C.A. No. 127016

NOVA SCOTIA COURT OF APPEAL
Cite as: Shean Co-Operative Ltd. v. Deagle, 1996 NSCA 217

Pugsley, Bateman and Flinn JJ.A.

BETWEEN:

SHEAN CO-OPERATIVE LIMITED Appellant	)	Lloyd I. Berliner for the Appellant
- and -	)	David L. Parsons, Q.C. and Alan J. Stanwick for the Respondent
KEVIN DEAGLE Respondent	)	Appeal Heard: November 12, 1996
	)	Judgment Delivered: December 3, 1996

THE COURT: Appeal dismissed per reasons for judgment of Flinn J.A.; Pugsley and Bateman JJ.A. concurring.

FLINN J.A.:

The issue which gives rise to this appeal is whether, in a civil action for damages for wrongful dismissal, the employer can invoke the principle of issue estoppel, against the employee's claim for damages, because of a prior order of the Labour Standards Tribunal. The Labour Standards Tribunal had ordered the employer to comply with the provisions of s. 72 of the **Labour Standards Code**, R.S.N.S. 1989, c. 246 (the **Act**), and to pay the dismissed employee $3,968 (eight weeks' pay) in lieu of notice.

Facts

On August 30th, 1990, the respondent, an employee of the appellant for the previous 13 years, was fired by the appellant, without notice or pay in lieu of notice. On September 30th, 1990, the respondent filed a complaint with the Labour Standards Tribunal of Nova Scotia with respect to his firing. Following an inquiry and determination by the Director of Labour Standards, and a subsequent appeal to the Labour Standards Tribunal, it was determined:

a) that there was no evidence of wilful misconduct on the part of the respondent justifying his dismissal without notice or pay in lieu of notice; and

b) that the appellant must comply with the provisions of s. 72 of the **Act**, and pay to the respondent $3,968 representing eight weeks' pay in lieu of notice.

The relevant provisions of s. 72 of the **Act** are as follows:

"72 (1) Subject to subsection (3) and Section 71, an employer shall not discharge, suspend or lay off an employee,

> unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least
>
> (d) eight weeks' notice in writing to the person if his period of employment is ten years or more.
>
> .....
>
> (4) Notwithstanding subsections (1), (2) and (3), but subject to Section 72, the employment of a person may be terminated forthwith where the employer gives to the person notice in writing to that effect and pays him an amount equal to all pay to which he would have been entitled for work that would have been performed by him at the regular rate in a normal, non-overtime work week for the period of notice prescribed under subsection (1) or (2), as the case may be."

Approximately five months later, on October 2nd, 1991, the respondent commenced a civil proceeding against the appellant, and others. The only aspect of that action which is relevant to this appeal is the respondent's claim against the appellant for damages for wrongful dismissal. The respondent's claim for damages included pay in lieu of reasonable notice of termination, lost benefits, punitive damages, aggravated damages and damages for mental distress.

At the commencement of the trial of the action, the appellant made a motion pursuant to **Civil Procedure Rule 14.25** to strike out the respondent's claim for damages for wrongful dismissal. The position of the appellant was that the respondent's claim of damages, or compensation in lieu of notice, had already been decided by the Labour Standards Tribunal. Therefore, on the basis of the principle of issue estoppel, the appellant argued, the respondent is not permitted to re-litigate that matter.

Decision of the Trial Judge

Justice Haliburton denied the appellant's motion. He said in his decision:

> "The Plaintiff [Respondent] seeks, in his action, to have adjudicated the value of his damages arising from that wrongful dismissal. That issue was not "adjudicated" before the Labour

> Standards Board. Section 72 of the Act fixes eight weeks notice or wages in lieu of notice as the statutory remedy for a person having ten years or more of employment as an employee. The Plaintiff's right of recovery at common law, at least theoretically, may be greater or less than that statutory amount. **The extent of his claim has not been previously adjudicated**. The matters at issue here are not "on all fours" with the issues to which the Adjudicator had to give his attention. The remedial nature of the legislation would, it seems to me, be totally thwarted if the Plaintiff were now deprived of his right to prove his real losses when the extent of his losses were never investigated or considered in the earlier proceeding."

Justice Haliburton then went on to assess the respondent's damages for wrongful dismissal. He awarded the respondent:

a) six months salary in lieu of notice ($13,389.50) less the amount recovered from the Labour Standards Tribunal ($3,968) $ 9,421.50

b) benefits lost during the six month notice period $ 1,024.06

c) pre-judgment interest $ 3,504.60

$13,950.16

He also ordered that each party bear their own costs of the trial.

Grounds of Appeal

The appellant appeals the trial judge's ruling on issue estoppel. His sole ground of appeal, as stated in his factum, is that the trial judge erred:

> "....in determining that the damage award arising from the respondent's wrongful dismissal claim had not been decided in the previous proceeding adjudicated before the Labour Standards Tribunal."

The appellant asks that the decision be set aside and the respondent's claim for damages for wrongful dismissal be dismissed.

<u>Disposition</u>

In **Rasanen v. Rosemount Instruments Ltd.** (1994), 17 O.R. (3d) 267 Abella J.A. said the following about issue estoppel at p. 277-278:

> "At its simplest, issue estoppel is intended to preclude relitigation of issues that have been determined in a prior proceeding. ......
>
> It arises as a doctrinal response to the 'twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause' .....
>
> As a species of estoppel, it is distinguishable from, but clearly conceptually related to, 'cause of action estoppel' or *res judicata*, which precludes the bringing of an action when the same cause of action has already been determined by a court of competent jurisdiction: *Thoday v. Thoday*, [1964] 1 All E.R. 341 (C.A.) at p. 352.
>
> .....Lord Guest summarized the requirements of issue estoppel as follows in *Carl-Zeizz-Siftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.) at p. 935:
>
>> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

It is only the first of the three requirements which is in issue in this appeal. The question then is: In considering what the respondent's damages are, in his action for wrongful dismissal, has that question already been answered in the proceedings before the Labour Standards Tribunal?

The answer is,clearly, no.

The only question which the Labour Standards Tribunal was required to deal with in this matter was to determine if the respondent employee "has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the

employer" as those words are used in s. 72(1) of the **Act**. The Tribunal answered that question in the negative.

Section 26 of the **Act** sets out the duty of the Tribunal and the scope of any order that it may issue. Section 26 provides as follows:

> "26 (1) The Tribunal, in determining any matter under this Act, shall
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> (a) decide whether or not a party has contravened this Act; and
>
> (b) make an order in writing.
>
> (2) Where the Tribunal decides that a party has contravened a provision of this Act the Tribunal may order the contravening party to
>
> (a) do any act or thing that, in the opinion of the Tribunal, constitutes full compliance with the provision; and
>
> (b) rectify an injury caused to the person injured or to make compensation therefor,
>
> but where the Tribunal decides that a complaint under Section 81 is made out the Tribunal shall order the employer to pay over to the Tribunal by a specified date the amount of pay found to be unpaid."

The Tribunal decided, in accordance with s. 26(1)(a), that the employer contravened s. 72(1) of the **Act**. Pursuant to the provisions of s. 26(2)(a) of the **Act**, the Tribunal ordered that the appellant comply with the provisions of s. 72 of the **Act** by paying to the respondent eight weeks' salary in lieu of notice, because the respondent had been in the employ of the appellant for ten years or more.

In dealing with a complaint under s. 72 of the **Act**, the Labour Standards Tribunal makes no inquiry, as would a court in a wrongful dismissal action, as to what notice requirements would be reasonable given the circumstances of both the respondent and the appellant. It makes no inquiry concerning other benefits which the

employee has lost as a result of being dismissed, and it makes no inquiry as to other damages such as punitive damages, damages for mental distress, etc.

Further, the **Act** clearly contemplates additional benefits being sought by the respondent in another forum.

Section 6 of the **Act** provides as follows:

> "6. This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act." {emphasis added}

The purpose of s. 72 of the **Code** is to require an employer to meet certain minimum standards when dismissing an employee who has not "been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer". These are minimum requirements, and vary with the length of service of the employee. Most employers voluntarily comply with the provisions of s. 72. In such cases, and because of s. 6 of the **Code**, the employer could not be heard to say that the employee has no further claim for damages for wrongful dismissal in the appropriate case. There is no reason why there should be any difference where the employer is forced to comply following a complaint made against him by the employee. If there was such a difference, employers would be encouraged not to comply with s. 72 of the **Code** if they thought a hearing before the Labour Standards Tribunal would fully resolve the dismissed employee's claim. That is not the purpose of s. 72 of the **Code**.

There is, therefore, no issue estoppel with respect to the respondent's claim for damages for wrongful dismissal, and Justice Haliburton was correct in so deciding. Justice Haliburton quite properly deducted, from the damages which he awarded to the

respondent, the eight weeks' pay ($3968.00) which was the subject of the order of the Labour Standards Tribunal.

It is worthy of note that Justice Haliburton's decision, on this issue, was followed in the recent case of **Tarr v. Kipling Motor Ins.** (1996), 18 C.C.E.L. (2d) 107 (Sask. Q.B.).

The appellant relies on the decision of Boyle, Co. Ct. J. in **Browne v. C.K.W.X. Ltd.** (1985) 7 C.C.E.L. (2d) 191. That case deals with the **Labour Code of Canada**, which has substantially different provisions than does the Nova Scotia **Act**. Under the **Canada Labour Code** an employee, who has been unjustly dismissed, has a right to reasonable notice under the common law. In that case, the adjudicator of the employee's complaint awarded the employee three months' salary. He said in his award:

> "...at a minimum, <u>common law remedies must be available</u> and the complainant is entitled to monetary compensation in lieu of reasonable notice." {Emphasis added}

In subsequent litigation for damages for wrongful dismissal, Judge Boyle concluded that the issue of reasonable notice had already been decided. Obviously, that case has no application to the Nova Scotia **Act**.

Justice Haliburton did apply the principle of issue estoppel to prevent the appellant from raising the defence of just cause at the trial. He found that the issue of just cause had already been decided, by the Labour Standards Tribunal, against the employer, because of the Tribunal's finding that the employer had contravened s. 72 of the **Code**. The appellant did not challenge that finding on this appeal; and, this Court has not been asked to rule on whether an order by the Tribunal, with respect to a complaint under s. 72 of the **Code**, is dispositive of the issue of just cause in a subsequent action, between the same parties, for damages for wrongful dismissal. I, therefore, express no opinion on that matter.

Counsel for the appellant raised two further submissions during the course of oral argument of this appeal.

Firstly, he submitted that in view of the decision of the Labour Standards Tribunal in **Noreen Smith v. Preston Area Housing Fund** (1989), L.S.T. No. 718, the Tribunal had jurisdiction to grant compensation, generally, to the respondent quite apart from the eight weeks' pay in lieu of notice which the tribunal ordered to be paid. Since the respondent did not take advantage of that opportunity, counsel submits, he is estopped from now claiming it in a court of law.

I have reviewed the **Noreen Smith** case. It did not deal with a complaint under s. 72 of the **Act**, as did the appellant's complaint. Noreen Smith made a complaint under, what is now, s. 71 of the **Act**, and the Director of Labour Standards had ordered her to be reinstated in her employment. The employer appealed the Director's decision to the Tribunal without success. However, on that appeal, both parties agreed that compensation was a more appropriate form of relief than reinstatement; and both parties requested the Tribunal to fix the compensation. As a result, the Tribunal ordered the employer to pay the employee one year's salary <u>in lieu of reinstatement</u>. Both the facts and the issues in the **Noreen Smith** case are entirely different than the facts and the issues between the appellant and the respondent. I, therefore, reject this submission as being without merit, quite apart from the fact that it was not raised by the appellant in its submission on the trial of this action, nor was it even mentioned in its factum which was filed with this appeal.

The second submission of counsel for the appellant relates to the effect of a consent order disposing of another proceeding between these same parties.

On February 14th, 1991, the appellant commenced an action against the respondent. The appellant claimed $5,509.53 as a balance owing on the respondent's

"accounts receivable". This was after the Director of Labour Standards had ordered the appellant to pay, for the respondent's benefit, the eight weeks' salary of $3968.00 (January 14th, 1991); and after the appellant appealed that ruling to the Labour Standards Tribunal (February 1, 1991); but before the Tribunal had ruled on the appeal (May 7th, 1991). The respondent filed a defence to that legal proceeding in which there was a general denial of liability, followed by an alternative plea that ".....any such funds would be set off against funds owing by the plaintiff [appellant] to the defendant [respondent]". That legal proceeding was eventually settled approximately one year later. Counsel signed a consent order on April 7th, 1992, which provided that "..... the action is dismissed without costs to any party". The appellant now says that the respondent's entire claim for damages for wrongful dismissal is "subsumed" in the consent order of April 7th, 1992. He submits that because the respondent, in that legal proceeding, claimed set off of funds owing by the appellant to the respondent; and having agreed to an order dismissing the proceeding, all issues that were raised, or ought to have been raised, in the dismissed action are *res judicata*. It is submitted that, by agreeing to the consent order, the respondent has effectively given up all funds owing by the appellant to him.

This submission has no merit whatsoever.

I have reviewed correspondence between counsel for the appellant and counsel for the respondent which was included in material filed with this Court. It is clear from that correspondence that the respondent's claim for set off related solely to the amount to be awarded by the Labour Standards Tribunal following the determination of the appeal. It is equally clear from correspondence of the appellant's own counsel that he acknowledged that fact. Further, counsel for the appellant filed an amended defence to the wrongful dismissal action (which is the subject of this appeal) several months after

the consent order in question had been taken out. What is now being put forth as the effect of the consent order was not mentioned in that amended defence.

I would dismiss the appeal. I would order the appellant to pay the respondent his costs of the appeal which I would fix at the sum of $2,000 inclusive of disbursements.

Flinn J.A.

Concurred in:

Pugsley J.A.

Bateman J.A.

C.A. No. 127016

NOVA SCOTIA COURT OF APPEAL

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SHEAN CO-OPERATIVE LIMITED Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
KEVIN DEAGLE Respondent	)	FLINN J.A.