THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2019 - 04176

IN THE MATTER OF THE NATIONAL INSURANCE ACT CHAPTER 32:01

And

IN THE MATTER OF AN APPEAL AGAINST DECISIONS OF THE NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO PURSUANT TO SECTION 62 OF THE NATIONAL INSURANCE ACT CHAP 32:01

Between

ROBERT CUMMINGS

Claimant

And

NATIONAL INSURANCE BOARD TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on Friday March 6, 2020

Appearances:

Mr. Aaron Seaton and Ms. A. Bain, Attorneys at Law for the Claimant

Mr. Bryan McCutcheon and Ms. Tonya Rowley, Attorneys at Law for the Defendant

RULING

A. Introduction

1. The matter determined in this Ruling is in relation to a Notice of Application filed by the Defendant seeking an order striking out the Claimant's Fixed Date Claim. The Application

is based on grounds of the Court's alleged lack of jurisdiction to determine the Claim and the Claimant's alleged lack of mental capacity to bring the Claim.

2. On 18 October 2019, the Claimant filed a Fixed Date Claim by virtue of which the Claimant appealed a decision of the Defendant. The appeal to the High Court was made pursuant to section 62 of the National Insurance Act Chap. 32:01 (the "NIA") which specifies that appeals from decisions of the Defendant shall lie to the Appeals Tribunal on questions of fact only and to the High Court on questions of law or partly law and partly fact.

3. The decisions of the Defendant which the Claimant has appealed are the Defendant's decision to:
    a) retroactively discontinue the Claimant's Invalidity Benefit in accordance with regulation 26(b) of the National Insurance (Benefits) Regulations ("the Regulations"); and
    b) to deduct the sum of $2000 per month from the Claimant's monthly pension benefit to recover the alleged overpayment in the sum of $137,052.54 arising out of the Defendant's retroactive discontinuance of the Claimant's invalidity benefit.

4. In response to the Claimant's appeal, on 14 November 2019, the Defendant filed a Notice of Application seeking, inter alia, an order of the court to strike out the Claimant's Fixed Date Claim. In its Application, the Defendant has argued that the Fixed Date Claim ought to be struck out because:
    a) the High Court of Justice has no jurisdiction to try the claim since the "issues raised by the Claimant within the Fixed Date Claim Form are questions of fact alone, to be determined by the National Insurance Appeals Tribunal"; and
    b) the Claimant does not have the mental capacity to bring the claim on his own and must conduct the proceedings through a 'next friend' because "based on the evidence adduced by the Claimant in support of the Fixed Date Claim Form, the Claimant may be a patient within the meaning of Rule 23.1(2) of the Civil

Proceedings Rules, 1998, as amended ("CPR") and/or the Mental Health Act, Chap. 28:02 and be incapable of managing and administering his own affairs".

5. At the first hearing on 20 November 2019, the Claimant was present. He was dignified, well dressed, respectful, and attentive during the proceedings. He seemed to fully understand the discussions and from time to time gave sotto voce instructions to his Attorneys. He appeared slightly upset/embarrassed when Counsel for the Defendant spoke of him as being incapable of bringing his Claim on his own behalf.

6. Directions were given for the Claimant to file an affidavit in response to the Defendant's affidavit and the Defendant was given an opportunity to file a reply. The Claimant filed his affidavit on 10 December, 2019 and the Defendant filed a reply affidavit on 8 January, 2020.

7. The Court also directed that both parties file written submissions on the Defendant's application to strike out the Claimant's Fixed Date Claim.

B. <u>Factual Background</u>

8. It is submitted by the Claimants that the facts in this matter are largely uncontested and it appears from a review of the affidavits on both sides that this is so. They are summarised as follows:

    a) Up to 1990, the Claimant worked as a carpenter for the Water and Sewerage Authority (WASA). However, in 1990 even though the Claimant had not yet attained the age of sixty, he was caused to retire from WASA as he was deemed medically unfit to continue to work due to the following mental illness: (a) chronic psychotic disorder, (b) impaired judgment, and (c) personality deterioration. The Claimant was also later diagnosed with schizophrenia. Having retired medically unfit, the Claimant applied to the Defendant for invalidity benefit payments on 8 November, 1990 and the Defendant granted same.

b) As per section 46 of the NIA, the invalidity benefit is a payment to an insured who is likely to remain incapable of work for a period of not less than twelve months, where such incapacity is caused otherwise than by way of employment injury. The Claimant received the invalidity benefit from the Defendant from the year 1990 up until he attained the age of 60 years old on 20 July, 2017 (the age at which he became entitled to a retirement pension from the Defendant).

c) According to the Defendant, when a person is in receipt of an invalidity benefit, it is the general practice of the Defendant to review the recipient's file to ascertain whether the need for the invalidity benefit remains. The Defendant further deposed that upon an administrative review and investigation conducted in 2017 on the Claimant, it was determined that from 3 January to 14 January, 2000, the Claimant worked with the Unemployment Relief Program (URP), a period during which the Claimant had still been receiving the invalidity benefit.

d) In his Affidavit, the Claimant also deposed to and admitted that he worked for URP for a short period on its "ten days programme" because he had "fallen into some serious hard times". He said the man who oversaw URP in the area decided to help the Claimant by giving him a "ten days" during which the Claimant helped dig a drain by the Community Centre.

9. Based on the fact that the Defendant had worked in insurable employment for a period during the time that he was in receipt of the invalidity benefit, the Defendant determined that the Claimant's invalidity benefits should have automatically ceased from that time. The Defendant calculated that the Claimant had received an overpayment of $137,052.54 from 1 January, 2000 to 31 May, 2017.

10. In September 2018, when the Defendant determined that the Claimant was entitled to a monthly retirement pension in the sum of $3,000, it further decided to recover the

alleged overpayment through deductions of $2,000 from the retirement pension of the Claimant from 1 October, 2018 until 31 July, 2022.

11. By letter dated 19, September 2019, the Defendant explained its decision as follows:

> *"Upon an administrative review and investigations conducted on the Insured [the Claimant], it was determined that the Insured worked with the Unemployment Relief Program (URP) from the 3rd January 2000 till the 14th January 2000;*
>
> *….*
>
> *The Insured's Invalidity Benefit was discontinued in accordance with Section 26(b) of the National Insurance (Benefits) Regulations Chap 32:01, wherein an insured person in receipt of the invalidity benefit may be disqualified from receiving such benefit if s/he works in employment which remuneration is or would ordinarily be payable;*
>
> *Due to the disqualification of the Insured from receipt of an Invalidity Benefit, the Insured became indebted to the NIBTT in the sum of $137,052.54;*
>
> *In accordance with section 49A of the National Insurance Act Chap. 32:01 the NIBTT shall be entitled to recover without prejudice to any other remedy, such excess by means of deductions from any other benefits payable to such person; and*
>
> *The NIBTT is therefore recovering the said sum of $137,052.54 from the insured by off-setting same from his entitlement to a monthly Pension benefit through payments of $2000 monthly till 31st July 2022 as per its missive to the Insured on the 10th May 2019."*

12. It is the aforementioned decision of the Defendant to discontinue the Claimant's Invalidity Benefit that is now being appealed to the High Court by the Claimant, on the basis that **section 26(b) of the National Insurance (Benefits) Regulations** requires that the

Defendant utilise its discretion when deciding whether or not to continue payment of the invalidity benefit.

13. The Claimant's application to this Court seeks to determine whether the Defendant had a statutory discretion and failed to exercise it appropriately. The Claimant contends that the correct interpretation of Regulation 26(b) is not that the NIB should automatically/retroactively cease payment of the invalidity benefit upon finding out that a recipient, such as the Claimant, had worked for a period.

C. <u>Issues</u>

14. By virtue of its Notice of Application, the Defendant has raised two main issues for the determination of this Honourable Court:
    a) Whether the High Court of Justice has jurisdiction to try the Claimant's Fixed Date Claim; and
    b) Whether the Claimant has the mental capacity to bring/sustain the Fixed Date Claim on his own or whether he must conduct the proceedings through a next friend pursuant to Rule 23.1(2) of the Civil Proceedings Rules 1998, as amended?

D. <u>Law and Analysis</u>

15. The sections of the NIA relevant to these proceedings are extracted below:

> *"46. (1) From the appointed day the benefits payable to or in respect of persons insured under section 36(1), shall be—*
>
> > *(c) invalidity benefit, that is to say, a payment or periodic payments to an insured person who is likely to remain incapable of work for a period of not less than twelve months where such incapacity is caused otherwise than by way of employment injury;*
>
> *55. The Board shall make Regulations relating to benefits and in particular may by such Regulations prescribe—*

(a) the circumstances in which the rates of benefit as shown in the Tables set out in the Third Schedule may be varied;

(b) the sums payable in lumpsum payments by way of grants;

(c) the conditions subject to which and the periods for which any such benefit or description of benefit may be granted;

(d) the time within which and the manner in which the several benefits and descriptions of benefits shall be claimed and paid and the information and evidence to be furnished by beneficiaries when applying for payment;

(e) the circumstances in which and the time for which a person shall be disqualified for or disentitled to the receipt of benefit or a benefit may be forfeited or suspended, including the prevention of the receipt of two benefits for the same period and the adjustment of benefits in the case of any special circumstances;

(f) penalties for offences against the Regulations;

(g) such other matters as may be necessary for the proper administration of benefits, including the obligations of persons claiming any benefit and of beneficiaries and employers.

59. All claims and questions arising under or in connection with this Act shall be determined by the Board.

62. (1) Appeals from decisions of the Board shall lie to the Appeals Tribunals on questions of fact only and to the High Court on questions of law or partly of law and partly of fact and from the High Court to the Court of Appeal."

16. **Regulation 26 of the Regulations** provides:

"26. An insured person entitled to receive invalidity benefit may be disqualified from receiving such benefit if—

(a) he … ; or

(b) works in employment for which remuneration is or would ordinarily be payable."

Capacity to bring the claim

17. The Defendant's challenge to the capacity of the Claimant to bring the present proceedings is brought pursuant to **Rule 23.3.(1) of the CPR**:

    "A minor or patient must have a next friend in order to issue a claim except where the court has made an order under rule 23.2(2)"

    "Patient" is defined at CPR 23.1as "a person who by reason of mental disorder within the meaning of the Act is **incapable of managing and administering his own affairs**." [Emphasis added]. The Act referred to is the Mental Health Act, Chap.28:02 which defines mental disorder as "mental illness" which means "the condition of mind of a mentally ill person" i.e. "a person who is suffering from such a disorder of mind that **he requires care**, supervision, **treatment** and control, or any of them, for his own protection or welfare or for the protection or welfare of others".

18. The Defendant firstly submits that, notwithstanding the lack of medical evidence presented by them, there is strong evidence that the Claimant "lacked capacity to issue the proceedings" and therefore, the burden of proof has shifted to the Claimant to prove capacity. Counsel for the Claimant contends that despite the fact that the Claimant suffers from mental illness in that his condition of diagnosed schizophrenia requires treatment for his own welfare, the Defendant has not proven that he is a "patient" in the sense that must be established based on CPR 23.1. This is so, he says, because the Defendant has not proven that the Claimant is "incapable of managing and administering his own affairs."

19. The case of **Masterman-Lister v Brutton & Co. [2003] 3 All ER 162** cited by both parties, outlines the test to be applied in determining where a party is capable of bringing legal proceedings:

"…the test to be applied was whether the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings. If the party had capacity to understand that which he needed to understand in order to pursue or defend a claim there was no reason why the law, whether substantive or procedural, should require the interposition of a next friend or a litigation friend."

20. The court in its analysis at para. 17 considered the rights of the individual to bring an action or defend himself in a court of law and determined that this right was protected by placing the burden of proof on the person alleging incapacity:

"17. It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity. Mr. Langstaff submitted that where, as in the present case, there is evidence that as a result of a head injury sustained in an accident the doctors who have been consulted agree that for a time the claimant was incapable of managing his property and affairs he can rely on the presumption of continuance. That I would not accept. Of course, ***if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity****. Furthermore it has to be recognised that when a person is treated as a patient, whether or not as a result of an order of the court, he is thereby deprived of civil rights, in particular his right to sue or defend in his own name, and his right to compromise in litigation without the approval of the court. They are important rights, long cherished by English law and now safeguarded by the European Convention on Human Rights…"*

21. The case of **Fehily v Atkinson [2016] EWHC 3069 (Ch)** highlights the need for the Court to be guided by medical evidence. The Defendant, in lieu of medical evidence, relies on the Claimant's affidavit which sets out the medical conditions from which he suffered that rendered him unable to work and led to him receiving the invalidity benefit – chronic psychotic disorder, impaired judgment and personality deterioration. They also placed heavy reliance on the words of the Claimant's Attorney-at-law in a letter dated 30 September, 2019:

> *"…the underlying disease from which my client suffered is schizophrenia. This is a chronic mental illness characterised by abnormal behaviour, strange speech and a decreased ability to understand reality.*
>
> *In modern times, institutions, governments and wider society are coming to understand the realities of mental illness. Such a reality includes the fact that mentally ill patients do not necessarily act rationally, make the best decisions or understand the full implications of their decisions."*

22. The Defendant argues that these statements along with the accepted history of the Claimant's mental illness give rise to the question of whether or not the Claimant has the capacity to sufficiently understand information relating to the present matter. It is clear, as the Claimant submits, however, that the presence of mental illness does not equate to incapacity. The burden is on the Defendant to show that the Claimant falls within the definition of "patient" as he is incapable of managing his own affairs which would include the present proceedings.

23. Counsel for the Claimant responds to the Defendant's submission concerning the Attorney's letter by indicating that the Claimant's capacity should not be assessed based on a generalised definition of the mental illness from which he suffers. Indeed, all the Attorney's letter did was describe the conditions mentally ill and schizophrenic patients suffer generally.

24. The Claimant further produced a medical report to rebut the concerns of the Defendant surrounding capacity. However, the Defendant objects to the report on the basis that it does not fulfil the requirements of the CPR in relation to expert evidence. They further submit that the report is silent as to the Claimant's condition on the date of filing of the claim. It addresses only the Claimant's condition at the date of the Doctor's examination.

25. The Claimant states, however, that this medical fulfills the requirements to be met by persons applying under Section 37 (1)(a) of the **Mental Health Act, Chap. 28:02** to be appointed as a Committee to manage the property and affairs of a patient. All that is required under that section is a certificate by a duly authorised medical officer or qualified psychiatrist "to the effect that the patient is suffering from mental disorder as a result of which he is incapable of managing and administering his property and affairs".

26. The Defendant's submission in reply to this is that the present application is not such an application. It is noteworthy, however, that the Defendant's current application is based on their contention that "the Claimant may be a patient within the meaning of Rule 23.1(2) of the CPR and/or the Mental Health Act, Chap. 28:02." Therefore, the same evidence is required to prove the Claimant's status as a "patient" under the CPR in the present case.

27. Even if the Court were to discount the medical evidence tendered by the Claimant, what is clear is that the Defendant has failed to present evidence of mental illness of the Claimant that equates to incapacity to bring the present claim. Such evidence by the Defendants would have shifted the burden to the Claimant. Further, Counsel for the Claimant submits that the Claimant's actions in beginning the claim, evidence his ability/capacity to carry on the proceedings with the legal assistance of his Attorneys.

28. Counsel for the Claimant contends that the Claimant's affidavit evidence shows that he was aware of the value and timing of his pension benefit and that he understood there was a problem when he wasn't receiving it. On his own, he was able to get a written

response from the Defendant about his issue. This shows that he articulated the problem clearly enough that the Defendant was able to provide a response. The Claimant also understood the need for him to seek legal advice, to instruct his Attorneys and to provide them with relevant documents, all of which he managed to achieve.

29. The Claimant's actions in bringing this claim to the court, even in the circumstances of his accepted medical illness, do demonstrate an ability to understand the consequences of the Defendant's decision against him and to provide adequate instructions to his Attorneys in relation to this. The Claimant's right to access the Court would be unduly curtailed without medical proof by the Defendant as to his incapacity to bring proceedings. Fairness dictates that the Defendant's application on this ground must be dismissed.

Jurisdiction

30. The Defendant's second submission on this application relates to the jurisdiction of this Court to determine the Claimant's appeal of the decision to disqualify the Claimant from receiving his benefits. This submission is based on Sections 59 and 62 of the NIA.

31. They submit that the Claimant's action is an appeal of fact as there is no discretion afforded to the Defendant under Section 26 of the Regulations. It is the Defendant's contention that once the Claimant meets the criteria in Regulation 26, he is disqualified and the Defendant must effect that disqualification.

32. However, the Claimant contends that there is, in fact, a discretion afforded that is connoted by the use of the word "may" in the section. Therefore, it is the Claimant's submission that its claim is based on a question of law relating to the failure of the Defendant to exercise this discretion fairly. There is no challenge by the Claimant to any fact in this case, it is not disputed that the Claimant worked for ten days.

33. The Defendant submitted at length on the interpretation of Section 26 of the Regulations as providing for an automatic, mandatory disqualification. They cite cases which have held that the word "may" does not always have an 'enabling' effect. In particular, the case of **Julius v Lord Bishop of Oxford [1874-80] All ER Rep 43** held:

> *"The words "it shall be lawful" in a statute are, plainly and unambiguously, merely permissive, empowering, and conferring on the person named a right to do a specified thing, but* ***where the object of the enactment is to effectuate a legal right, whether public or private, they are to be construed as compulsory****. This is equally the case where the enabling power is given by the word "may."*

34. Further, the case of **Sheffield Corporation v Luxford [1929] 2 KB 180** which supports the finding above was cited. The Defendant also cites cases which state more generally that the use of the word "may" alone is not determinative of whether there is an obligation imposed or discretion allowed and that the context of the provision must be considered – **R v S (S) [1990] 2 SCR 254; Sullivan on Construction of Statutes, 5th Ed. (2008) p. 271**.

35. The Claimant submits that the natural and ordinary meaning of the word "may" is permissive and that only exceptionally, it can be construed as mandatory. The Claimant argues that the provision involves deprivation of the Claimant's entitlement and this should only be done on the clear words of the legislature manifesting that intention. The Claimant also cites other sections of the Regulations which make use of the word "shall" instead of "may".

36. The Claimant cites the decision of **The National Insurance Board of Trinidad And Tobago v. The National Insurance Appeals Tribunal CV 2017 – 00875, CV 2017 – 00706** where it was held:

> *"The defendant's members injected their interpretation of the statute and arrived at a decision. This interpretation was a matter of law and fell outside of the ambit of the legislation, more specifically, the power that section 62(1) of the NIA confers*

on the defendant. Section 62 merely allows the defendant to hear appeals on matters of fact only. Matters of law or mixed fact and law should be referred to the High Court. ***To construe or interpret the legislation is a matter for the courts.*** *The defendant went further to identify a list of persons, which included employees of the Ministry of National Security, who must first have their leave classified before they are able to apply for injury benefit, then attempted to create an exception for said persons."*

37. The Defendant submits that there are only two options in relation to the receipt of a benefit – (i) where a person meets the conditions, they receive the benefit and (ii) where a person does not meet the conditions, they do not receive the benefit. They argue that this same alternate applies in the case of disqualification from benefit, with no discretion involved. Their argument in relation to policy considerations is that the national insurance system is built upon public taxpayers' revenue and the Defendant must jealously guard against abuse of the system to ensure moneys are provided to those most in need.

38. However, this must be balanced against a person's entitlement under the system. The Benefits system under the NIA is non-voluntary. Persons such as the Claimant had contributions deducted from their private property in the form of earnings. This provides assistance to persons whose inability to work whether through pregnancy, sickness, invalidity or retirement, places them in a vulnerable financial position. Indeed, as the Claimant submits, these are benefits a citizen gets in exchange for the involuntary contributions taken which are only for that reason a justifiable governmental intrusion into their private property. The Claimant is correct in submitting that these benefits and entitlements are not mere privileges to be trifled with in deference to an automatic approach that no person who has worked , even a day or two, can benefit. An appropriate position based on the balance between these two interests is that the NIA's provision must be interpreted so that the Defendant can effectively guard against abuses of the system but still ensure that benefits are provided to those covered by the Act. The

interpretation is a point of law to be determined in the Claim and as such the Defendant is not correct in submitting that there are only issues of fact to be determined.

39. If, as the Defendant argues, it has no discretion in the matter, there would likely be situations arising in the application of Regulation 26 which could result in manifest unfairness. This raises, as the Claimant suggests, serious constitutional questions, which are points of law that cannot be determined other than by the High Court.

40. In reply submissions, the Claimant also notes that even the content of the Defendant's legal arguments on Regulation 26 demonstrates that the issue before the Court is one of law that could not have been determined by the Board. Indeed, if the claim were purely factual there would be no point of law to be submitted on, even as a preliminary point. The engagement of the Defendant in the dispute on the interpretation of the section tends to support that there is a point of law to be addressed. According to Section 62, this can only be addressed by the High Court.

41. The Claimant also submits that there are further matters of law to be considered in determination of the claim. These include whether there was the need for and if so the denial of an opportunity to be heard before the decision to retroactively deduct from the Claimant's benefit was made; and whether there was a failure to consider proportionality and/or other relevant factors in deciding on the retroactive recovery of the benefits. There is merit to this submission by the Claimant.

E. <u>Conclusion</u>

42. The Defendant has not succeeded in its application to strike out the Claimant's claim. It has failed to prove the Claimant's incapacity to institute these proceedings. It also failed to prove that the Claimant's claim is an appeal based on fact alone such that only the Appeals Tribunal would have jurisdiction.

43. It is, therefore, ordered as follows:

a. The Defendant's Notice of Application filed on 14 November, 2019 for striking out the Claimant's claim on the basis of

   i. failure to comply with Rules 23.2(1) and 23.3.(1) of the CPR; and

   ii. abuse of process/want of jurisdiction

   is hereby dismissed.

b. The Defendant shall pay to the Claimant costs of the said Application to be assessed if not agreed.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC 1