

SUPREME COURT OF NOVA SCOTIA

Citation: Downey v. Cranston, 2009 NSSC 336

Date: 20091116

Docket: Hfx No. 177887

Registry: Halifax

Between:

Terrence Downey

Plaintiff

and

David Cranston, Robert Fisher, Board of Trustees Halifax Port International,
International Longshoremen's Association, Halifax Employers Association
Pension Plan and Halifax Employers Association Welfare Trust Plan

Defendants

LIBRARY HEADING

Judge: The Honourable Justice Glen G. McDougall

Heard: January 15 - 18, 2008, in Halifax, Nova Scotia

Subject: Eligibility for benefits under the Halifax Longshoremen's Pension Plan and Welfare Plan.

Summary: The Plaintiff had worked for 26 years as a non-union worker on the Halifax Waterfront. He was invited to become a member of the union. This opened up the further possibility of eligibility for pension and welfare benefits that are only available to union members. Unfortunately the Plaintiff became permanently and totally disabled after having worked only 245 ½ hours as a member of the union. To become eligible for pension benefits and other medical and disability benefits under the Welfare Plan, so-called, the Plaintiff had to meet certain minimum work requirements. His work-related injuries prevented him from doing so.

The Plaintiff was mistakenly credited with hours worked while in receipt of Workers Compensation Benefits and was reimbursed for certain medical expenses under the Welfare Plan for which he was not entitled. Once the mistake was realized, the Trustees of the Plan instructed the Plan Administrator to advise the Plaintiff that he was not eligible for such coverage. The Trustees did not seek reimbursement of the amount

paid in error. Later he was offered additional compensation for medical expenses incurred during a subsequent three-year period provided he agreed not to make any further claims for either medical expenses or a disability pension. The Plaintiff chose, instead, to sue.

Issue: Is the Plaintiff eligible for Pension Plan and Welfare Plan benefits after working just 245 ½ hours as a member of the International Longshoremen’s Association?

Result: The Plaintiff failed to satisfy the eligibility requirements for membership in the Pension and Welfare Plans which are only available to union members. Union members are not automatically covered by the two plans. They must first meet certain eligibility requirements. The Trustees would have been in breach of their duty of good faith and even-handedness to eligible Plan members had they authorized the payment of benefits to an ineligible person. The Plaintiff’s claim for benefits or, alternatively, damages for breach of contract and breach of trust, is dismissed.

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Counsel: Bruce W. Evans, on behalf of the Plaintiff
John C. MacPherson, Q.C., on behalf of the Defendants

By the Court:

INTRODUCTION:

[1] Terrence Downey (hereinafter referred to as the "Plaintiff") became a member of the Halifax Longshoremen's Association, Local 269 of the International Longshoremen's Association (hereinafter referred to as the "Union") on July 2, 1991. Prior to this he had worked as a non-Union longshoreman at the Halifax ports since 1965.

[2] The Defendants are members of the Board of Trustees of the Halifax Port ILA/HEA Pension Plan (hereinafter referred to as the “Pension Plan”) and of the Halifax Port ILA/HEA Health and Welfare Trust Fund Benefits Plan (hereinafter referred to as the “Welfare Plan”). The Defendants and a number of other individuals are appointed by Locals 269, 1341, 1738 and 1825 of the International Longshoremen’s Association (hereinafter referred to as the “ILA”) and the Halifax Employers’ Association (hereinafter referred to as the “HEA”) to administer the terms of the Pension Plan and the Welfare Plan.

RELIEF SOUGHT:

[3] The Plaintiff claims:

- (a) Restitution of disability pension benefits from December 31, 1992 or alternatively from July 1, 1996 or special damages for such disability pension benefits;
- (b) Restitution of Welfare Plan benefits from December 31, 1992 or alternatively from July 1, 1996 or special damages for such Welfare Plan benefits;
- (c) A declaration that the Plaintiff is totally disabled in accordance with the terms of the 1991 Pension Plan and has been so totally disabled since December 31, 1992 and is entitled to disability pension benefits under the 1991 Pension Plan and successor plans and to medical and dental benefits under the Welfare Plan;
- (d) or, alternatively:
 - (i) damages for breach of contract, in the amount of the present value of the disability pension benefits to which the Plaintiff would have been entitled under the 1991 Pension Plan had it provided the pension entitlement represented in the booklets and information provided by the Trustees; and,
 - (ii) damages for breach of contract, in the amount of the present value of the medical and dental expenses which the Plaintiff would have been entitled under the Welfare Plan, had it provided the medical

and dental benefit entitlement represented in the booklets and information provided by the Trustee;

- (e) Pre-judgment interest;
- (f) Costs on a solicitor and client basis for breach of fiduciary duty and breach of trust.

FACTUAL BACKGROUND:

[4] The Plaintiff began working as a longshoreman on the Halifax waterfront in 1965. He was less than 15 years of age and had only completed Grade V. His reading and writing skills were, and still are, limited.

[5] The Plaintiff worked as a longshoreman at the Port of Halifax until December 16, 1991. Throughout the 26 years working on the waterfront he was assigned longshoreman duties on a daily or half-daily basis.

[6] The Union was the certified bargaining agent for the longshoremen at the Port of Halifax until 2002. Subsequent to 2002 the Council of the ILA Locals, of which the Union is a member, has been the certified bargaining agent for longshoremen at the Halifax port.

[7] From before January 1, 1988 until after July 1, 1996, the Union assigned longshoreman duties first to members of the Union and if there was additional work available it was then assigned to non-Union workers who were listed on a Cardboard operated by the Union. If there was still more work available it was assigned by the Union to non-Union workers who were not listed on the Cardboard as long as they were physically in attendance at the hiring hall and held work card numbers issued by the employers. The longshoremen who were neither members of the Union nor listed on the Cardboard were said to work out of the “bull pen”.

[8] Whether working out of the bull pen or from the Cardboard or as a Union member, the hourly rate paid to all longshoremen was the same. The rate was as set out in the collective agreement between the Union and the employers. Check-off amounts were deducted from the pay of all longshoremen including the Plaintiff and paid to the Union to help defray the cost of operating the hiring hall. Union members, in addition to check-off deductions, were also required to pay Union dues.

[9] After progressing from the bull pen to the Cardboard, the Plaintiff became a Union member on July 2, 1991. At all times while working as a longshoreman, the Plaintiff's hours of work, pay and deductions, including check-off amounts, were tracked according to the work card number that had been initially assigned to him when he first began working as a longshoreman at the Halifax waterfront.

[10] Members of the Union, provided they meet the eligibility requirements, are entitled to Pension and certain Welfare Plan benefits. All contributions required to fund the Pension Plan, which provides retirement and disability pension benefits, and the Welfare Plan, which provides medical and health benefits, are paid by the employers. This has been the case since the Plaintiff first began working at the waterfront in 1965. The contribution amounts are set out in the various collective agreements signed by the bargaining agents for the Union and the employers.

[11] Prior to January 1, 1974 the contributions were based on man hours worked by all longshoremen on the Halifax waterfront. From January 1, 1974 to the present, the contributions have been based on the amount of tonnage going through the port. Longshoremen personally have never had to make any monetary contributions to the funds that support either the Pension Plan or the Welfare Plan.

[12] On July 2, 1991 when the Plaintiff became a member of the Union he was entitled to the benefits that were open to other Union members provided he, like all other members, met the requirements for membership in the Pension Plan and the Welfare Plan.

[13] By written agreement signed on the 12th day of April, 1991, the Maritime Employers Association (the "MEA") on behalf of its employer members at the Port of Halifax and the Port of Saint John, in New Brunswick and the ILA representing union locals in Halifax and Saint John agreed to adopt an amended text of the Pension Plan. This so-called "1991 Pension" incorporated amendments made to the "1966 Pension". Those amendments were made on January 1, 1985 and January 1, 1987. The Plaintiff's claim for disability pension is made under the "1991 Pension" plan.

[14] In 1991 the Defendants published a red coloured booklet titled in part "Outline of the Pension Plan Maritime Ports, Agreed to Between the Maritime Employers Association and the International Longshoremen's Association, 1991 Edition". In it can be found:

Section 1

Definitions

1.10 “Employee” means any person Employed in the Industry as defined below.

1.13 “Employment in the Industry,” or “Employed in the Industry” means:

- (a) employment or being or having been employed by one or more Employer Companies at the Maritime Ports which at the time of such employment were parties to a Collective Labour Agreement with one of the I.L.A. Maritime Ports Locals while being an I.L.A. Member in good standing and works for a least 100 hours during the year. After January 1, 1991 the hours must be in work covered by the said Collective Labour Agreement.
- (b) employment or having been employed by one of the ILA Maritime Ports Locals and while being an I.L.A. Member in good standing and works for at least 100 hours during the year;
- (c) employment by the Maritime Records Bureau;
- (d) employment as a Union Representative as defined in Section 1.27 (Union Representative).

Section 2

Participation In The Plan

2.1 Members

Each person who is an Employee shall become a Member of the Plan provided that he works for at least 300 hours during the year and provided that he has not attained age 71, unless the employee, because of his religious beliefs, objects to becoming a Member.

Section 5

Pension Benefits

5.3 Disability Pension

- (a) A Member who has completed5 years of consecutive service for the purpose of (ii) below, with an average of at least 600 hours for each such year and a minimum of 300 hours in each such year and who becomes totally and permanently disabled, may retire and the date of such retirement is his Disability Retirement Date. Total Disability shall mean any qualified Member's inability to perform the duties of any job for which the Employee is qualified by training or experience, due to physical or mental impairment.

- (ii) On or after January 1, 1985:

Subject to any increase granted pursuant to Section 5.4 (Pension Increases), if such a member becomes so disabled on or after January 1, 1985 and before attaining age 60, he shall receive a monthly pension equal to:

\$807.00, if he becomes disabled on or after January 1, 1990,

up to and including the first of the month preceding his 60th birthday and subsequent to that date he shall receive a monthly pension determined in accordance with Section 5.2 (Early Retirement) or, if he had completed 25 years of Credited Employment prior to January 1, 1985, in accordance with Section 5.1 (Normal or Postponed Retirement).

- (b) Total and permanent disability must be certified by a medical practitioner appointed by the Board who shall make final determination with respect to such disability, sickness or injury. The Member upon request of the Board, must submit to an examination by any physician or physicians selected by the Board, which shall pay for the cost thereof, and any expenses incident thereto. A Former Member receiving a pension due to disability under this Plan must, upon request of the Board, submit to an examination to determine whether he is eligible for continuance of such pension. If any Member of (sic) Former Member shall refuse to submit to any examination properly requested hereunder, he shall not receive or continue to receive a pension due to disability, or shall not be deemed to have suffered sickness or injury, whichever the case may be.

[15] After becoming a member of the Union on July 2, 1991 the Plaintiff continued to perform the work assigned to him until suffering a workplace injury on or about December 16, 1991. He worked a total of 245 ½ hours during that period. He has not worked as a longshoreman since.

[16] This was not the first time the Plaintiff suffered a workplace injury. On June 30, 1989 he injured his back. As a result he received Temporary Total Disability benefits from the Workers' Compensation Board (hereinafter referred to as "WCB") from on or about June 30, 1989 up to December 4, 1989. Following the period of total disability, the Plaintiff returned to work on the Halifax waterfront where he continued to work until the time of the second injury on December 16, 1991.

[17] After the second injury, the Plaintiff collected WCB benefits based on a Temporary Total Disability. He also received benefits based on a Permanent Medical Impairment assessed first at 10.5% and subsequently at 15%.

[18] The Plaintiff also received Vocational Rehabilitation benefits from WCB for several different periods since December 14, 1992 along with payments pursuant to Benefit Recalculation and Temporary Earnings Replacement. Some of the WCB benefits received by the Plaintiff were the result of internal WCB appeals or appeals to the Workers Compensation Appeals Tribunal and were awarded a number of years after eligibility first arose.

[19] After becoming a member of the Union in July of 1991 the Plaintiff was given credit for the number of hours he actually worked as a Union member up to the time of the accident in December of the same year. He was also credited in error for 432 hours in 1992 and 575.5 hours in 1993 while collecting WCB benefits. The Plan administrators, at that time, misinterpreted the provisions of the Welfare Plan and reimbursed the Plaintiff for certain expenditures for prescription drugs and for such things as chiropractic treatments. This error was not noticed until new Plan administrators were retained to administer the Plan on behalf of the Trustees. The Defendants, however, decided not to seek reimbursement of any of the benefits paid to the Plaintiff under the Welfare Plan. They went so far as to offer additional payment to the Plaintiff on compassionate grounds for similar expenses incurred by him between 1996 and 1999 even though they had determined he was not eligible for such coverage. The Plaintiff refused the offer because the Defendants required the Plaintiff to accept the payment of those expenses in final settlement of all claims for Welfare Plan benefits.

[20] Communication of the Defendants' decision was sent to the Plaintiff by letter dated May 16, 2000. The letter provided in part:

In January, the Trustees asked their Chief Executive Officer, Mr. Blair Richards, to gather the facts related to your requests and to present his findings to them. B.P.A. Ltd. was ordered not to process the welfare claims until your eligibility was established.

Mr. Richards' investigation involved meetings with union officials, Trustees individually and at sub-committee meetings, with you personally on at least two occasions, with at Workers Compensation case worker, with professional consultants to the Board, administrators, insurance agents, and the Board's lawyer. It also led to a historical review of Board meeting minutes and of official documents, including correspondence.

The authority to render decisions in these matters is mandated by the parties to the Master Trust Agreement. your membership in the union was confirmed. However, Welfare Plan membership is different from union membership, and a verification of your hours-worked revealed that you have never satisfied the Welfare Plan's eligibility requirements of actually working a minimum of 450 hours in any one year. None of the Welfare Plan rules, nor any entitlements, apply to non-Welfare Plan members.

Despite this conclusion, the Trustees felt that the confusion around your rights and entitlements was understandable in light of erroneous decisions which our previous third-party administrators had made in your case. The secondary decision to adjudicate your welfare claims for the finite period covering August, 1996, to the latest welfare claim in 1999, was made compassionately, but does not imply any further obligation.

The data upon which you are declared ineligible for any further welfare benefits is your work history, which our records indicate was (after becoming a union member on 2 July 1991) 245 ½ hours in 1991 and 430 hours in 1992. Unless you can furnish evidence that these records are erroneous, the Board stands by its determination and does not intend to pursue your case any further.

The Plaintiff depended on his common law wife to read and help him to understand any documents sent to him.

[21] The Defendants acknowledge that hours have been credited to the Plaintiff in the past based on the WCB benefits he received in 1992 and 1993. They are not attempting to recover any of these credits. The Plaintiff feels he is, nevertheless, entitled to receive Welfare Plan benefits as well as a disability pension under the Pension Plan. His claim is based on a total and permanent disability which the Defendants do not challenge.

THE PLAINTIFF'S ELIGIBILITY UNDER THE PLANS:

[22] The Court must first determine the Plaintiff's eligibility under the Pension and Welfare Plans. It is clear that he is totally and permanently disabled. That is the unfortunate reality. The Defendants do not challenge this.

[23] It is equally clear that the Plaintiff never became eligible to receive either Disability Pension benefits or any other benefits covered under the Welfare Plan.

[24] The Plaintiff did not meet the Plans' eligibility requirements which first arose on his becoming a member of the Union on July 2, 1991. Participation in the Plan was only open to those Union members who, according to Section 2 of the 1991 Pension, was an "Employee.... provided that he works for at least 300 hours during the year...". Unfortunately the Plaintiff did not meet this proviso. After becoming a Union member in July of 1991 the Plaintiff only worked 245 ½ hours before ceasing work due to injury which resulted in total and permanent disability. He did manage to meet the minimum requirement to be considered an employee in that he worked for at least 100 hours during the year but he did not meet the minimum threshold of 300 hours to become eligible for membership in the Plan. Even when factoring in the hours credited to the Plaintiff in error in 1992 and 1993 when he was receiving WCB benefits the Plaintiff still did not meet the requirements for Disability Pension benefits. According to Section 5.3(a) of the 1991 Pension Plan:

5.3 Disability Pension

- (a) A Member who has completed... 5 years of consecutive service for the purpose of (ii) below, with an average of at least 600 hours for each such year and a minimum of 300 hours in each such year and who becomes totally and permanently disabled, may retire and the date of such retirement is his disability Retirement Date.....

[25] First of all, the Plaintiff was not a Plan member since he did not work 300 hours after becoming a Union member. Furthermore, he never worked an average of 600 hours for five consecutive years with a minimum of 300 hours in each such year. His only year worked as a Union member was the second half of 1991. He has not worked as a longshoreman since. Clearly the Plaintiff cannot claim benefits save for some modest pension amount when he reaches the retirement age spelled out in the Pension Plan based on the credits properly allocated to him for 1991 along with those credits given to him in error for the years 1992 and 1993 which the Defendants are prepared to allow him to keep.

[26] The Defendants as Trustees under the Plans owe all eligible members a duty of fairness or even-handedness. The Plaintiff, although a member of the Union, cannot demand benefits to which he is not entitled since he is not a Plan member. The

Defendants would breach the duty they owe to eligible Plan members if they authorized the payment of either disability or Welfare Plan benefits to an ineligible recipient.

[27] The Plaintiff argued that the information booklets distributed to Plan members through the ILA locals affected the contractual relationship that existed between him and the Trustees.

[28] The booklet distributed by the Trustees to Members in 1991/92 clearly stated that it was only intended to provide a summary of the Plan. It stated:

The complete details of the Plan and the Pension Fund are contained in a Pension Trust Agreement between the Maritime Employers Association Inc. and the International Longshoremen's Association, Maritime Ports and in a Trust Agreement between the Board of Trustees and the Royal Trust Company, and in the amendments to these documents which are adopted from time to time. These are the governing documents and may be read in their entirety upon request to your Union office.

[29] The Plaintiff never requested the opportunity to review the plans governing documents. In any event, the terms of the booklet are not inconsistent with the terms of the Plan itself and, therefore, did not create a contractual relationship between the Trustees and the Plaintiff. I will deal with this more fully later in this decision.

Are the Trustees estopped from maintaining that the Plaintiff is not entitled to benefits under the Plan(s)?

[30] In the case of **White v. Halifax (Regional Municipality) Pension Committee**, [2005] N.S.J. No. 417, Kennedy, C.J.N.S., stated the following in regard to the issue of estoppel in the context of a case dealing with pension benefits at para. 62:

¶62 The Nova Scotia Court of Appeal addressed the law of estoppel in Ford v. Kennie, [2002] N.S.J. No. 477, 2002 CarswellNS (C.A.) 461, (2002 NSCA 140) at paras. 36-42:

As Lord Denning said in Crabb, supra, [Crabb v. Arun District Council (1975), [1976] 1 Ch. 179, [1975] 3 All E.R. 865 (Eng. C.A.) - considered] at page 871:

... There are estoppels and estoppels ...

Perhaps the best known estoppel is estoppel by representation. Hanbury and Maudsley: Modern Equity (London: Sweet & Maxwell Ltd., 2001) at p. 891, describes it as follows:

... The basic principle is that a person who makes an unambiguous representation, by words or conduct or by silence of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation ... apart from a few long established exceptions, such an estoppel works negatively. It is not capable of creating a cause of action. It works like a rule of evidence, a rule which excludes a particular defence or line of argument ...

... A claimant may take advantage of the doctrine if he has an independent cause of action, and can show that the defence is inconsistent with a representation of the defendant on which he relies ...

Estoppel by representation results from the representation of a present existing fact, not an intention with respect to the future.

After a representation has been made, it must be shown that the representee relied thereon by altering his/her position on the basis thereof.

Finally, it must appear that a detriment has resulted to the representee as a result of such reliance, if the representor is allowed to resile from the position taken by the representation. The representation itself generally involves a benefit. The detriment lies in the injustice to the representee that would result if the benefit of the promise were withdrawn.

[31] The Plaintiff during discovery examination on September 13, 2006, had the following question put to him by Defendants' counsel:

Q. Okay. But by relying on it, did you change anything about your personal situation in any way because either a pension member statement came in the mail or booklet may have come in the mail?

[32] The Plaintiff simply answered “No.” in response to this question. It is clear from this response that the Plaintiff did not act (or fail to act) to his detriment in reliance on any representation made by the Defendants. In any event, estoppel works negatively. It is not capable of creating a cause of action.

[33] Estoppel has no particular application in this case and cannot be used as the basis for a cause of action by the Plaintiff.

Is the Plaintiff entitled to damages for breach of contract under the Pension Plan or the Welfare Plan as represented in the booklets and information provided to him by the Trustees?

[34] The booklets and information provided to the Plaintiff made it clear that the complete details of the plan pertaining to the pension fund could be found in a Pension Trust Agreement. The booklet distributed to the members by the Trustees in 1991/1992 stated at page 4:

The complete details of the Plan and the Pension Fund are contained in a Pension Trust Agreement between the Maritime Employers Association Inc and the International Longshoremen’s Association, Maritime Ports and in a Trust Agreement between the Board of Trustees and the Royal Trust Company, and in the amendments to these documents which are adopted from time to time. These are the governing documents and may be read in their entirety upon request to your Union Office.

The booklet expressly stated that it was intended to provide a summary of the Plan.

[35] Furthermore, the contents of the booklet are not inconsistent with the terms of the Pension Plan itself.

[36] The Welfare Plan Booklet provides the only written source of the terms of the Welfare Plan at the relevant time. Any reference to eligibility for membership and the benefits that flow from that are consistent with those found in the terms of the Plan itself.

[37] The eligibility criteria for participation in the 1991 Welfare Plan is contained in the booklet. The requirements for active members are:

- 800 or more work hour credits for Group I
- 450 - 800 work hour credits for Group II benefits

[38] There was a further provision for active members who were unable to work the necessary hours in any given year due to illness. The requirements would be waived if the member was employed in the industry when the illness occurred and had at least 15 continuous years in the industry during which he worked not less than 15,000 total hours.

[39] The Plaintiff did not work 450 hours in 1991 after becoming a member of the Union. He, therefore, did not achieve eligibility for Welfare benefits as an Active Member. The only other way he might be eligible for Welfare benefits was if he could be classified as a "Non Active Pensioner". Since he was not eligible for a disability pension he could not meet this classification.

[40] There is nothing in the wording of the Pension Trust Agreement or the Plan booklets that assist the Plaintiff in establishing a contractual basis for any claims he feels he might have. His claim for damages based on breach of contract, therefore, fails.

CONCLUSION:

[41] The Plaintiff has failed to establish that he is entitled to any of the benefits he seeks under either the Pension Plan or the Welfare Plan. Unfortunately for him, his membership in the Union did not automatically entitle him to membership in the Plan. He failed to meet the requirements for Plan membership.

[42] The Defendants have not breached any statutory or fiduciary duty that might have been owed to the Plaintiff if he had been an eligible member of either or both of the Plans.

[43] Furthermore, the Defendants as Trustees did not breach their trust obligations to the Plaintiff. They were obligated to deny him benefits for if they had not they might have been in breach of their duties to those other members who not only belonged to the Union, but who were also legitimate Plan members. They, and not the Plaintiff, are entitled to the benefits covered by the Plans.

[44] The Court cannot grant the remedies or the declaration sought by the Plaintiff nor are the Defendants in any way contractually bound to pay him the benefits he now seeks. He simply does not qualify for any of the relief claimed.

[45] It will leave it to the parties to try to come to some agreement on costs. If an agreement cannot be achieved I am prepared to accept the written submissions of counsel within 30 days of the date of release of this decision.

Justice Glen G. McDougall