata* (in the context of these proceedings more properly, issue estoppel) by reason of the plaintiff's prior appeal to, and determination by, the MAB.

[26] Both parties submit that it is appropriate for this Court to decide, as a matter of law, whether the action is barred by the principle of *res judicata* or issue estoppel. The defendant qualifies that agreement in one respect: the defendant contests the plaintiff's submission that minimizes the role played by the union representative Odette MacLeod at the MAB, to the effect that, while present, she did not "represent" the plaintiff. The defendant questions the relevance of that submission to the issue before the Court but sought an adjournment to present evidence if it was important to the Court's analysis.

[27] My reading of the affidavits and the decision of the MAB suggests no conflict; Ms. MacLeod was familiar with the appeal process, and participated and made representations to the MAB. A more precise description of Ms. MacLeod's involvement and legal training is not relevant to this decision.

B *Res Judicata* - Issue Estoppel

[28] I adopt and incorporate Part III.B in the majority decision in the Court of Appeal in *Wright* to the extent that the statements of law set out in that analysis apply to this case.

[29] As a general principle, once a dispute has been judged with finality, it is not subject to re-litigation. Because the prior determination of the plaintiff's claim was by an administrative appeal tribunal, the two-step analysis outlined in *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44, applies.

[30] The first step involves consideration of three preconditions for the operation of the doctrine:

1. The same question was decided in the earlier proceeding;
2. The part of the judicial decision which is said to create the estoppel was final; and,
3. The parties to the earlier decision are the same persons as are parties to this proceeding. (*Danyluk*, ¶ 25)

[31] Fundamental to the three preconditions is that the prior proceeding involves a judicial decision. That requires positive answers to three questions:

1. Was the MAB capable of receiving and exercising adjudicative authority?
2. As a matter of law, was the particular decision one that was required to be made in a judicial manner? and,
3. As a mixed question of law and fact, was the decision made in a judicial manner? (*Danyluk*, ¶ 35)

[32] With respect to the third element or question, Binnie J. wrote that while the administrative tribunal may utilize procedures more flexible than those that apply in the Courts, their decisions must be based on findings of fact and the application of an objective legal standard to these facts. (*Danyluk*, ¶ 41).

[33] Meeting the three preconditions does not automatically entitle the applicant to the benefit of issue estoppel. Issue estoppel is an equitable doctrine closely related to abuse of power. It is designed to implement justice and to protect against injustice. It calls for the exercise of judicial discretion to achieve fairness in the circumstances of each case (*Danyluk*, ¶ 63).

[34] It is an error of principle not to address the factors for and against the exercise of the discretion (*Danyluk*, ¶ 66). The list of factors is open and involves any factors relevant to these specific circumstances of a particular case. Seven factors were analyzed by the Supreme Court of Canada in *Danyluk* and these factors are the ones most common referred to by courts since. They are the factors upon which counsel in this case make their analysis. They are:

1. The wording of the statute from which the power to issue the administrative order derives
2. The purpose of the legislation
3. The availability of an appeal
4. The safeguards available to the parties and the administrative procedure
5. The expertise of the administrative decision maker
6. The circumstances giving rise to the prior administrative proceedings
7. The potential injustice

C The Three Preconditions

[35] Both parties accept that the three *Danyluk* preconditions are met in this case. The same question was decided in the earlier proceeding as is central to this proceeding. The earlier judicial decision was final. The parties in both proceedings are the same.

[36] With respect to the three questions raised by Binnie J. at ¶ 35, the plaintiff does not challenge that the MAB was capable and receiving and exercising adjudicative authority and, as a matter of law, the decision was required to be made in a judicial manner. It appears to challenge the third element or question: As a mixed question of law and fact, the decision was not made in a judicial manner.

[37] The basis for this challenge was that the procedure was unusual - that is, very informal, and, on the facts of this case, unfair. The unfairness of the procedure appears to be raised both in respect of this third question and as a factor at the second stage - the exercise of discretion. The particulars of the unfairness were that: the plaintiff was not represented by counsel during the hearing; and, despite the information as to how the appeal would be conducted, the fact that the defendant (Plan administrator) was not present at the oral hearing and permitted to make a written submission, and the plaintiff was not expressly advised that she might respond to the written submission, an injustice occurred.

[38] In the context of a challenge to the third element or question underlying the application of the estoppel doctrine, which was the main controversy in *Danyluk* (see ¶¶ 37 to 51), I agree with the statement made by Binnie J., and discussed in detail by Cromwell J.A. in *Wright*. Because the procedure before the MAB is flexible and informal (based on the scheme of the consensual Plan agreed to by the employer and union), where the alleged errors were in the exercise of jurisdiction, any such errors do not negate the preconditions to the application of the plea of issue estoppel, but rather are matters for consideration at the second stage - the exercise of discretion.

[39] Based on the above, I find that the three preconditions to the exercise of the plea of issue estoppel are met.

D Step 2 - The Discretionary Factors

[40] The contest between the parties in this case focussed on the plaintiff's two reasons for asking the Court to exercise its discretion to reject the defence of *res judicata* or issue estoppel.

[41] The plaintiff's first issue was the appeal process. The process is not statutory but rather, as explained in *Wright* at ¶¶ 12 to 16, 48, 98 to 99 and Annex A, similar to a contractual arbitration process. It was intended to be informal, presumably inexpensive, with a medical focus.

[42] The plaintiff says that the MAB's decision to conduct the appeal in an unusual bifurcated process has created an unfairness. Because the defendant was unable to attend the scheduled hearing due to Hurricane Juan hitting Halifax the day before, and because the plaintiff, her spouse and union representative did attend, the Board decided, with the consent of all parties, to hear the plaintiff's evidence and submissions orally, receive the defendant's submission in writing within a few days, and make a decision within a few weeks. The plaintiff argues that the fact that the plaintiff did not have legal counsel and therefore did not understand that she could respond to the defendant's written submission (which was attached to her affidavit as Exhibit H) was essentially unfair. In particular,

she argues, as an example, that the defendant's submissions about the FCE were submissions that the plaintiff would have responded to.

[43] The plaintiff's second issue is that while all the parties acknowledged that the threshold test for disability had changed from "her own occupation" to "any occupation", the MAB, in effect, exceeded its jurisdiction by analysing her medical condition against the "her own occupation" test as opposed to the "any occupation" test. It also erred in its analysis of the requirements of her own occupation and the accommodations that would have been necessary to enable her to return to her own occupation.

[44] For the latter, the plaintiff relies upon her supervisor's February 3, 2000, job description and supervisor's description of the extent that accommodations could be made (Exhibit B to the Sharon Cochrane affidavit). She argues that there is a "disconnect" between the MAB's discussion and decision respecting accommodation and her supervisors' February 2000 description.

[45] She also describes a conflict in the decision between the description of the FCE - that the plaintiff demonstrated tolerances for work at a sedentary level "for up to four hours per day", if avoiding lifting and trunk rotation at page 3 of the decision with the conclusion at page 8 that "the FCE also confirms her ability to work at a sedentary job for a minimum of four hours per day".

[46] Thirdly, the materials before, and decision of, the MAB was silent as to whether accommodation of "four hours per day" in a regular seven-hour work day would entitle the plaintiff to her full pay or only a prorated portion (in particular, less than 80%).

[47] Finally, the plaintiff argues that to the extent that the MAB concluded that she was capable of working not only at her own occupation - which appears to be the only analysis made, but also "any occupation at a sedentary level with the necessary restrictions on lifting, sitting and standing times", there is no indication in the materials or the decision as to what those other occupations (for which she may be fit) might be, what the current rate of compensation for her own occupation was, and whether any of these other unnamed occupations paid 80% of the current rate of her own occupation.

[48] The defendant's response to the first issue is that the procedure before the MAB was an informal one provided for by agreement between sophisticated parties. The Plan and letter of understanding outlining the process of appeals, which were fully described in *Wright*, were fair and reasonable. The procedure should not support the exercise of discretion to bar the defence of issue estoppel.

[49] The plaintiff was advised in writing of the process and of her entitlement to be represented by legal counsel. She had the assistance of a union representative, Ms. MacLeod (whether or not she was a non-practising lawyer) who had participated in many MAB appeals and was familiar with the process.

[50] The focus of the hearing was the medical condition of the plaintiff and not legal issues. Counsel argues, citing *Bracich et al* v *Holt*, [1998] N.S.J. 497 (NSCA), that judicial review may have been available for an error of jurisdiction arising out of a procedural error.

[51] In its response to the plaintiff's second issue, the defendant submits that the MAB had before it the entire medical file and record of the plaintiff. While the entire record is not before this Court, this Court must assume, based on the affidavits and MAB's decision, that it was before the MAB. That this is so is not disputed. The time when the plaintiff's medical condition was relevant for the purposes of the MAB's decision was September 6, 2002, when the threshold definition of disability changed. The defendant argues that the plaintiff's selective reliance on the November 2001 FCE, and the February 2000 supervisor's job description, which constitute only a small part of the entire record before the MAB, should not be the basis for discrediting the more important evidence as to the plaintiff's condition, based on the entire medical file, as of the relevant date of September 6, 2002.

[52] The defendant further argues that, while the assessment was at the "any occupation" stage; that is, if the defendant could not do her own job, then the MAB must look at other occupations that fit the plaintiff's abilities that paid not less than 80% of the current rate of her own occupation - this does not preclude the MAB from determining whether in fact the plaintiff could perform her own occupation. Said differently, it is not an error of law to consider the plaintiff's ability or capacity, at the relevant time, to perform her own occupation. If she was not disabled from performing her own occupation, then she could not be disabled from performing any other occupation for which she was or could become suited. The defendant submits that such was the assessment and determination made by the MAB in this case. It does not constitute an error of law.

[53] The defendant notes that there was not factual dispute before the MAB as to what the plaintiff's job entailed. The MAB's decision in this case is a detailed review of the plaintiff's medical history and a transparent explanation of the MAB's assessment of her level of ability or capacity based on that medical evidence. In this respect, the decision is unlike that of the MAB in *Braithwaite* v *Disability Plan* (1999), 176 NSR (2d) 173, where no reasons were provided by the MAB, and that of *Wright*, where the reason consisted of only one short sentence in a three-sentence decision.

[54] The defendant submits that the plaintiff's action is, in effect, an attempt at an impermissible appeal from, or judicial review of, the MAB decision. Absent a factual dispute before the MAB as to the plaintiff's job description and the willingness of the employer to accommodate, the medical assessment and decision of the MAB should not be re-litigated through this action.

[55] The defendant's final submission was that, in this case, the MAB dealt with the medical issue, as opposed to *Wright* where the issue was the non-medical precondition to the assessment of the plaintiff's capacity to perform her occupation.

E Analysis

[56] The plaintiff's first issue was the unfairness of the process; in particular, the fact that the defendant did not attend at the hearing and instead made a written submission that the plaintiff was not advised, and did not know, she could respond to.

[57] My analysis of this issues centres on the first, fourth and seventh factors in *Danyluk*.

[58] In *Wright*, Cromwell J.A. discusses at length the first *Danyluk* factor (¶¶ 70 to 97). Many of his statements provide context for this analysis. In particular, he stated that it was not an error in principle to find that issue estoppel should not operate simply because the parties had entrusted an important issue to an informal process; generally, courts should respect the parties' choice and not undermine it (¶¶ 70 and 77). Secondly, the scope of appeals is restricted to medical grounds for ruling that an employee is not eligible for benefits. (¶ 87). Thirdly, the role of the MAB is simply to assess from a medical perspective whether the individual was capable or not of doing specific jobs (¶ 90).

[59] The extensive MAB decision, and affidavits in this motion, confirm that the plaintiff was informed of the procedures before the hearing in a plain and transparent manner. She was particularly advised of the right to be represented by a union representative and/or a lawyer; and in fact was assisted during the hearing by a union representative who was familiar with the MAB appeal process, having previously participated in many hearings.

[60] In my view the fourth *Danyluk* factor - the safeguards available to parties in the administrative procedure, including issues concerning natural justice - a factor not separately considered in *Wright*, is relevant to the plaintiff's procedural issue.

[61] If the informality of the process should not be, by itself, the basis for the exercise of discretion in these circumstances, then the Court's primary interest in the exercise of discretion, in respect of this issue, is whether the procedure adopted by the MAB, breached the rules of natural justice. The only reason for the bifurcated hearing was the storm that prevented the defendant from attending. To my mind the procedural disadvantage was as likely to adversely affect the defendant, who was forced to make its submission in response to the plaintiff's submissions without hearing them, as the plaintiff.

[62] The real concern of the plaintiff appears to relate to the analysis and decision of the MAB - not the defendant's submissions. The MAB decision shows that the plaintiff did make submissions respecting the circumstances that preceded the FCE that should qualify its relevance and did dispute Dr. Wilson's analysis. The reason that the plaintiff seeks a "second bite at the cherry" has to do with the analysis and decision of the MAB, not the submission of the defendant, which did not advance new arguments or issues that were not already addressed by the plaintiff in her submissions.

[63] In light of the focus of the MAB - the review and analysis of all the medical information, the absence of any new argument or issue by the defendant, and the informality chosen for the determination of this medical issue, the absence of advice to the plaintiff that she could respond to

the defendant's submission does not constitute a breach of natural justice that would justify the exercise of discretion to bar the *res judicata* or issue estoppel defence.

[64] The plaintiff's second issue is that the MAB's decision appears on its face to have been made in respect of the plaintiff's own occupation, and not any occupation for which the plaintiff was or could become suited; and, in the analysis of "her own occupation", there were three "disconnects" between the medical information and MAB's reasoning. She submits that both errors merit re-litigation.

[65] As for the first "disconnect", the plaintiff's supervisor's February 2000 job description and description of possible accommodation are inconsistent with the MAB's conclusion that the employer was prepared to accommodate the plaintiff in her own job so as to find her not disabled from performing her own occupation.

[66] As for the second "disconnect", the Board's reference at page 3 of its decision to the November 2001 FCE states that the plaintiff demonstrated tolerances for work at a sedentary level "for up to four hours per day" whereas in the conclusion at page 8, the Board confirms her ability to work at a sedentary job "for a minimum of four hours per day".

[67] The defendant response is that these are not "disconnects", but two small pieces of the medical evidence - distant in time from the relevant date for the assessment of the plaintiff's capacity (September 6, 2002), that were assessed by the MAB in the context of the entire medical file. In effect, the defendant argues that there were no factual errors made by the Board in its medical assessment that should merit the plaintiff having a "second bite at the cherry". I agree.

[68] The third "disconnect" was the absence of anything of the MAB's decision, or the materials before this Court, to indicate whether accommodation of the plaintiff by her own employer to permit work of "four hours per day" in a regular seven-hour work day, would entitle the plaintiff to full pay or only a prorated remuneration. Without entitlement to at least 80% of the current pay for her old job, the MAB's decision would be in error. It is improbable, or at best impermissible speculation to conclude, that the accommodation of the plaintiff would result in a reduction in her pay. The exercise of discretion should not be founded on such speculation.

[69] The important difference between the MAB decision in this case, and those in *Braithwaite* and *Wright*, is that the MAB in this case rendered a lengthy, detailed and transparent analysis and conclusion of the extent of the ability and capacity of the plaintiff to perform her work, applying the definitions of the Plan. In *Braithwaite* and *Wright*, the Boards made assessments about other occupations without any apparent factual matrices - information as to other occupations or the current pay of the plaintiff's own occupation, that would permit a purely medical assessment. In this case, the MAB had the entire medical file and, in light of the employer's willingness to accommodate, did not need information as to other occupations and the current rate of pay of the plaintiff's own occupation.

[70] I agree with the defendant that if the plaintiff could be accommodated in her own job it was unnecessary for the MAB to consider whether she was or could become suited to any other occupation. Therefore, it was proper for the MAB to make an assessment, based on the medical evidence of impairment provided, in the context of her own job and her employer's willingness to accommodate her in that job. It made a medical assessment as to whether her impairment caused disability sufficient to meet the criteria for benefit under the Plan, when it assessed her capacity in the context of her own job with accommodation. The MAB did not apply the wrong legal test. It expressly applied the definitions in the Plan to the medical evidence before the MAB.

Application of the *Danyluk* factors

1. The wording of the statute from which the power to issue the administrative order derives

[71] As noted in *Wright*, the Plan restricts the administrative appeal to an assessment of disability on medical grounds only. The Court noted that the MAB may deal with the question of whether a person is disabled within the "own occupation" definition, provided there is no dispute as whether to the person is an employee covered by the Plan or about what the "regular duties of his/her occupation" are (¶ 95); and within the "any occupation" definition, provided there is no factual dispute about the types of jobs the person is fit for and whether these jobs pay not less than 80% of the current pay for the person's former job (¶ 96).

[72] In this case, the assessment, even though at the "any occupation" stage, was of the plaintiff's "own occupation". It is undisputed, and a matter of common sense, that the threshold of disability under the "any occupation" definition is a higher threshold to meet than the definition of disability under the "own occupation" definition. The "any occupation" definition usually comes into play after a person has established the threshold of disability under the "own occupation" definition. (For example, in *Wright,* at ¶ 92, the court found that the MAB first accepted that Mr. Wright could not do his own job.) If a person is not disabled from their "own occupation", then they cannot be disabled under the "any occupation" test. For this reason, as a matter of law, it was not improper for the MAB in this case to first conduct an assessment under the "own occupation" definition, and includes consideration of any accommodation the employer was prepared to make.

[73] The legal dispute in this case is whether, with accommodation, the plaintiff was disabled from her own job.

[74] In this case, there was no factual dispute that the plaintiff was an employee covered by the Plan or as to the regular duties of her job. The only dispute was whether, with accommodation, she was disabled from doing her job.

[75] In *Wright*, the Court found, in its very short decision without reasons, that when the MAB assessed in a medical context other occupations that matched Mr. Wright's education, training and experience, it did so without any information as to the requirements of those other jobs and without

any knowledge as to the current pay of his former job. In doing so, it exceeds the scope of its authority.

[76] That did not happen in this case. The assessment in this case was on her disability, based on the complete medical information, from performing the regular duties of her occupation with accommodation that the employer was prepared to make.

[77] This factor favours the defendant.

2. The purpose of the legislation

[78] The plaintiff concedes that this factor favours the defendant.

3. The availability of an appeal

[79] In *Wright*, the Court acknowledged that judicial review for jurisdictional issues was an option, but, in that case, the failure to keep a record of its proceedings or to give any reason for its decision effectively deprived Mr. Wright of the ability to apply for judicial review.

[80] In this case, in a written decision, the MAB thoroughly reviewed the medical information, the parties' submissions, the relevant definitions in the Plan, the MAB's role, and its application of those definitions to the medical information before it. The plaintiff has not challenged the MAB's description of its role or the relevant definitions. Its dispute is with the medical analysis and conclusion.

[81] The circumstances of this case contrast with those in *Wright* and *Braithwaite*. Judicial review was a possible remedy to deal with any jurisdictional or procedure issue. Judicial review to challenge the medical analysis was not available (the decision was final). Res Judicata's purpose is to restrain re-litigation that was procedurally fair (not a denial of natural justice), and within the decider's intended role or mandate. This factor favours the defendant.

4. The safeguards available to the parties and the administrative procedure, including issues relating to nature justice

[82] This factor was not separately addressed in *Wright*. I reviewed it in respect of the plaintiff's submission that the bifurcated appeal hearing, which left the plaintiff unaware, because she was without a lawyer, that she could respond to the defendant's written submission, created an unfairness that amounts to a breach of natural justice. As noted earlier in this decision, on the facts of this case, this factor is neutral. The plaintiff was advised that she could have a lawyer and the defendant's submission to the MAB (attached to the plaintiff's affidavit) and the discussion of the defendant's submission in the MAB's decision, confirm that the defendant's submission introduced no new issue or argument that was not also addressed by the plaintiff.

5. The expertise of the administrative decision maker

[83] If the plaintiff had established that the MAB entered into a disputed interpretation of the Plan, such as an improper description or misunderstanding of the Plan definitions, or attempted to deal with the medical issues with disputed evidence as to the relevant threshold requirements, this factor might favour the plaintiff.

[84] On the facts of this case, the MAB was a medical professional whose expertise was assessment of disability on medical grounds. Its description and interpretation of the Plan's definitions that were relevant to its medical assessment have not been challenged. The plaintiff's objection was focussed on the fact that the assessment was not of "any occupation" which was a higher threshold than "own occupation". This approach did not constitute an error, even at the "any occupation" stage.

[85] About the factual medical issues as to disability, the MAB had the necessary expertise to make its decision worthy of deference. This factor favours the defendant.

6. The circumstances giving rise to the prior administrative proceedings

[86] If the evidence before this Court supported the possibility of a jurisdictional, procedural, or legal error by the MAB, this factor would favour the plaintiff, but such is not apparent in this case.

[87] In *Wright*, the plaintiff was under psychiatric care at the relevant time and had little help from his union representative. In this case, there is no suggestion that the plaintiff was under a similar disability and, from the MAB's written decision, it is apparent that the plaintiff had the benefit of submissions by an experienced union representative familiar with such appeals. For that reason, this factor favours the defendant.

7. The potential injustice

[88] This factor involves looking at the big picture - the overarching concern about fairness and justice. In one sense, it requires the Court take an overview of all of the individual factors and circumstances. In *Wright*, the injustice was that because the information necessary to address the threshold issues were not before the MAB and the MAB in that case did not address those threshold issues (or at least apparently so from its very short decision), Mr. Wright never had a fair appeal.

[89] The seventh factor involves weighing the rationale behind issue estoppel (that is, that litigants should have only one kick at the barrel, or one bite of the cherry), thus limiting collateral attacks on a final decision and preventing abuses of the justice system - unless the first kick or bite was conducted unfairly so as to demonstrate a potential injustice.

[90] There is no evidence before this Court of unfairness in the MAB decision - to the effect that the plaintiff was not disabled from carrying out her "own occupation" based on the accommodation

that the employer was prepared to make, or that the MAB usurped a role not intended for it, or that its procedure created an unfairness.

[91] While this Court has considerable sympathy for the plaintiff and an inclination to find in her favour and to give her another chance with the aid of very able counsel, her disability was assessed according to the procedure provided for by the Plan, the procedure was explained to her, the appeal was conducted fairly, the Board confined itself to medical issues within its mandate, and the Board provided a thorough, reasoned decision.

[92] A very important difference between this case, and the decisions in *Braithwaite* and *Wright*, is that in the latter two cases no reasons were provided, while in this case, the MAB conducted a thorough analysis, on medical grounds, of the plaintiff's disability, and gave relevant written reasons.

V Conclusion

[93] The plaintiff sued the defendant for benefits under the Plan, based on her inability because of illness or injury, as defined in the Plan's Guidelines, from engaging in any occupation which she is or may become fit to do through education, training, experience or rehabilitation, and which pays not less than 80% of her current pay for her former position.

[94] The defendants plead *res judicata* (issue estoppel) because the plaintiff had exercised her right of administrative appeal under the Plan, which appeal was a final judicial decision on the same issue between the same parties as she seeks to re-litigate.

[95] The plaintiff applies under *CPR 12* for determination, as a question of law, whether the defendant's plea of *res judicata* should be permitted. There are no relevant factual disputes on the issue.

[96] Unlike *Braithwaite* and *Wright*, the MAB issued a written decision thoroughly setting out the medical evidence, the submissions, and the Board's medical analysis, applying the relevant definitions in the Plan.

[97] While the appeal was in respect of the "any occupation" test for disability, the MAB assessed, on medical grounds, the plaintiff's capacity or ability to perform her "own occupation" with the accommodations offered by her employer. It was not an error in law to do this, in light of the fact that the threshold for disability from engaging in the "any occupation" is a higher threshold than the threshold for disability from engaging in one's "own occupation".

[98] The MAB administrative appeal met the *Danyluk* stage one preconditions to *res judicata* or issue estoppel. Applying the *Danyluk* stage two contextual analysis, the Court declines to exercise discretion to bar the *res judicata* defence.

[99] The Court will hear the parties on costs if they cannot agree.

J.