SUPREME COURT OF NOVA SCOTIA

Citation: *Amirault v. Nova Scotia Association of Health Organizations Long Term Disability Plan,* 2016 NSSC 293

Date: 20161102
Docket: Dig No. 439345
Registry: Digby

Between:

Simone Amirault

Plaintiff

v.

The Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund by its Trustees Lynette Johnson, Carl Crouse, Mike MacArthur, Ken MacDermid, Blaise MacNeil, Jim Mott, Gerri Oakley, Bruce Quigley, Bruce Thomson and Claire Westhaver

Defendants

Judge: The Honourable Justice Mona M. Lynch

Heard: July 27, 2016, in Halifax, Nova Scotia

Counsel: Lynette M. Muise, for the Plaintiff
David G. Hutt, for the Defendant, Trustees of the Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund

By the Court:

Background:

[1] The pleadings in this matter prior to the current motion are:

1. November 27, 2014 – Notice for Judicial Review, Simone Amirault;
2. December 19, 2014 – AMENDED Notice for Judicial Review, Simone Amirault;
3. February 13, 2015 – Notice of Participation, The Nova Scotia Association of Health Organizations Long Term Disability Trust Fund;
4. May 20, 2015 – Notice of Action and Statement of Claim, Simone Amirault;
5. June 12, 2015 – Notice of Discontinuance of the Application for Judicial Review, Simone Amirault;
6. November 4, 2015 – Notice of Defence, The Nova Scotia Association of Health Organizations Long Term Disability Trust Fund.

[2] On May 17, 2016, the Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund (NSAHOLTDTF), filed a motion seeking an order dismissing the plaintiff's action with costs payable to the defendant along with an affidavit and brief. On July 13, 2016, Simone Amirault filed a Notice of Contest along with an affidavit disclosing documents, a supplementary affidavit disclosing documents and a brief. On July 21, 2016, NSAHOLTDTF filed a rebuttal affidavit and a rebuttal brief. The matter was heard on July 27, 2016, in Halifax, NS.

[3] The NSAHOLTDTF seeks summary judgment on the evidence on the basis of *res judicata* and abuse of process.

[4] Simone Amirault was an employee of the former South West District Health Authority from January 26, 1990, until she stopped working on August 5, 2013, due to back pain. She was enrolled in the NSAHOLTD plan. The Trustees are to pay disability benefits under the LTD plan to employees who meet the definition of "totally disabled". If the employee claiming disability benefits under the LTD plan is not successful, they have two other avenues to have their claim considered.

First, they can submit further evidence to the claim adjudicator for a claim review that does not prejudice other legal remedies. They can also request an appeal to the Appeal Board. In order to be eligible to appeal to the Appeal Board, the employee must agree to be bound by the decision of the Appeal Board and agree not to commence legal action with respect to the denial or termination of benefits (Article 11.09(1) of the plan). The Appeal Board decision is final and binding and according to Article 11.09(9) is not open for further review.

[5] The NSAHOLTD plan was negotiated between unions and employers and the Trustees administering the plan are from both unions and employers.

[6] Simone Amirault submitted her claim in December 2013, based on back pain. In February 2014, it was determined that she did not meet the definition of "total disability" or "totally disabled" under the LTD plan. This was communicated to Simone Amirault by letter dated February 3, 2014. The letter also explained her options to request a claim review and if that was not successful to initiate an appeal. The letter indicated that initiating the proceedings for an Appeal Hearing would waive her right to litigate and take further legal action against the Trustees of the NSAHOLTDTF. The letter attached an appeal procedure document.

[7] On February 20, 2016, Simone Amirault asked for a claim review and submitted a note from her family doctor. By letter dated March 19, 2014, Simone Amirault was informed that her claim review was not successful and the previous decision to decline the claim was maintained. The letter also advised her again of her right to appeal the decision and provided the form to complete for the appeal.

[8] Simone Amirault signed a notice of appeal by claimant form. The form indicated in two places that the claimant must agree to be bound by the decision and not commence court proceedings with respect to the denial of long-term disability benefits. Simone Amirault signed the form that indicated she was agreeing that upon commencement of the hearing she would be bound by the decision of the Appeal Board and would not commence court proceedings with respect to the denial of long-term disability benefits.

[9] By letter dated April 2, 2014 NSAHO informed Simone Amirault of the date and time of the hearing and both in the letter and the attachments again informed her that the decision of the Appeal Board was final and binding.

[10] Dr. Colin Davey, acting as the Appeal Board, heard Simone Amirault's appeal on June 6, 2014, and denied the appeal.

[11] As noted above, Simone Amirault filed a Notice of Judicial Review that was subsequently discontinued. She then filed a Notice of Action and Statement of Claim.

Issues:

[12] 1. Should the action be dismissed by summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04?

2. Does the doctrine of issue estoppel or *res judicata* apply to bar Simone Amirault's action?

3. Should the action be dismissed because there has been an abuse of process pursuant to *Civil Procedure Rule* 88.02?

Law:

[13] The *Civil Procedure Rules* relevant to this matter are 13.04, 12.02 and 88.02:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

a) determine a question of law, if there is no genuine issue of material fact for trial;

b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

(a) the facts necessary to determine the question can be found without the trial or hearing;

(b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

(c) no facts to be found in order to answer the question will remain in issue after the determination.

88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

[14] The purpose of Summary Judgment is set out in para. 22 of **Burton Canada Company v. Coady,** 2013 NSCA 95 as:

> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. “Summary” is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

While the **Burton** decision was decided before the amendment to *CPR 13.04*, it still sets out the test for genuine (or arguable) issue of material fact. At para. 33 the court says:

> “…the test is only whether there *any* material facts in dispute. If there are then a judge must conclude that summary judgment is not available and that a trial is required to resolve the dispute.”

Further at para. 87(8), the court defines “material fact” as a fact that is essential to the claim or defence and “genuine issue” as an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. The burden is on the moving party. At para. 87(6) in **Burton**, the court said that proof requires evidence, the parties cannot rely on mere allegations or the pleadings, and each side must “put its best foot forward” by offering evidence with respect to the existence or non-existence of material facts in dispute.

[15] Rule 13.04 makes it clear that the decision as to whether to grant summary judgment is not discretionary. I must grant summary judgment if I find both no genuine issue of material fact and no determination of a question of law is necessary. In **M.U. Rhino Renovations v. Dora Construction Ltd.,** 2016 NSSC 90, para. 39 the test under the amended rule is set out as:

> Thus, I must ask myself:
>
> (i) Is there a genuine issue of material fact (on its own or mixed with a question of law), for trial of the claim or defence? If no, then;
>
> (ii) Does the claim or defence require determination of a question of law (on its own or mixed with a question of fact)? If no, then summary judgment must be granted; if yes, that a question of law on its own presents, then
>
> (iii) I may determine the question of law, and make an appropriate disposition under 13.04(3).

Analysis:

[16] The first question to be determined is whether there are any material facts in relation to a genuine issue as described above in **Burton** – no arguable issue of material fact. Here Simone Amirault says that there is at least one material fact in dispute – whether the inequality in bargaining power and her lack of understanding lead her to sign documents that affected her rights under the contract with the NSAHO. The NSAHOLTDTF argues that was not pleaded by Simone Amirault and therefore cannot be a genuine issue. They also indicate that there was no indication that she did not understand that she was giving up her right to litigate by entering into the appeal process through the plan.

[17] There was little evidence from Simone Amirault as no evidence was provided, except for affidavits of documents. One of the documents provided is a “request for a claim review” signed by Simone Amirault on February 17, 2014. The form gives two bases for requesting a claim review that are set out in section 11.07(1) of the plan. Both the plan and the form signed by Simon Amirault provide, on plain reading, two options. They are set out as alternatives and are separated by the word “or”. Simone Amirault chose both alternatives. I find there is some evidence that she may not have understood at least one of the documents that she signed.

[18] In the Notice of Defence, at para. 19, the defence asserts that Simone Amirault, by signing the Notice of Appeal, expressly acknowledged her understanding of being bound by the Board's decision and not to commence court proceedings. Simone Amirault contests that she understood the nature of the documents she was signing. She asserts she was in an unequal bargaining position and she did not have any independent advice from a union rep or legal counsel. The documents would support that she did not have a union rep or legal counsel with her for the appeal hearing.

[19] Simone Amirault relies on **Norberg v. Wynrib,** [1992] 2 S.C.R. 226 to show that where there is an imbalance of power between the parties an unconscionable transaction can arise. She points to herself as an employee who must participate in the LTD plan. The circumstances in each case must be examined and the imbalance of power is a fact to be proven, p. 250.

[20] While you are presumed to understand what you sign, there is some evidence in this case that would rebut that presumption.

[21] I find that Simone Amirault's understanding of documents she signed in relation to her remedies under the plan is a material fact in dispute. It is a fact that is relevant to the allegations associated with the cause of action and the defences pleaded.

[22] Therefore under Rule 13.04(1) I can proceed no further to deal with the questions of law that have been raised.

[23] As there is at least one material fact in dispute I will not separate a question of law from other proceedings under *CPR* 12.02 or determine whether there has been an abuse of process under *CPR* 88.02.

Conclusion

[24] The motion for summary judgement on the evidence is dismissed.

[25] Counsel for NSAHOLTDTF, in submissions, suggested that the court could direct the matter back for another appeal to the Appeal Board. I am not convinced that the court has the authority to make such a direction. However, now that Ms. Amirault has counsel to assist her in obtaining and presenting the medical evidence

for the Appeal Board, counsel may decide that a return to the Appeal Board is a better, more practical and more efficient alternative than proceeding with the court process.

Lynch, J.