

SUPREME COURT OF NOVA SCOTIA

Citation: *Baxendale v. The Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2019 NSSC 143

Date: 20190530

Docket: Hfx. No. 474011

Registry: Halifax

Between:

Brenda Baxendale

Applicant

v.

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

Respondent

LIBRARY HEADING

Judge: The Honourable Justice C. Richard Coughlan

Heard: January 14, 2019 in Halifax, Nova Scotia

Last Written February 22, 2019

Submissions:

Written Decision: May 30, 2019

Subject: Insurance – Interpretation of Terms – Disability Plan – deductions from amount payable.

Summary: Ms. Baxendale was injured in a motor vehicle accident and entitled to receive LTD benefits. Ms. Baxendale commenced an action against the Estate of the driver of the vehicle involved in the accident. After the action was settled the amount of \$360,000 was attributed to future wage loss. Ms. Baxendale kept the \$360,000 and the Fund set off her LTD benefit until the value of the future income recovery was reduced to zero. Ms. Baxendale has worked part-time at the Cape Breton Regional Hospital.

Issue: Is Ms. Baxendale's LTD benefit to be reduced by the amount of her part-time income from the Cape Breton Regional Hospital?

Result: The part-time income from employment from the hospital is not to be deducted from the benefit as it is not an item set out in the LTD Plan as an amount to be deducted from the benefit.

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Counsel: Barry J. Mason, Q.C. for the Applicant
Colin D. Bryson, Q.C. for the Respondent

Coughlan, J.

[1] Brenda Baxendale was involved in a motor vehicle accident on October 12, 1990, in which she suffered extensive injuries. At the time of the accident she was employed by the Nova Scotia Health Authority as an Occupational Therapist at the Nova Scotia Hospital in Dartmouth, Nova Scotia. Ms. Baxendale became entitled to receive Long Term Disability benefits under the Nova Scotia Public Service Long Term Disability Plan (Plan) operated by the Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund (Fund).

[2] Ms. Baxendale went back to work for a private occupational therapy firm in Cape Breton where she worked for approximately ten hours per week in the Fall of 1993. From February 1994 until May 1994, she worked fifteen hours per week at the Cape Breton Regional Hospital and occasionally a few hours for a private occupational therapy firm as well.

[3] In June 1994, Ms. Baxendale gave birth to her first child and was off work until the Fall of 1995 at which time she returned to work at the Cape Breton Regional Hospital for ten hours per week. In 1995, 1996 and 1997 Ms. Baxendale's LTD benefits were reduced by \$7,927.44, \$3,843.84 and \$443.52 respectively for an amount identified as "Rehab Reduction".

[4] Ms. Baxendale commenced action against the Estate of the driver of the vehicle involved in the accident which action was settled for \$800,000. The sum of \$109,490.46 was paid to the LTD fund as reimbursement for LTD payments made to Ms. Baxendale to August 16, 1997. The amount of \$360,000 of the settlement was attributed for future wage loss.

[5] Negotiations were conducted by Ms. Baxendale's then counsel and counsel for the Trustees concerning the \$360,000 in respect of her loss of future income claim. In a letter dated August 12, 1997 the Trustees' counsel set out three options available to Ms. Baxendale:

There appears to be three options in dealing with this portion of the claim:

- a) Mrs. Baxendale retains \$360,000 and waives her right to any future benefits from the LTD Fund;
- b) Mrs. Baxendale pay to the Fund \$360,000 and retains her right to receive benefits provided she continues to meet the definition of disability;
- c) Mrs. Baxendale retains \$360,000 and the Fund reduces any benefit to which she is entitled until the value of the future income recovery is reduced to zero. Given the other offsets to Mrs. Baxendale's disability entitlement i.e., C.P.P., part-time income, it appears it will be a considerable period of time before any further benefit is actually made to Mrs. Baxendale. Having said that, I quickly add that the Fund has not completed any calculation but it appears given the size of the recovery that it would be some time in the future before any payment is made to her again.

[6] By letter dated April 29, 1998 the Trustees' counsel wrote to Ms.

Baxendale's counsel in which he stated:

Attached is a draft Agreement between the Trustees and Ms. Baxendale which purports to set out the terms involved in the amortization of the net recovery by Ms. Baxendale for future wage loss.

The objective of the Agreement is that Ms. Baxendale would receive no further payment from the LTD Fund until the future loss recovery was fully exhausted. While I used a certain number and definite period to account for the set-off, you will see that the Agreement requires some flexibility. The initial set-off is \$1,052.05, which is \$1,124.72 less \$147.84 of employment earnings. The \$1,124.72 figure is provided by an actuarial calculation based on the assumptions listed in paragraph 2 of the agreement and a term of 18 years (approximately).

Flexibility is required because the bi-weekly entitlement will fluctuate depending on the various factors as set out in Section 8 of the Plan. Depending on whether the entitlement increases or decreases the amortization period will shorten or lengthen. The draft Agreement sets out the current entitlement and estimated length of time that will be required to set-off the net recovery for future loss of wages. It proposes that the Fund will report annually to Ms. Baxendale how much of the future wage loss recovery has been amortized and how much is outstanding.

As we discussed, because Ms. Baxendale continues to be entitled to LTD subject to the set-off, she also remains entitled to her other employment benefits. The employee contribution to these benefits has in the past deducted from the LTD paid, but now that no cheque has been issued the Fund cannot continue to do that. Accordingly Ms. Baxendale will have to make arrangements to pay her employee contributions for each of her benefits ...

The set-off of the recovery for future loss of wages by virtue of the method of calculation is set out in Section 8 of the Plan.

[7] During negotiations reference was made to deduction of part-time income as being an offset deducted from any benefit to which Ms. Baxendale was entitled under the Plan.

[8] The LTD Fund and Ms. Baxendale entered into an agreement in 2001 setting out the terms of the agreement between them. Ms. Baxendale kept the \$360,000

and the Fund setoff her benefit in accordance with the agreement between Ms. Baxendale and the Fund.

[9] By letter dated January 3, 2002 the LTD Fund's counsel sent a revised agreement to Ms. Baxendale's counsel which changed references to certain regulations and numbering in reference to the LTD Plan but not the substance of the agreement.

[10] The parties agree that pursuant to s.9(8) of the LTD Plan Ms. Baxendale's LTD benefits since August 16, 1997 are to be offset by the \$360,000 net recovery, until the net recovery is reduced to zero.

[11] The parties agree the 2002 version of the agreement accurately reflects the argument between the parties the terms of which are as follows:

1. For the purpose of this Agreement the net recovery by Baxendale for future loss of wages is \$360,000 ("Net Recovery").
2. For the purpose of this Agreement the parties make the following assumptions for the treatment of the Net Recovery:
 - (a) assume a real rate of investment return 4.5% per annum;
 - (b) the potential for recovery mortality prior to retirement has not been considered;
 - (c) there has been no accounting for the differing tax treatments of benefits.
3. The Trustees acknowledge Baxendale is not disqualified under the Plan by virtue of the Net Recovery for future loss of wages. The Net Recovery of \$360,000 is, however, a set-off against future payments. The Trustees do not waive any of the terms or conditions of the Plan that must be met in order for Baxendale to be entitled to receive LTD benefits after the Net Recovery has been completely set-off.

4. The parties agree that according to subsection 9(8) of the Plan the Trustees, when calculating the LTD benefit otherwise payable to Ms. Baxendale, will reduce the LTD benefit by a set-off amount in keeping with the amortization of the Net Recovery.
5. The period of amortization of the Net Recovery will be approximately 18 years (from April 29, 1998), and the initial set-off amount will be \$1,052.05 bi-weekly. The set-off figure may be subject to variance when applying all other factors under Sections 8 and 9 of the Plan in calculating Baxendale's entitlement. It is the intent of the parties that Baxendale should not receive any further payment under the Plan until the Net Recovery has first been exhausted according to the set-off arrangement set out herein.
6. The LTD office will, on the request of Baxendale, report annually the amount of the set-off taken into account, and the remaining balance of the Net Recovery to be reduced by future LTD benefits otherwise payable.
7. Baxendale shall be entitled to continue her employment benefits, including her medical and long term disability plan and her pension, as provided for in the LTD Plan and under the applicable collective agreement/civil service regulations, and the *Public Service Superannuation Act*, provided she continues to meet the terms and conditions of disability under the Plan. Baxendale shall be responsible for the payment of her contributions for the costs of these employment benefits.

[12] In September 1997, Ms. Baxendale became a permanent part-time employee at the Cape Breton Regional Hospital on a "0.5" basis. She worked 22.5 hours for one week (3 days) and 15 hours the next week (2 days). She continued this for many years until January 2011 when she started working "0.6" which she continues to work.

[13] Brenda Baxendale is seeking declarations that the LTD Fund is in breach of its agreement with her regarding repayment of the LTD Fund's subrogated claim and that she has been eligible to receive long-term disability benefits from the LTD Fund since October 2010 and all retroactive benefits are owing. The LTD Fund opposes the application.

[14] The issue before the Court is whether Ms. Baxendale's part-time income is deductible from the monthly LTD entitlement pursuant to the settlement agreement.

BACKGROUND OF THE PLAN

[15] The LTD Plan was established in 1985. The Plan was described by Cromwell, J.A., as he there was, in giving the Court's judgment in **Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Wright** 2006 NSCA 101 at para. 12:

The Plan was established by the Province of Nova Scotia and the Nova Scotia Government Employees Union ("NSGEU") in 1985. They established a trust fund (the "LTD Fund") from monies held by the Province and the ongoing premium contributions by the Province and the Plan members, with the LTD Fund to be administered by a Board of Trustees, four of whom were to be appointed by the Province, and four by the NSGEU. The principal role of the Trustees was to administer the LTD Fund and the Plan. The Plan was the product of negotiations between the Province and the NSGEU. The trustees hired Maritime Life Assurance Company to carry out the day-to-day administration of the Plan, including the processing and the adjudication of claims.

[16] The Trust Agreement contains the following provisions:

1.16 "plan" means the Nova Scotia Public Service Long-Term Disability Plan.

2.1 The fund as created and established shall be used for the purpose of operating and administering the Plan as determined from time to time by the Union, and the Employer as defined in Article 1.10(a), and shall also provide a means for financing the expenses of the Trustees in the operation and administration of the Fund and Plan in accordance with this Agreement.

2.2 All contributions under the Plan paid to the Trustees, together with the income therefrom, shall constitute on receipt by the Trustees a trust fund to be administered by the Trustees in accordance with the terms of this Agreement and the Plan.

4.4 The Trustees shall have the absolute power to construe the provisions of this Agreement and any of the terms contained herein, and any construction adopted by the Trustees in good faith shall be binding upon the Union, the Employer and the employees and their families, dependents, beneficiaries and legal representative.

4.5 Except as otherwise provided in the Plan or this Agreement, the Trustees shall have the power of trustees as provided in the *Trustees Act, R.S.N.S. 1967, c.317*, and in particular they shall have the following powers:

(l) to interpret and construe the Plan and determine all questions of eligibility, duration of service, continuity of service, dates of birth, membership or retirement, computation of benefits, value of benefits, and similarly related matters of the purpose of the Plan;

(o) to do all acts, whether or not expressly authorized herein which the Trustees deem necessary to accomplish the general objectives and enable the employees to obtain benefits under the Plan in the most efficient and economical manner.

6.1 The Employer, as defined in Article 1.10(a), and the Union, will determine the nature and extent of the benefits to be provided under the Plan and the rates of contributions which will be made to the Plan, and subject to this, the Trustee shall have authority to determine all questions of the nature, amount and duration of benefits to be provided to any employee.

[17] The LTD Plan as it existed in 1985 contained the following provisions relevant to the issues before the Court:

1.(i) “rehabilitation employment program” means a program for re-employment of a disabled employee.

7.(3) If the administrator determines that the employee is capable of participating in an approved rehabilitation employment program and if the employee participates in a program he/she shall receive benefits as provided in s.8(5).

7.(4) While an employee is on rehabilitation employment, he/she is considered to be on active Long-Term Disability benefits. Rehabilitation employment consists of:

- (a) employment at the employee’s regular duties on a part-time basis, or;
- (b) employment at some other employment that provides monthly earnings less than the employer’s pre-disability salary, or;
- (c) a formal educational training program.

8.(5) The benefit for an employee who is receiving income under a recognized rehabilitation employment program, shall be reduced by an amount equal to 50% of the income received. Where the combination of benefits and income is in excess of the current rate of pay for the position, classification and step the employee held prior to disability, the benefits shall be reduced so as not to exceed 100% of that rate of pay.

9. The benefit to which an employee is entitled under this section shall be reduced by:

(3) the amount of income received from rehabilitation employment in accordance with subsection 5 of section 8.

[18] In 1992 the plan was amended. The amendment fundamentally changed the plan from a non-indemnity to an indemnity program. The amendments were ratified by the *Long Term Disability Plan Ratification Act* S.N.S. 1992 c. 6 which was given royal assent June 30, 1992. (see **Nova Scotia Public Service Long Term Disability Plan (Trustees of) v. MacDonald** 1997 NSCA 97).

[19] The provisions of the 1992 plan relevant to the issue before the Court are:

1.(1) “rehabilitation employment program” means a mandatory program, as contained in guidelines made pursuant to this Plan, for rehabilitation of a disabled employee so as to enable him/her to return to suitable productive employment as determined by the Trustees.

7.(3) If the administrator determines that the employee is capable of participating in an approved rehabilitation employment program and if the employee participates in a program he/she shall receive benefits as provided in s.8(5).

8.(5) The benefit for an employee who is receiving income under a recognized rehabilitation employment program, shall be reduced by an amount equal to 50% of the income received. Where the combination of benefits and income is in excess of the current rate of pay for the position, classification and step the employee held prior to disability, the benefits shall be reduced so as not to exceed 100% of that rate of pay.

9. The benefit to which an employee is entitled under this section shall be reduced by:

(3) the amount of income received from rehabilitation employment in accordance with subsection 5 of Section 8.

(7) The amount of income received by an employee from self-employment as set out in guidelines made pursuant to this Plan.

[20] It is the understandable that the items to be deducted from disability payments may change when the plan changes from a non-indemnity to an indemnity plan.

[21] In a supplemental affidavit filed December 14, 2018, Theresa Williams, the Director Claims Management for the LTD Fund deposed:

As a result of the above errors coming to my attention, I looked through the LTD Fund records, including the minutes of the meetings of the Trustees of the LTD Plan, for references to the enactment of guidelines to the offsetting of part-time earnings. The following is what I found:

- a) A minute of a Trustee meeting of March 9, 1999 listing the guidelines under the LTD Plan then in place, which listing included “Rehabilitation Guidelines” and “Self-Employment Earnings Guidelines”. A true copy of these minutes is attached hereto as Exhibit “A”.
- b) A minute of a Trustee meeting of November 29, 2001 discussing potential changes to Guideline No. 6, a true copy of which guideline is attached hereto as Exhibit “B”. This guideline states “Approved by the Board of Trustees and Effective April 1992”.

9. Our legal counsel, Colin Bryson has also provided me with a memorandum to him dated June 30, 1999 from Colleen Ryan of the LTD Fund enclosing a complete set of the guidelines that the memo states were in existence in 1996. This memorandum and set of guidelines are attached hereto as Exhibit “C”. Mr. Bryson advises (and I believe this to be true) that this memorandum was provided to him at the time because of litigation between the LTD Fund and one of its insureds, David Braithwaite. This memorandum and guideline was provided to Mr. Braithwaite in the LTD Fund’s July 1999 List of Documents in that litigation. The set of guidelines include a guideline entitled “Earnings Offset While in Receipt of LTD” and is identical to guideline No. 6 referenced above. It states:

“Any employee in receipt of Long Term Disability benefits, who is employed, either through an approved rehabilitation program, or when employed by an outside employer, or through self-employment, must submit proof of earnings to

the LTD Plan. Failure to disclose any such earnings may result in termination of benefits.

Such earnings are subject to a 50% offset via LTD benefits reduction. Offset may exceed 50% where such earnings plus LTD benefits exceed 100% of the employee's pre-disability salary.

April, 1992

[22] The copy of Guideline No. 6 attached to Ms. Williams' affidavit provides:

Authority

These guidelines are made by the Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund, pursuant to Section 13 of the Plan Document, dated May 4, 1998.

Guideline

Any employee in receipt of Long Term Disability benefits, who is employed, either through an approved rehabilitation program, or when employed by an outside employer, or through self-employment, must submit proof of earnings to the LTD Plan. Failure to disclose any such earnings may result in termination of benefits.

Such earnings are subject to a 50% offset via LTD benefit reduction. Offset may exceed 50% where such earnings plus LTD benefits exceed 100% of the employee's pre-disability salary.

[23] Ms. Baxendale submits it is unlikely that a document prepared in 1992

would reference as authority for the guideline a document dated May 4, 1998.

That on a preponderance of evidence Guideline No. 6 was not in effect in 1992.

[24] Guideline No. 6 does not apply to the facts of this matter. There is no

evidence Ms. Baxendale was in a rehabilitation employment program or was self-

employed. I find Ms. Baxendale was not in a rehabilitation employment program nor self-employed.

[25] Other than the work for a private occupational therapy firm in Cape Breton prior to June 1994, there is no evidence Ms. Baxendale was employed by an “outside employer”. Section 1.10 of the Trust Agreement defines employer as follows:

“employer” means:

- a) her Majesty the Queen in the right of the Province of Nova Scotia as represented by the Minister in charge of the Administration of the *Civil Service Act*;
- b) the Union, to the extent that it acts in the capacity of an employer requiring contributions to be made to the Fund in accordance with the provisions of the Plan; and
- c) the employer of employees listed in Schedule “A” or “B” of the Agreement.

[26] Exhibited to the supplemental affidavit of Theresa Williams is a guideline concerning “Participatory Agencies” which states: “ When an outside agency requests coverage under the LTD Plan, it must be in writing to the Chair of the Board of Trustees and must detail specific information”....

[27] It is clear when the term “outside employer” or “outside agency” is used it means an employer or agency which is not part of the Plan. In this case, Ms. Baxendale was employed as an occupational therapist with the Nova Scotia Department of Health at the time of her accident and is currently employed at the

Cape Breton Regional Hospital by the same employer. I find Ms. Baxendale is not employed by an outside employer.

[28] Section 4.5 of the Trust Agreement begins: “Except as otherwise provided in the Plan or this Agreement ...”. The section does not give the Trustees power to overrule clear provisions of the Plan which in fact set out amounts to be deducted from a benefit payable pursuant to the Plan.

[29] The Plan sets out the amounts to be deducted from the benefit to which an employee is entitled. Ms. Baxendale was not in a rehabilitation employment program, not self-employed and not employed by an outside employer. Her part-time income from the employment at the Cape Breton Regional Hospital is not to be deducted from the monthly LTD entitlement pursuant to the settlement agreement.

[30] Counsel will do the calculations to determine the current status of the \$360,000 attributed for future wage loss. If the parties are unable to agree on the calculations, I will hear them. I will then be in a position to make the appropriate declarations.

[31] I will hear counsel on the issues of costs and pre-judgment interest.

J.