

SUPREME COURT OF NOVA SCOTIA

Citation: Inglis v. Nova Scotia Public Service Long Term Disability Plan
Trust Fund, 2009 NSSC 254

Date: 20090827

Docket: Hfx No. 203247

Registry: Halifax

Between:

Robert D. Inglis

Plaintiff

v.

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

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: August 20, 2009, in Halifax, Nova Scotia

Counsel: Bruce W. Evans, for the plaintiff
Colin D. Bryson, for the defendant

By the Court:

[1] The Court has been asked to rule on a motion brought by defendant's counsel to permit the introduction of certain letters and documents exchanged between counsel for the Plaintiff and counsel for the Province of Nova Scotia. The matter before me initially included a claim against the Attorney General of Nova Scotia, as representing Her Majesty the Queen in Right of the Province of Nova Scotia. The plaintiff settled his claim against the Province for unjust dismissal and breach of a duty of good faith and fairness. The settlement also included a companion complaint filed with the Nova Scotia Human Rights Commission which alleged discrimination based on the Province's failure to accommodate the Plaintiff's medical disabilities in respect of his employment.

[2] The plaintiff objects to the admission in evidence at trial of the pre-contractual or pre-settlement negotiations on the grounds of:

- (1) the evidence is privileged communications in furtherance of settlement that can not be used against Mr. Inglis on grounds of public policy promoting settlements and this not a lump sum settlement with no characterization of the damages so that the privilege should be overruled to be able to determine what the settlement was for, as the settlement is clearly for nontaxable general damages of \$65,000.00.
- (2) the parole evidence rule prohibits extrinsic evidence from being used to contradict the terms of a contract which are clear and unambiguous.

[3] Further arguments advanced by the plaintiff for preventing the defendant from having these pre-contractual communications admitted are as follows:

- (1) The pre-contractual settlement communications in furtherance of settlement are privileged and not admissible in evidence against Mr. Inglis. While the court has ruled that the pre-contractual settlement communications must be disclosed to the LTD Plan because of the duty of good faith, Mr. Inglis objects to the admission of those pre-contractual settlement communications into evidence at trial on the basis of privilege. This privilege should be recognized to promote the public interest in promoting settlements and there is no overriding need to use the communications to interpret an ambiguous lump sum settlement that does not characterize the nature of the settlement amount.
- (2) The LTD Plan has no contractual subrogation rights or other rights in the LTD Plan giving it the right to control or interfere in or approve negotiations or settlement contracts, regarding Mr. Inglis's employment and Human Rights claims.
- (3) The implied duty of good faith which an insurer and insured each have under a contract of insurance basically requires that each of them act in a balanced manner considering the rights and obligations of both parties under the contract. But the duty of good faith does not give the LTD Plan the right to ignore the terms of the LTD Plan and to try to use the duty of good faith to effectively rewrite the LTD Plan to include subrogation rights that are not in the LTD Plan at all. Such a claim is inconsistent with the duty of good faith. This is an attempt by the LTD Plan to convert Mr. Inglis' duty of good faith, into a fiduciary duty owed by Mr. Inglis to the LTD Plan to act solely in the best interests of the LTD Plan. The law does not recognize that any fiduciary duty is owed by an insured to the insurer in these circumstances and the law

clearly recognizes a mutual duty of good faith to abide by the contract terms as they actually are. The LTD Plan does not state that Mr. Inglis has any duty to include “earnings” in a settlement with the Province.

- (4) Mr. Inglis accepted the express terms of the settlement because those were the express terms and Mr. Inglis has now given up his rights of action and rights under the Human Rights Act against the Province and Mr. Inglis can not pursue his claims against the Province if he does not like the terms of settlement imposed on him by the Court or the LTD Plan.
- (5) The court can interpret contracts and consider extrinsic evidence to help resolve ambiguity if the contract of settlement is ambiguous, but it can not and should not, attempt to rewrite the clear terms of a contract of settlement into something different. This would violate the parole evidence rule and discourage settlements and violate the freedom of contract.

[4] The documentary evidence now being discussed was the subject of an earlier application brought by the defendant for disclosure under Rule 20 of the Civil Procedure Rules (1972). In ordering disclosure the Honourable Justice M. Heather Robertson of this court followed the reasoning of the Nova Scotia Court of Appeal in the case of **Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally** (1999), 179 N.S.R. (2d) 314 (N.S.C.A.) which in turn accepted the reasoning of Baynton, J., of the Saskatchewan Court of Queen’s Bench in **Young v. Saskatchewan et al** (1992), 103 Sask. R. 50; [1992] 5 W.W.R. 49 Q.B. which decision was affirmed by the Saskatchewan Court of Appeal substantially for the reasons given by Justice Baynton. (Reference (1994), 128 Sask. R. 106; 85 W.A.C. 106 (C.A.)) At paragraphs 55 and 56, Chipman, J.A., writing for our Court of Appeal stated:

55 In *Young*, supra, the insured was covered by a disability income plan. Monthly payments were to be reduced by the amount of other benefits received, including regular payments awarded as compensation for loss of earnings because of third party liability, lump sums to be actuarially prorated to a regular monthly benefit. The disability insurer relied on the reduction of benefits clause in the Plan at issue which was a provision corresponding to s. 9(8) of the Plan. The insured took the position that, having received a lump sum settlement which did not contain an allocation for wage losses, there should be no deduction. Baynton, J. took the following approach, [1992] 5 W.W.R. 49, at p. 53:

This issue should be approached bearing the following principles in mind:

1. The plan is designed to guarantee monthly compensation to the employee during his period of disability in an amount equivalent to 75 per cent of the wages he would have received if not disabled. It is not as such a pure or full disability plan in that the benefits it provides depend in part on what other disability or wage replacement benefits the employee receives.

...

3. The onus is on the defendant to establish that the plaintiff has received third party liability loss of earnings compensation from a source or in a manner that falls within the definitions of the policy. Once this has been done, especially where the particulars of the compensation are not available to the defendants, the burden shifts to the plaintiff to establish that the compensation does not fall within the deduction provisions of the policy. [This is analogous to the shifting of the burden of proof of disability for any reasonable occupation from the plaintiff to the defendant. Once the plaintiff has made out a prima facie case of disability, the burden shifts to the defendant to show that the plaintiff is capable of performing some other occupation.] In a settlement type of scenario, as opposed to a court award, the plan sponsor need only prove that the plaintiff received a settlement from a third party and the onus shifts to the plaintiff to establish the breakdown. But what about a settlement in which the plaintiff either deliberately or inadvertently did not break down the proceeds by category? Can he satisfy the onus of proving the nature and allocation of the settlement proceeds by simply relying on the fact that they were not specified? I think not. The plaintiff has sued the plan for benefits. Those benefits depend on what the plaintiff received for wage compensation. To get the benefits the plaintiff must establish what he received for wage compensation whether or not the allocation of the compensation was specified in the settlement itself. This requirement may be of no concern to the third party but it is of vital concern to the plan sponsor. It is untenable for a plaintiff to take the position that he can satisfy this onus of proof, (and thereby obtain additional disability benefits under the plan to which he is not entitled) by simply relying on the fact that the settlement itself did not expressly allocate the proceeds among the various heads of damages for which the plaintiff received compensation.

4. The fact that it may now be difficult to determine in retrospect the breakdown of the plaintiff's settlement does not relieve the plaintiff from doing so. Nor is there any term of the plan, express or implied, that waives the required deduction and increases the plaintiff's benefits payable under the plan because of such difficulty ...

56 I agree with this reasoning. I consider it applies equally to the somewhat different circumstances of this case.

[5] Turning again to Justice Robertson's decision she stated at paragraphs 33 to 38 the following:

33 Section 18 of the Plan is identical to s. 16 of the plaintiff's plan herein. (Mr. Bryson's affidavit Exhibit "D").

34 The plaintiff has continued its suit against the insurer, the LTD Fund. Sections 9(8) and 16 of the Plan contemplate the recovery of any portion of earnings from a settlement proceeding.

35 Although there is no precise authority to govern the circumstances of this case, in my view the McNally case never the less applies because of the relevance of the negotiations correspondence to the suit against the LTD Fund.

36 There may not have been a contractual right to control the settlement process, but the plaintiff does have good faith obligation in dealing with the LTD Fund, in circumstances where lost earnings may have been a significant factor in arriving at settlement.

37 The trial judge may address the issue of parole evidence as it applies to the settlement agreement at trial, including the merit of the agreement in relation to the plaintiff's claim against the LTD Fund. In this proceeding, disclosure is the issue and the application of s. 9(3) and (8) to these circumstances.

38 The LTD Fund is entitled to view the settlement documentation including all settlement demands and settlement negotiations correspondence leading up to and including the settlement arrived at between the plaintiff and the defendant Attorney General of Nova Scotia, in the trial preparation process and within the intent of Civil Procedure Rule 20.

[6] Although Justice Robertson's decision was given in the context of ordering disclosure (leaving the ultimate decision of trial admissibility to the trial judge), the circumstances of this case (particularly the good faith obligation owed by each party to the other, along with section 9, sub-section (8) of the LTD Plan) make the pre-settlement documents that led to the agreement between the plaintiff and the Province of Nova Scotia relevant. Consequently, they should be admitted in evidence.

[7] In the event the Court awards LTD benefits to the plaintiff it will be necessary to determine what, if any, portion of the settlement paid by the Province might be construed as earnings which would permit the LTD Fund to offset “earnings recovered through a legally enforceable cause of action against some other person or corporation “within the meaning of s. 9(8).

[8] This, in my opinion, is sufficient to justify an exception to the parol evidence rule which would normally preclude admissibility of extrinsic evidence to add to, subtract from, vary or contradict the terms of an agreement.

[9] The onus is on the plaintiff to establish that none of the settlement paid by the Province of Nova Scotia is in respect to earnings.

McDougall, J.