Date: 19981221 Docket: C.A. 147707

NOVA SCOTIA COURT OF APPEAL

Cite as: Bacich v. Holt, 1998 NSCA 208
Glube, C.J.N.S., Roscoe, Bateman, JJ.A.

BETWEEN:

JIM BACICH, GREG A. BLANCHARD, REINHOLD ENDRES, Q.C., GEORGE L. FOX, BESSIE M. DUNICK, BILL McKEE, KEVIN McNAMARA and GRANT VAUGHAN, as Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund and Maritime Life Assurance Co., as Medical Adjudicator for LTD claims		Colin Bryson for the Appellants
	Appellants	
- and -		Dianne E. Paquet for the Respondent
GOLDIE HOLT		
	Respondent	Appeal Heard: November 23, 1998
		Judgment Delivered: December 21, 1998

THE COURT: Appeal allowed per reasons for judgment of Bateman, J.A.; Glube C.J.N.S., and Roscoe, J.A., concurring.

BATEMAN, J.A.:

This is an appeal from a decision of Justice Donald Hall of the Supreme Court quashing the decision of an arbitrator.

BACKGROUND:

The respondent, Goldie Holt, was employed as a general office clerk at the VG Hospital in Halifax. As such, she was a Provincial government employee and a member of the Clerical Bargaining Unit of the Nova Scotia Government Employee's Union (the NSGEU). Through the *Clerical Collective Agreement* Ms. Holt is covered by a long term disability plan (the Plan). Pursuant to a Trust Agreement the LTD Plan is administered by a Board of Trustees (the appellant) consisting of four persons appointed by the Province and four persons appointed by the NSGEU. Under the Trust Agreement, the Board appointed Maritime Life Assurance Co. to administer the Plan.

Ms. Holt stopped work in August of 1994, having been diagnosed with fibromyalgia and a secondary depression. She received disability benefits under the LTD Plan for 30 months (until July 5, 1997), when the Plan Administrator denied further benefits. The Administrator had determined that Ms. Holt's circumstances no longer qualified under the modified definition of disability that applied after a member had received benefits for a 30-month period. As was her right under the LTD Plan, Ms. Holt appealed the termination of benefits on medical grounds. The Board of Trustees appointed Dr. Byron Reid to hear the appeal. By decision dated January 21, 1998, Dr. Reid denied Ms. Holt's appeal. Ms. Holt applied for judicial review of Dr. Reid's decision. Justice Hall heard the matter. In a decision dated April 29, 1998, he found that Dr. Reid had committed jurisdictional errors,

quashed the decision of Dr. Reid and issued an Order declaring Ms. Holt to be disabled and entitled to benefits under the LTD Plan. The Board appeals.

GROUNDS OF APPEAL:

The appellant identifies the following issues:

1. Did Justice Hall err by holding that Dr. Reid failed to exercise his discretion by limiting his inquiry to whether or not the LTD Plan Administrator had adhered to the rules and regulations of the LTD Plan, as opposed to inquiring as to Ms. Holt's medical condition as it related to the definition of disabled in the LTD Plan?

2. Did Justice Hall err by inferring that Dr. Reid required Ms. Holt to provide "objective medical evidence" of disability to establish her claim?

3. Having found that Dr. Reid committed jurisdictional errors, did Justice Hall err by failing to send the matter back to the Medical Appeal Board for a rehearing, and, instead, deciding the merits of Ms. Holt's disability claim?

ANALYSIS:

(i) Standard of Review:

Justice Hall was satisfied that the decision of Dr. Reid was reviewable only for jurisdictional error. This accorded with the position of the appellant, who submitted that Dr. Reid was acting as a consensual arbitrator, protected by a privative clause. While the respondent agreed that Dr. Reid was not sitting as a statutory tribunal, she was of the view

that his decision was reviewable on a correctness standard. In the respondent's view Dr. Reid was a "domestic board" operating without a privative clause and without any special knowledge or expertise.

In support of his position that Dr. Reid was sitting as a consensual arbitrator protected by a privative clause, the appellant cited **Roberval Express Ltd. v. Transport, Drivers, Warehousemen and General Workers Union, Local 106, et al**, [1982] 2 S.C.R. 888.

In **Roberval** an action was taken challenging the decision of an arbitrator appointed under a collective agreement concluded pursuant to the **Canada Labour Code**, R.S.C. 1970, c. L-1. In the course of its decision the Court considered the nature of the tribunal. A collective agreement concluded pursuant to the **Canada Labour Code**, was required by the **Code** to contain a provision for final settlement of disputes "by arbitration or otherwise". The parties chose arbitration as the process for final settlement.

The Court confirmed that, generally, when arbitration is statutorily required as the dispute resolution process, the tribunal is statutory. When, however, the statutory provision for final settlement permits the parties to chose arbitration or another process, and the parties chose arbitration, is the tribunal statutory? Chouinard, J. writing for the Court, affirmed an earlier statement by the Court in **Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada)**, **Local 663**, [1962] S.C.R. 318 (S.C.C.) to the effect that a statutory provision "requiring a collective agreement to provide for the

settlement of disputes “by arbitration or otherwise”, and so leaving the parties to choose their method, did not have the effect of making the arbitration tribunal a statutory tribunal, one to which by statute the parties must resort” (at p.893). Chouinard, J. explained, however, that it does not necessarily follow that such a tribunal is not statutory. He said, beginning at p.899:

> In my view the key point to be noted is this characteristic . . . which consists of duties and powers conferred by statute and which seems to me to be as important in classifying a tribunal as the obligation to resort to that tribunal or, what would be more correct in the context, the absence of a choice whereby the parties may adopt this method or some other to resolve their differences.
>
> The test that the statute must require the parties to resort to the tribunal is sure and easy to apply when it must be given a positive application, as in the case of the Ontario statute, which imposes an obligation to include an arbitral clause, as was held in *Rivando* and *Port Arthur (supra)*.
>
> However, when it is given a negative application, as in *Howe Sound (supra)*, I do not see why the Court should not go further and consider the other tests mentioned by Lord Goddard, in particular that relating to the conferring of powers and duties by statute. A distinction must be recognized between, on the one hand, a tribunal invested with wide powers by statute, the award of which is binding on the parties and defines their rights, and on the other, a clearly consensual tribunal which owes its existence solely to the will of the parties, the only jurisdiction and powers of which are those conferred on it by the parties, and the award of which will be binding or not depending on whether the parties have so provided or not.
>
> The mere fact that the parties have been left the choice of another method of reconciling their differences should not be the sole determining factor, when they have in fact selected arbitration and this arbitration which they have selected is governed by statute. Convenient though the test that the statute must require the parties to resort to a tribunal may be in determining its statutory nature, when that is the case, it should not remove from consideration the intrinsic nature of the tribunal itself once it has been selected.
> (Emphasis added)

Thus, although the parties may not be obliged to resort to arbitration, if they chose arbitration and the tribunal's duties and powers are conferred by statute, then the tribunal is statutory. Chouinard, J. went on to note that the **Canada Labour Code**, as it was in 1975, addressed in detail, the powers of the arbitrator, should that recourse be chosen by the parties. Accordingly he found that, those parties having chosen arbitration as a final

method for settling their differences, the arbitrator appointed in accordance with the collective agreement that was concluded pursuant to the **Canada Labour Code** is a statutory tribunal.

Here, **Section 33** of the **Civil Service Collective Bargaining Act**, R.S.N.S., 1989, c.71 as amended, (the **Act**) requires that each collective agreement contain a provision for final settlement of differences between the parties, failing which, such a provision will be deemed to apply:

> *Final settlement provision*
> 33. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by adjudication or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> *Deemed provision*
> (2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation or application of this agreement, including any question as to whether or not a matter is adjudicable within the meaning of *subsection (4)* of *Section 33* of the *Civil Service Collective Bargaining Act*, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to adjudication.

As required the *Clerical Collective Agreement* contains a final settlement provision at *Article 26*.

The Long Term Disability Plan is created pursuant to *Article 22.06* of the *Clerical Collective Agreement* and is *Appendix 2* to that *Agreement*:

> **22.06** Employees shall be covered for long-term disability in accordance with the provisions of the Memorandum of Agreement signed by the parties on August 1, 1985 and forming part of this Agreement (see Appendix 2). The agreed upon terms and conditions of the Long-Term

> Disability Plan shall be subject to negotiations between the parties in accordance with the provisions of the Collective Agreement.

While disputes on the interpretation or application of the LTD Plan are to be resolved by the *Article 26* adjudication process, the Plan establishes a separate procedure when benefits are denied on medical grounds. (See **Re: Kimberly Wigginton** - arbitration decision - October 14, 1994, S. Bruce Outhouse, arbitrator) This alternative final resolution process is created through **Section 6** of the LTD Plan which provides in relevant part:

> (1) The applicant for benefits must submit written proof of disability satisfactory to the Administrator. The Administrator may require that the applicant be examined by an alternate duly qualified medical practitioner of the Administrator's choosing.
>
> (2) When the Administrator rules that an employee is not eligible for benefits hereunder, the employee may appeal to the Board of Trustees, who shall arrange a medical appeal hearing, in accordance with *Letter of Understanding #6* attached hereto.
>
> (3) The decision resulting from the appeal shall be final and not subject to further review.
>
> . . .
>
> (Emphasis added)

The *Letter of Understanding* referred to in **s.6(2)** states:

> **LETTER OF UNDERSTANDING #6**
> **MEDICAL APPEAL SYSTEM**
>
> The parties agreed that the Board of Trustees be instructed to establish a medical appeal system.
>
> (a) Such appeal system shall be on medical grounds only.
>
> (b) The cost of appeals shall be borne by the appellant however, if the appeal is successful, the costs will be paid from the Fund.
>
> (c) Any appeal is to be initiated no later than 30 days following final denial of the employees claim by the Plan Administrator.

The Board of Trustees designed a "medical appeal system" as referred to in the *Letter of Understanding*. It is set out in the *Medical Appeal Rules*, attached as **Appendix**

"A" hereto.

Applying the principles from **Roberval** to this case, the **Collective Bargaining Act** provides for final settlement "by arbitration or otherwise". The **Act** is silent on the powers of the arbitrator. Thus the parties are neither required to resort to arbitration nor are the duties, responsibilities or powers of such arbitrator prescribed by statute. Accordingly, I would agree with the submission of the appellant that, under the *Medical Appeal Rules,* Dr. Reid was functioning as a consensual arbitrator.

The appellant says, as well, that **s.33(3)** of the **Collective Bargaining Act** gives the consensual arbitrator privative protection:

> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

In **Department of Human Resources (N.S.) v. N.S. Government Employees Union,** (1997), 158 N.S.R. (2d) 146, this Court held that **s.33(3)** is a "significant statutory provision" which provided privative protection for the statutory arbitrator there (at p.156).

Thus, **Section 33(3)**, provides privative protection for the final settlement procedure contained in the *Collective Agreement*. **Section 33(1)** requires that a final settlement provision be incorporated for "all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation". The LTD Plan is part of the *Collective Agreement*. Logic would dictate that the privative

protection extends to the medical appeals process. I am fortified in this view in that **Section 6(2)** of the LTD Plan states that the medical appeal decision is not subject to further review:

> **6(2)** The decision resulting from the appeal hearing shall be final and not subject to further review.

This intention is reiterated in **s.20** of the *Medical Appeal Rules*:

> 20. The Medical Appeal Board's decision is final and binding and not open to judicial review.

Accordingly, I would find that Dr. Reid's decision was protected by a privative clause.

In **Canada Post v. Canadian Postmasters and Assistants Association**, (1993), 121 N.S.R. (2d) 112 this Court held that the decision of a consensual arbitrator protected by a privative clause was reviewable only for jurisdictional error. Hallett, J.A., writing for the Court said at p.128:

> The test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction, which question turns on the determination of the issue before him and whether he dealt with that question. If the issue before him involves the interpretation of clauses of the collective agreement the arbitrator must give to those clauses an interpretation the language will reasonably bear (Volvo). Finally, in exercising his jurisdiction, an arbitrator must comply with the recognized tenets of procedural fairness. If the arbitrator complies with these duties, his award is immune from judicial review even if it appears to be wrong or even patently unreasonable.

Accordingly, Justice Hall correctly, in my view, accepted the appellant's position that his review of Dr. Reid's decision was limited to jurisdictional error.

(ii) Justice Hall's Decision:

Beetz, J. speaking for the Supreme Court of Canada in **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048 at p.1086 defined jurisdictional error:

> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
>
> > 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
> >
> > 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

In **British Columbia Telephone Co. v. Telecommunication Workers Union** 1985 CanRepBC 231, 20 D.L.R. 4th 719 (B.C.C.A.) Lambert, J.A., dissenting, summarized the principles applicable when reviewing the decision of a consensual arbitrator. On further appeal, his reasons for judgment were adopted by the majority of the Supreme Court of Canada (reported as **T.W.U. v. British Columbia Telephone Co.,** [1988] 2 S.C.R. 564). Commencing at para 36 (CanRep) Lambert, J.A. wrote:

> [36] The fact that this was a consensual arbitration also raises two points of particular significance.
>
> [37] The first is that we must look to the terms of the submission and not to the provisions of a statute in deciding on the scope of the "jurisdiction" conferred by the parties on the arbitrator.
>
> [38] The second is that the award only affects the parties. There is no obligation on any other arbitrator, dealing with a similar issue between other parties, to follow the award. That is in contrast to the position of a statutory tribunal. A statutory tribunal should follow its own previous decisions, and, for that reason, ought to be required to be right in its interpretation of general public enactments and general legal principles, and ought to arrive at its decisions, even on matters particularly within its special expertise and function, on the basis of a demonstrably rational process. Those requirements do not have quite the same force in the case of a consensual arbitrator. The significant fact about a consensual arbitrator is that the parties have picked the arbitration process, and they have picked the arbitrator, because they want that process and that arbitrator in preference to any other process or any other decision maker. And they want the arbitrator to do what they ask him to do in the way they ask him to do it; and not to do something else in some other way.

> [39] In short, the *Anisminic* principles apply to a consensual arbitrator, but there is maximum scope for curial deference, and for judicial restraint, in the determination of whether he contravened his terms of reference, and so made a "jurisdictional" error.
> (Emphasis Added)

Accordingly, one must examine Dr. Reid's terms of reference. He was appointed arbitrator by letter dated November 19, 1997 from the LTD Plan Administrator:

> **RE: Medical Appeal for Goldie Holt**
>
> Dear Dr. Reid:
>
> This letter will confirm that an Appeal Board Hearing has been scheduled for Goldie Holt on **Friday, 16 January 1998 at 10:30 a.m.** The Hearing will be held at the **6th Floor Boardroom of the CCL Building at Maritime Life, 2695 Dutch Village Road,** Halifax, Nova Scotia. All the medical information on file at Maritime Life is included with this letter for your review.
>
> Please call me, Dr. Reid, if you have any questions concerning this case, at 461-0421. You may also call Margie Drew at Maritime Life, 453-4300, for her input regarding the decision to terminate benefits. Thank you for your assistance.
>
> Sincerely,
>
> Colleen J. Ryan, MBA
> Coordinator, LTD Benefits
>
> Enclosure
>
> C: M. Drew, Disability Case Manager, Maritime Life Assurance Co.

The letter of appointment not having specified the detail of the terms of Dr. Reid's engagement, the scope of his jurisdiction must be garnered from the relevant portions of the *Medical Appeal Rules*. From a review of the *Rules* (Appendix A attached), I would summarize Dr. Reid's terms of reference as follows:

1. The appeal is on medical grounds only.

2. The appellant may present medical evidence, including new medical evidence if first provided to the Administrator and restricted to her condition at the date of termination of benefits.

3. All information in the hands of the Administrator is provided to the Medical Appeal Board in advance of the hearing.

4. After hearing or receiving all evidence the Medical Appeal Board will render a written decision but need not provide reasons.

Obviously, the issue before Dr. Reid was whether Ms. Holt was “disabled” as that term is defined in the LTD Plan. He was to interpret and apply the Plan definition to Ms. Holt's circumstances.

This is the “jurisdictional envelope” within which Dr. Reid carried out his duties. As Lambert, J.A. said in **British Columbia Telephone**:

> [37] I do not think that any further delineation of the submission to arbitration can be extracted from the written terms of reference or from the factual matrix in which the terms of reference came into being. In particular, I consider that it would be improper to say that any specific standards or any specific set of principles were to be applied by the arbitrator to the facts as he found them. The parties could have selected and agreed on the applicable standards or principles.. . . But instead, the submission did not require the application of those standards or any other standards. The arbitrator was left free to select the appropriate principles to apply.

The terms of the LTD Plan, including the definition of disability were the subject of negotiation between the parties to the *Collective Agreement*, as is specified in *Article 22.06* (“The agreed upon terms and conditions of the Long-Term Disability Plan shall be subject to negotiations between the parties in accordance with the provisions of the *Collective Agreement*”.). The development of the medical appeal system was entrusted to the bipartisan Board of Trustees. The Board through the *Medical Appeal Rules*, did not dictate standards or principles which Dr. Reid was to apply in reaching his decision, save as set out above. The letter of appointment imposes no additional terms. Dr. Reid was left to determine the applicable principles and the relevant facts.

The question before Dr. Reid can be drawn from **s.6** of the LTD Plan - was Ms. Holt "disabled" within the meaning of **s.1(c)**. I again refer to the words of Lambert, J.A. in **British Columbia Telephone**:

> [63] . . . in a consensual arbitration case, the parties themselves set the standard by which the reasoning is to be judged to determine whether it is patently unreasonable. If the parties have conferred a consensual jurisdiction on an arbitrator by a finely conceived and drafted submission, then they themselves set a high standard by which the arbitrator's reasoning is to be gauged. If, on the other hand, they just throw the whole problem at an arbitrator, without setting any precise question, or any principle to be applied, then the standard by which the arbitrator's reasoning is to be judged is very considerably lower. So, in cases of that kind, if the arbitrator adopts a rational process of applying principles to facts, and acts judicially, then, in my opinion, the *Anisminic* principle does not require anything more. If the arbitrator sticks to the task he is given, he is, in Lord Reid's words, as much entitled to decide the question submitted to him wrongly, as he is entitled to decide it rightly. Where the terms of reference are broad and imprecise, the scope for both right and wrong decisions within jurisdiction is correspondingly broad and imprecise.
> (Emphasis added)

Dr. Reid's decision is contained in his brief letter of January 21, 1998 to Ms. Holt:

> I am writing to render my decision on your appeal hearing on January 16, 1998.
>
> Your appeal is denied. I believe the Plan Administrators adhered to the rules and regulations concerning your ability to perform "any occupation".
>
> At the hearing you will recall the discussion around "objective medical evidence". Pain, fatigue and depression do not qualify.
>
> On a clinical note, you should continue to look for a more effective treatment. I would suggest a visit to Dr. Heisler in Shubenacadie.

In finding that Dr. Reid had erred impermissibly Justice Hall said:

> . . . Dr. Reid appears to have misunderstood his role or function. From what he said in his decision, he apparently was of the view that his role was simply to determine whether the Administrators had adhered to the "rules and regulations" concerning the plaintiff's ability to perform "any occupation". I found no other reference to "rules and regulations" in the record and do not understand what he was referring to unless he meant that they had followed the proper process or procedure.
>
> It is apparent that the Administrators of the Plan were of the view that if the plaintiff was able to do some work she ceased to come within the definition of "disabled". That clearly is wrong. It is only if she was capable of engaging in some employment that would pay not

> less than eighty percent of her former employment income that she would cease to come within the definition. In saying as he did, that the Plan Administrators adhered to the rules and regulations concerning her ability to perform "any occupation", it appears that Dr. Reid accepted the position of the Plan's Administrators. Thus, he failed to enter upon a proper inquiry as to the plaintiff's medical condition as it applied to her engaging in any occupation within the definition. In doing so, he improperly limited or fettered his discretion, thereby improperly failing to exercise his jurisdiction.
>
> A further indication that Dr. Reid misunderstood his function appears where he makes suggestions to the plaintiff as to seeking treatment and referring her to another physician. This would appear to be a back handed acknowledgment that the plaintiff was suffering from an illness and indeed a serious illness and in need of treatment, and that the course of treatment that she was then following was not helping her.
>
> In dealing with the appeal in this manner I am of the opinion that Dr. Reid failed to exercise his jurisdiction as an Appeal Board, which he was required to do and thereby resulting in a loss of jurisdiction.
>
> It appears, as well, that Dr. Reid injected into the requirements for qualifying for benefits under the Plan an "objective medical evidence" standard while the Plan makes no reference to such Letter of Understanding #6 simply says that the appeal shall be on "medical grounds only". Disability and disabled are defined in the Plan and these conditions are not confined to physical disabilities only, but rather to the insured being, because of illness or injury, unable to engage in employment to the extent set out in the definition. In departing from the standard of disability set out in the Plan, in my respectful opinion, Dr. Reid exceeded his jurisdiction.
>
> (Emphasis added)

Summarizing, in Justice Hall's view there were a number of errors in Dr. Reid's decision:

1. He asked himself the wrong question in limiting himself to deciding only whether the Administrator had followed the proper procedures under the LTD Plan.

2. Dr. Reid adopted the interpretation of "disabled" applied by the Administrator which interpretation was "clearly wrong".

3. Dr. Reid injected, as a prerequisite to qualifying for benefits, a requirement that there be objective medical evidence, supporting the employee's condition.

Justice Hall initially concluded that Dr. Reid had erred in limiting himself to deciding whether the Administrator had followed the proper procedures under the LTD Plan. In my view, a reading of Dr. Reid's decision does not support Justice Hall's inference that he

limited the scope of his inquiry in this way. His reference to the Plan Administrator "adhering to the rules and regulations" is equally consistent with an expression of his view that Maritime Life was correct in its assessment of Ms. Holt's status. It is not, in my view, an indication of clear error.

At a later point in his decision Justice Hall appears to accept that even if Dr. Reid did consider the extent of Ms. Holt's disability, he was in error in so doing because he accepted the Administrator's interpretation of "disability". That interpretation was, in Justice Hall's view, "clearly wrong". The test is not, however, whether, in Justice Hall's opinion, the interpretation of **s.1(c)** by the Administrator was correct, but whether that interpretation is one which the words of that section could reasonably bear.

Additionally, Justice Hall, mis-characterized the Administrator's interpretation of the "disability" requirement when he said: "It is apparent that the Administrators of the LTD Plan were of the view that if the plaintiff was able to do some work she ceased to come within the definition of "disabled"".

Having received benefits under the Plan for 30 months, Ms. Holt's continuing entitlement was governed by the extended definition in **Section 1(c)**:

> 1. (c) "disability"/disabled" means the complete inability, as defined from time to time in *Guidelines* made pursuant to this Plan, of an employee, because of illness or injury, to perform the regular duties of his/her occupation during the applicable elimination period and the next 30 months of any period of disability. Thereafter, an employee remains disabled if he/she is unable to engage in any occupation for remuneration or profit for which the employee is or may become fit through education, training, experience or rehabilitation, which occupations pays not less than 80% of the current rate of the position, class and step he/she held prior to disability.

(Emphasis added)

There are as yet no *Guidelines*, although contemplated in the definition of disability. The interpretation of **s.1(c)** applied by the Administrator, and therefore adopted by Dr. Reid, can be gleaned from a series of letters from the Administrator to Ms. Holt, preceding the end of the first 30 months of benefits.

In a letter of June 11, 1996 Loretta Levy, Disability Administrator said in part:

> To continue payment of benefits beyond this point [30 months], a claimant must be judged to be totally disabled from engaging in "any occupation for remuneration or profit for which the employee is or may become fit through education, training, experience, or rehabilitation". Based on all of the information in your file indicating that you can do some work, we do not consider you to fulfill this criteria, and your claim will not be continued past the disability definition change point of July 4, 1997.

It is perhaps upon this passage that Justice Hall relied in concluding that the Administrator was wrongly of the view that if Ms. Holt could do "some work," she was not entitled to continuing benefits. Subsequent correspondence, however, clarifies the Administrator's position.

In a letter of January 15, 1997 to Ms. Holt, Colleen Rector, Coordinator, LTD Benefits, said in part:

> As we advised you at the commencement of disability payments, after 30 months on long term disability the definition of "disability" changes; for you to continue on long term disability payments you will have to meet the more stringent definition of disability: you must be "unable to engage in any occupation for remuneration or profit for which ...[you] are or may become fit through education, training, experience, or rehabilitation, which occupation pays no less that 80% of the current rate of the position, class and step ... held [by you] prior to disability." The new occupation may be in either the public or private sector, and **availability of work is not a criteria**. (Emphasis in original)

In a letter to the Administrator dated February 11, 1997 Ms. Holt requested

clarification of certain points in the letters of June 11, 1996 and January 15, 1997. Carla Russell, Disability Administrator with Maritime Life replied by letter dated April 24, 1997. There she set out in full the definition of disability from **s.1(c)** of the LTD Plan, after which she said:

> You are considered to be totally disabled from your own job, and unless your condition deteriorates considerably by July 5, 1997, 30 months after the date your benefit began, further payments will not be paid. Ms. Rector's letter indicates that if the medical information supports that you are capable of performing an occupation, we are not required to find this position and the fact that you may not be able to find a job will be immaterial.
>
> . . .
>
> You have asked for examples of different types of employment you can perform working only 2 to 3 days per week. The onus is not on the insurer to do job searches for claimants.
>
> . . .
>
> Dr. Sheehy's response indicates that he is still of the opinion that you would be capable of working on a part time basis 2 to 3 days a week.
>
> Therefore, our decision remains, and your file will be closed on July 4, 1997.

Ms. Holt sought further clarification. Colleen Rector responded by letter dated June 17, 1997:

> I understand from my Administrative Assistant, Jacquie, that you had called earlier today asking for more detailed information on the definition of the requirement to earn at least 80% of your pre-disability salary once you reach the 30-month point in your LTD claim. Both Jacquie and I, as well as Maritime Life staff, have tried to explain this to you and your husband previously, thus I'm not certain I can shed anymore light on the subject, but I will attempt to do so.
>
> > For the first 30 months on LTD, your disability is evaluated based on your own occupation. If you are unable to perform the essential duties of your own occupation, then you are considered totally disabled and you are eligible to receive LTD benefits.
> >
> > At 30 months, the definition of disability changes to include "any occupation for which you can earn at least 80% of your pre-disability salary" - this means either public or private sector employment, as well as self-employment.
> >
> > In your previous occupation, you earned an annual salary, pre-disability, of $22,546.16. Therefore, you would have to be able to earn at least $18,036.93 per year in some alternate type of work. This computes to a job at the rate of $9.25/hour, full-time equivalent.
> >
> > So long as Maritime Life can identify a few wide categories of occupational titles or a sub-set of a few jobs that would earn a salary range of $18,000 to $19,000 per year, even if worked on a part-time basis, then you are no longer considered "totally disabled from any occupation". Maritime Life believe there are several

> sedentary-type jobs which your skill level and physical ability would permit you to perform. The important thing to remember here is that there does not have to be an actual job available--it need not exist--it only needs to be identified.
>
> As an example, if Maritime Life felt you could do the job of dispatching taxi cabs and this type of job in Nova Scotia generally paid you $5 to $10.00/hour, then you would not be considered "totally disabled" from any occupation". Whether or not a job with a taxi cab company actually exists in your area or whether or not they would hire you is of no concern and is not a requirement of the LTD Plan.
> (Emphasis added)

. . .

It is clear from a reading of the correspondence that Justice Hall was in error when he concluded that “Administrators of the Plan were of the view that if the plaintiff was able to do “some work” she ceased to come within the definition of "disabled"”. The Administrator's interpretation of **s.1(c)** of the LTD Plan, as contained in the letters above, was an interpretation that the language could reasonably bear.

Justice Hall found, as well, that Dr. Reid had erred by requiring Ms. Holt to demonstrate objective symptomology of her condition. The appellant conceded that had Dr. Reid so required he would have erred. A record of the proceedings before Dr. Reid is unavailable, accordingly we do not know the context in which he discussed objective symptoms with Ms. Holt. On its face, the inclusion of the comment is equivocal. It does not lead only to the inference, as suggested by the respondent, that he required objective symptomology. The existence of objective symptomology, while not a requirement is not irrelevant to an assessment of such a claim. It therefore cannot be said that Dr. Reid’s reference in this regard was demonstrative of jurisdictional error.

In my opinion the decision of Dr. Reid reveals no error going to jurisdiction. In light of this finding, it is unnecessary to deal with the third ground of appeal.

Accordingly, I would set aside the judgment of Justice Hall and restore the decision of Dr. Reid. The appeal is allowed, but in the circumstances, without costs.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.

Appendix "A"

NOVA SCOTIA PUBLIC SERVICE LONG TERM DISABILITY PLAN TRUST FUND MEDICAL APPEAL RULES

1. A letter is sent from Maritime Life Assurance Company, the claims administrator, to the insured denying benefits or advising that benefits will terminate. This letter will also advise the claimant of the right of appeal and the appeal procedure.

2. The appellant is entitled to a copy of the documentation on which the decision to deny or terminate benefits is based.

3. The appellant may commence an appeal by writing to the Coordinator, LTD Benefits or the Chair of the Board of Trustees within 30 days of the date of the letter from the claims Administrator advising the appellant of the denial or termination of benefits; the letter must set out the specific grounds on which the appeal is to be based.

4. The appellant must submit all pertinent medical information intended to support the appeal to the claims Administrator for review by the claims Administrator of its decision, prior to the establishment of a Medical Appeal Board.

5. The claims Administrator shall review the appellant's case and advise the appellant of the result of its review.

6. The Trustees may review the appellant's file held by the claims Administrator and, if there is additional information or any other reason to do so, the Trustees may ask the claims Administrator to review the file and reconsider its recommendation.

7. If the Trustees do not ask the claims Administrator to review the file or if the claims Administrator does not change its recommendation after a review, the Coordinator or the claims Administrator will advise the appellant that the appeal will proceed, and the Trustees will appoint a Medical Appeal Board to hear and determine the appeal on medical grounds only.

8. The date, time and place for the hearing of the appeal will be determined by the Coordinator, on behalf of the Board of Trustees, upon consultation with all parties.

9. The Medical Appeal Board may consist of one or more qualified medical doctor(s).

10. The Board of Trustees shall designate the chairperson, who will write the Appeal Board's decision.

11. The parties before the Medical Appeal Board are the appellant, the claims Administrator and the Board of Trustees.

12. Notification of the hearing to the appellant shall be by certified mail at least 14 days before the date of the hearing.

13. The claims Administrator shall forward all information held by it with respect to the appeal in advance of the hearing to allow for appropriate review.

14. The appellant may present medical evidence in support of his/her appeal, and may be represented by legal counsel. Costs incurred on account of legal counsel, medical evidence or other professional services are the responsibility of the appellant, and are not reimbursed.

15. Medical evidence which was not before the claims Administrator will not be considered by the Medical Appeal Board. New medical evidence must have regard to the appellant's disability as of the date the claims Administrator decided to deny or terminate benefits, and must be put to the claims Administrator before it can be considered by the Medical Appeal Board.

16. The Medical Appeal Board may request the presence of the claims Administrator/Coordinator/and/or any other persons as may be determined by the Medical Appeal Board.

17. The Medical Appeal Board shall render a written decision with a copy to the Board of Trustees and the claims Administrator within 14 days after the Medical Appeal Board has heard or received all evidence.

18. The Medical Appeal Board in not required to give reasons for its decision.

19. The Medical Appeal Board may deny an appeal on the basis of unreasonable delay, and shall deny the appeal if the appellant fails to perfect his/her appeal within 6 months of the denial or termination of

benefits by the claims Administrator.

20. The Medical Appeal Board’s decision is final and binding and not open to judicial review.

C.A. No. 147707

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JIM C. BACICH, GREG BLANCHARD, REINHOLD M. ENDRES, Q.C., GEORGE L. FOX, BESSIE M. DUNICK, BILL McKEE, KEVIN McNAMARA and GRANT VAUGHAN, as Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund and Maritime Life Assurance Co., as Medical Adjudicator for LTD claims		
	Appellants	
- and -		REASONS FOR JUDGMENT BY:
GOLDIE HOLT		Bateman, J.A.
	Respondent	