NOVA SCOTIA COURT OF APPEAL

Citation: ***Nova Scotia (Human Rights Commission) v. Multibond Inc.***, 2003 NSCA 122

Date: 20031120
Docket: CA197091
Registry: Halifax

Between:

The Nova Scotia Human Rights Commission

Appellant

v.

Dural, a division of Multibond Inc.
and Cyril D. Kaiser

Respondents

Judges:	Saunders, Chipman & Hamilton, JJ.A.
Appeal Heard:	November 12, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed as per reasons of Hamilton, J.A.; Chipman and Saunders, JJ.A. concurring
Counsel:	Kevin A. MacDonald, for the appellant Jean McKenna, for the respondent

Reasons for judgment:

[1] This is an appeal by the Nova Scotia Human Rights Commission from the January 15, 2003 decision of a human rights board of inquiry consisting of the chair, Richard L. Evans. The board determined that the Commission and Cyril D. Kaiser (one of the respondents) were estopped from proceeding to a full hearing of the board on Mr. Kaiser's complaint under the **Human Rights Act**, R.S.N.S. 1989, c. 214 alleging that Dural, a division of Multibond Inc. (the other respondent) discriminated against him by firing him because of his disability.

[2] At the conclusion of the Commission's submissions we recessed and then returned to state in our unanimous opinion the appeal was dismissed with reasons to follow. These are our reasons.

FACTS:

[3] The relevant facts are as follows. Mr. Kaiser was hired as an employee of Dural in June 1998. He stopped working March 1, 1999 because of medical problems. On April 19, 1999 he had surgery and on May 13, 1999, Dural terminated his employment. He has received long term disability benefits since March 1, 1999 as a result of his medical condition although it took some time for his entitlement to these benefits to be established.

[4] Mr. Kaiser did two things as a result of being fired by Dural. He commenced a law suit for wrongful dismissal against Dural in the Nova Scotia Supreme Court on July 28, 1999 and made a complaint under the **Act** on November 26, 1999.

[5] Mr. Kaiser's statement of claim in the Supreme Court contained the following paragraphs:

> 5. The Plaintiff says that his dismissal by the Defendant was without cause and constituted a breach of his employment contract for which he is entitled to damages, including general and punitive damages arising out of the Defendant's malicious and unjustified method of termination. The Plaintiff says that he was

> dismissed from his employment without warning because he had suffered a heart attack and that his dismissal was, accordingly, unjust and discriminatory.
>
> 6. The Defendant's actions as stipulated in the preceding paragraph have caused emotional and psychological harm to the Plaintiff, which have curtailed his recovery from a heart attack.
>
> 7. The Plaintiff, therefore, claims against the Defendant as follows:
>
> ...
>
> Punitive, aggravated and exemplary damages for the Defendants' malicious discriminatory and wrongful method and motivation in terminating the Plaintiff's employment. (Underlining mine)

[6] Thus Mr. Kaiser put the issue of Dural discriminating against him by firing him before the trial judge as an integral part of his wrongful dismissal action, although his statement of claim did not specifically plead discrimination under the **Act**.

[7] Dural's defence was that Mr. Kaiser "was dismissed for cause on the basis that he was not competent in the performance of his duties."

[8] In his complaint Mr. Kaiser also claimed Dural discriminated against him by firing him because of his medical condition, which he characterized as a physical and/or mental disability.

[9] Mr. Kaiser's wrongful dismissal action in the Supreme Court was tried first, from May 8 to 10, 2001 inclusive. Counsel for Mr. Kaiser argued at trial that Mr. Kaiser was fired in part at least because he was disabled:

> . . . He was disposable because he didn't fit Dural's mould and I would submit to Your Lordship, in part at least, because he was disabled and Mr. Sales was sitting there saying, "We've got some damaged goods here and we've got a fellow who, if he hasn't been meeting our standards up to this point, is clearly not going to be able to continue to meet those standards, given his heart condition and the serious surgery he has gone through." (Underling mine)

[10] Mr. Kaiser was successful at his wrongful dismissal trial. The trial judge awarded him damages to compensate him for a period of nine months notice, the down payment and deficiency payment on a vehicle he purchased for his employment, two months unpaid car allowance, vacation pay, 80% of his health benefit cost, together with prejudgement interest and costs, totalling $49,000.

[11] In his September 13, 2001 decision the trial judge found that although Mr. Kaiser was incompetent as alleged by Dural, he was not grossly incompetent so as to justify dismissal without appropriate notice. He found Mr. Kaiser had not been given any training as to how to do his job and had not received any warning that his job performance was unacceptable.

[12] The trial judge found as a fact in ¶ 15 of his decision in **Kaiser v. Dural, a division of Multibond Inc.** (2001), 196 N.S.R. (2d) 377:

> 15. Mr. Sales made a decision around the time of a sales meeting in February to fire Mr. Kaiser. The steps to implement the decision were not in place when Mr. Kaiser became ill.

[13] He again found in ¶ 36:

> 36. . . . The decision to fire Mr. Kaiser was made at the time of the sales meeting in early February.

[14] By finding the foregoing the trial judge at least implicitly, if not explicitly, found that Dural did not discriminate against Mr. Kaiser by firing him because of his disability, his medical condition, since not even Mr. Kaiser, much less Dural, was aware of his medical condition on the date the trial judge found Dural decided to fire Mr. Kaiser.

[15] The trial judge's decision was appealed to this court and the appeal was dismissed on May 21, 2002. **Kaiser v. Dural, a division of Multibond Inc.** (2002), 205 N.S.R. (2d) 194.

[16] By letter dated April 29, 2002, Chair Evans was appointed a board of inquiry to adjudicate Mr. Kaiser's complaint. Up to five days were set aside for the hearing of the complaint in March, 2003 and at Dural's request it was agreed by the parties and the board that a preliminary hearing would be held before the board

"to deal with the implications of the proceedings in the civil suit in the Supreme Court of Nova Scotia on the question of whether (and/or how) the human rights complaint should proceed."

[17] The preliminary hearing was held on December 5, 2002. Counsel for the Commission advised the board that the only remedies being sought were additional compensation for Mr. Kaiser and an apology. The reason only these limited remedies were being sought was because Dural no longer carried on business in Nova Scotia and Mr. Kaiser was not seeking reinstatement because he was disabled and not able to work.

[18] The board held that the Commission and Mr. Kaiser were estopped from proceeding to a full hearing on Mr. Kaiser's complaint since the trial judge had jurisdiction to adjudicate on whether Dural had discriminated against Mr. Kaiser by firing him because of his disability in the context of the wrongful dismissal action properly before him, and had done so, finally determining the same issue raised by Mr. Kaiser in his complaint that was now before the board. This decision is now appealed to this court.

ISSUES

[19] The issues are:

1. Did the board of inquiry err in determining that the trial judge had jurisdiction, as part of the wrongful dismissal action that was properly before it, to adjudicate the issue of discrimination?

2. If not, did the board of inquiry err by considering irrelevant matters, such as the cost of a full hearing and the particular remedies sought, in determining that the Commission and Mr. Kaiser were estopped from having a full hearing before the Board to deal with Mr. Kaiser's complaint? or

3. Did the board of inquiry err in determining that Mr. Kaiser and the Commission were estopped from having a full hearing before the Board to deal with Mr. Kaiser's complaint because of issue estoppel?

STANDARD OF REVIEW

[20] The applicable standard of review in this appeal is correctness. The Supreme Court of Canada in **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 indicates the factors to be taken into account in determining the standard of review to be applied on an appeal from an administrative tribunal. These factors are whether there is a privative clause, whether the tribunal has expertise, the purpose of the **Act** as a whole, and the provision in particular, and the "nature of the problem," whether it is a question of fact or law that is in issue.

[21] In this case the **Act** does not contain a privative clause and s. 36 of the **Act** provides for a right of appeal on questions of law from a board's decision. This suggests a searching review rather than deference is applicable in this appeal. Persons appointed under the **Act** to sit on boards of inquiry are not required to have any particular expertise or experience, again suggesting no deference is to be given to the board's decision. The **Act** has a mixed purpose; a public interest to deter and eliminate discrimination on the bases enumerated in s. 5 of the **Act** and a private interest to remedy specific violations of the **Act**. Here the complaint was made by Mr. Kaiser to remedy an alleged specific violation of the **Act**, a private interest especially given the limited remedies being sought. Hence, any deference that may be warranted if there were a public interest at stake is not warranted in this appeal. The issues before the court on this appeal are questions of law, again suggesting no deference. Hence, the standard of review is one of correctness, without any deference to be shown to the board's decision.

ISSUE 1

[22] The first issue is whether the board erred in determining that the trial judge had jurisdiction, as part of the wrongful dismissal action that was properly before him, to adjudicate the issue of discrimination.

[23] In its decision the board noted that neither party had argued before the trial judge or the court of appeal that the trial judge did not have jurisdiction to determine the discrimination issue raised by Mr. Kaiser as an integral part of his wrongful dismissal action.

[24] The Commission candidly concedes that its argument that the trial judge did not have jurisdiction to adjudicate the issue of discrimination in the context of Mr. Kaiser's wrongful dismissal action, because the board has exclusive jurisdiction to adjudicate claims of discrimination, is weak. It goes so far as to state that if the pleadings in Mr. Kaiser's wrongful dismissal action had specified that the discrimination alleged was one that violated the Act, as opposed to being silent on this, that it would not have raised this ground of appeal.

[25] In support of its argument that the trial judge did not have jurisdiction to adjudicate the discrimination claim raised by Mr. Kaiser in his wrongful dismissal action, the Commission relies on the Supreme Court of Canada decision in **Bhadauria v. Seneca College of Applied Arts and Technology**, [1981] 2 S.C.R. 18 (SCC) and on the Prince Edward Island Supreme Court (Trial Division) decision in **Ayangma v. Prince Edward Island** (1998), 168 Nfld. & P.E.I. R. 1. The board considered the **Bhadauria** and **Ayangma** cases and distinguished them from this case on the facts:

> The case of *Ayangama v. Prince Edward Island,* 1998 Carswell PEI 95 is cited by Mr. MacDonald in support of the proposition that this Board has exclusive jurisdiction over the allegation of discrimination. So too is the well known Supreme Court of Canada case of *Bhadauria v. Seneca College of Applied Arts and Technology*, [1981] 1 S.C.R. 181. Both of these cases involved suits by individuals who were unhappy with the fact that they had not been hired for a position. In addition, both Ms. Bhadauria and Mr. Ayangama had been informed by their respective provincial human rights bodies that their cases would not be processed through to the stage of a referral for a tribunal hearing. Unsatisfied with this result, both individuals then commenced civil actions in their provincial superior court. The respective defendants then moved, successfully, to strike those provisions in the statement of claim that purported to found a cause of action on the tort of discrimination.
>
> In the Ontario Court of Appeal in *Bhadauria v. Seneca College of Applied Arts and Technology,* Justice Wilson (as she then was) had held that a new tort of discrimination should be recognized. However, in the Supreme Court of Canada, Chief Justice Laskin held that, in a situation where no prior common law right of action existed, the (then relatively new) statutory human rights scheme should be seen as having created exclusive jurisdiction to that statutory scheme.
>
> In the more than twenty years that have passed since M. Bhadauria attempted to invoke the jurisdiction of the courts when it was clear that she would have no

> access to the provincial human rights regime, much has changed in the human rights field. It is quite possible that the approach and analysis of C.J. Laskin could be revisited in light of the lessons from the accumulated experience of federal and provincial human rights regimes in the intervening years.
>
> However, for the purposes of this matter, it is not necessary to explore this question in any detail. This is because *Bhadauria (supra)* and for that matter *Ayangama (supra)* do not state that there is always to be exclusive jurisdiction to the statutory human rights regimes for all cases or allegations of discrimination. Exclusive jurisdiction arises only in those cases where it is clear that there is no other statutory or common law action available to the plaintiff/complainant. In this situation, the complainant must resort to the regime provided for in the human rights statute. In both *Bhadauria* and *Ayangama* the plaintiff was asserting that the defendant had discriminated in not hiring them. There is no common law tort that relates to a decision not to hire someone. And as there has been no hiring, there can be no action based on a breach of contract.
>
> However, in this case, Mr. Kaiser had been hired and he had a contract of employment, no matter how imprecise the terms of that contract might have been. When he was terminated, he had available to him a common law action in the courts, an action for wrongful dismissal. It matters not whether this action is conceptualized as a breach of contract action or as a tort. In either case, there was a pre-existing common law action available to Mr. Kaiser. Accordingly, there was no possibility that the defendant might move, as it had in *Bhadauria* and *Ayangama*, to strike some or all of the plaintiff's statement of claim as disclosing no cause of action.

[26] The Commission has not satisfied me that the board erred in distinguishing the **Bhadauria** and **Ayangma** cases on the facts and finding that on the facts of this appeal, where Mr. Kaiser had a common law right of action for breach of contract that gave the trial judge jurisdiction to adjudicate his wrongful dismissal action, that the trial judge had jurisdiction to adjudicate Mr. Kaiser's claim that discrimination played an integral part in the injury he suffered.

[27] The difference in the fact situation before the Supreme Court of Canada in **Bhadauria** and the facts of this appeal, together with the difference in the wording between the **Ontario Human Rights Code,** R.S.O. 1970, c. 318 considered in **Bhadauria** and the **Act** being considered in this case**,** satisfies me **Bhadauria** does not apply in this case. It does not prevent the trial judge from having jurisdiction to decide the discrimination issue raised by Mr. Kaiser as an integral part of his

wrongful dismissal action. The Court in **Bhadauria** noted in ¶ 9 that s.14b (6) of the **Code** provided that " a board of inquiry has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision." By comparison, s. 34(7) of our **Act** does not mandate exclusive jurisdiction to the board as it provides: "A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision." A similar difference in the wording of the **Canada Human Rights Act** led the Federal Court of Canada, Trial Division, in **Perera v. Canada,** [1997] F.C.J. No. 1997, ¶ 14 to distinguish **Bhadauria.**

[28] There is no principled reason for precluding the trial judge on the facts of this case from dealing with Mr. Kaiser's discrimination claim along with the other aspects of his wrongful dismissal action. There is no loss of expertise in having the court adjudicate on the issue of discrimination in the context of a wrongful dismissal action for there is no expertise or experience required for persons who are appointed to boards of inquiry under the **Act. Canada (A.G.) V. Mossop,** [1993] 1 SCR 554. Having the trial judge deal with this aspect of Mr. Kaiser's wrongful dismissal claim at the same time he deals with the other aspects of the wrongful dismissal claim is a cost and time effective way for Mr. Kaiser's whole claim, including discrimination, to be adjudicated, without the loss of any procedural safeguards. This is not to say it will always be appropriate for the court to adjudicate on discrimination alleged in a wrongful dismissal action. There may be fact situations where the discrimination issue should be dealt with separately by a board of inquiry, perhaps where there are remedies claimed that are available to a board but not to a court. I agree with the statement by the board: "Mandating that proceedings must be bifurcated, so that a civil court may hear only some aspects of a wrongful dismissal case while a Board of Inquiry has exclusive jurisdiction to deal with any and all allegations of discrimination, can only add unnecessary complications to legal proceedings.

ISSUE 2

[29] Being satisfied the board did not err in finding the trial judge had jurisdiction to deal with the discrimination alleged by Mr. Kaiser in his wrongful

dismissal action, the second issue raised by the Commission was whether the board erred by considering irrelevant matters, such as the cost of a full hearing and the particular remedies sought, in determining that the Commission and Mr. Kaiser were estopped from having a full hearing before the Board to deal with Mr. Kaiser's complaint.

[30] The Commission argued that these were "public policy" issues that were for the Commission alone to decide before appointing a board of inquiry under s. 32A(1) of the Act and were not open for reconsideration by the board. No cases dealing with this issue were provided to the court.

[31] The Commission has not satisfied me that the board erred in considering these and similar factors in reaching its decision. There is nothing in the **Act** or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint. In my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everything relevant to lawfully adjudicating the rights and interests of the parties before it. This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, *res judicata* and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.

ISSUE 3

[32] The third issue to be considered is whether the board erred in determining that Mr. Kaiser and the Commission were estopped from having a full hearing before the Board to deal with Mr. Kaiser's complaint against Dural that it discriminated against him by firing him because of his disability, i.e., his medical condition. This involves the question of whether the board properly applied the law of *res judicata*, issue estoppel and abuse of process to the facts of this appeal.

[33] The parties agree the board correctly stated the law of *res judicata* and issue estoppel. The board carefully considered the law at pages 5 and 6 of its decision:

> *The Law:*

Some differences in detail may exist when dealing with the application of any one of the concepts of *res judicata*, issue estoppel or abuse of process. However, at the heart of all three concepts, there is a basic principle, namely: it is in the public interest to promote finality in legal proceedings. However, any one of these concepts of estoppel should only be applied when to do so advances the interests of justice.

Mr. Justice Binnie in the recent case of *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraphs 18 and 19, states:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. ... An issue, once decided should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.

The aptness of this statement is not diluted by the fact that in this proceeding it is the winner (Mr. Kaiser) who, after success at both the trial and appeal stage in the superior courts of the province, seeks now to also pursue his human rights complaint under the *Act*.

In the context of the concept of issue estoppel, Binnie, J. goes on in the *Danyluk* case to articulate how the concept is to be applied. He states (at paragraph 33):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. . . . The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra* ... If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied ...

In *Danyluk*, Binnie, J. refers to the majority judgment of Dickson, J. in the case of *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at paragraphs 24 and 25 as follows:

> . . . Dickson, J. (later C.J.) speaking for the majority in *Angle, supra,* at p. 255, subscribed to the more stringent conditions of issue estoppel. 'It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or mixed fact and law (the "questions") that were necessarily (even if not explicitly determined) in the earlier proceedings.
>
> The preconditions to the operation of issue estoppel, as they were set out by Dickson, J. in *Angle, supra,* at p. 254, are:
>
> (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 . . .

[34] After stating the law the board applied the law to the facts before it. It considered whether the three preconditions to the operation of issue estoppel set out in **Angle v. Minister of National Revenue**, [1975] 2 S.C.R. 248 were met. The board deals with the first precondition in **Angle** at pages 8 to 10 inclusive of its decision:

> As noted Dural's primary position in the civil suit was that the defendant had met the onus to establish just cause for firing Mr. Kaiser because he was incompetent. Justice Coughlan has, I believe, ruled directly on this aspect of the civil suit in his reasons. After noting the lack of resources at Dural devoted to human resources issues, and the significant problems associated with having no system (progressive or otherwise) for warning employees about their shortcomings, Justice Coughlan states:

> [22] Mr. Kaiser is not a salesperson. Howard McKay said so. Mr. Commander testified Mr. Kaiser did not have the ability to close a sale - he never asked for the order. Mr. Kaiser did not keep accurate records. In many instances, his mileage records were unbelievable. He was not a good salesperson; although Dural did not give him long to prove himself or offer any sales training.
>
> [23] Incompetence is clearly recognized as a ground for dismissal. However, to justify dismissal for cause without appropriate warning, the incompetence must be gross in nature (Babcock v. Weickert (C. & R.) Enterprises Ltd. (1933), 126 N.S.R. (2d) 170 (C.A.)).
>
> [24] I find that Mr. Kaiser was not so incompetent as to justify dismissal without appropriate warning.
>
> [25] When dismissing an employee notice of unsatisfactory performance of duties must be given. . . .

After further enunciating what the employers obligations are in setting objectives and standards for employees and providing appropriate notice and warnings when the employer believes the employee is not measuring up, Justice Coughlan then finds as follows:

> [27] I find that Dural dismissed Kaiser without just cause.

At a later point in the judgment, after expressly referring to the fact that Mr. Kaiser had open heart surgery in April of 1999, Justice Coughlan states in Paragraph 36:

> . . . The decision to fire Mr. Kaiser was made at a time of the sales meeting in early February (of 1999).

Ms. McKenna argues that the judge’s statements quoted above must be interpreted so as to reach the conclusion that Dural’s decision to terminate Mr. Kaiser’s employment was based on the company’s assessment that he was not a competent salesperson. Her position is that the judge found that the company acted wrongfully in dismissing Mr. Kaiser without notice in the manner it did given the level of his (in)competence **and** that the judge also must be taken to have found that the firing was not connected to Mr. Kaiser’s health condition or disability.

Though Justice Coughlan could have been more explicit in rejecting the Plaintiff’s allegation of discrimination, I agree that at a minimum it must be held

> that he has made this finding implicitly, if not explicitly. Justice Coughlan has clearly found that Mr. Kaiser was not doing a good job as a salesperson. He has also found however that Mr. Kaiser's shortcomings did not justify letting him go without notice. Paragraph 36 in the judgment must be read to confirm that the decision to fire Mr. Kaiser was entirely related to his poor performance on the job because the decision was made early in February of 1999. This was prior to the onset of any heart condition and therefore before this condition was known by the company. (Emphasis mine)

[35] The board thus concluded on the first precondition to issue estoppel that the same question that would be before it on a full hearing, i.e., whether Dural discriminated against Mr. Kaiser by firing him because of his medical condition, had already been decided "implicitly, if not explicitly" by the trial judge who found no discrimination.

[36] Considering the pleadings in Mr. Kaiser's wrongful dismissal action previously reproduced in ¶ 4, the arguments made by his counsel at trial previously noted in ¶ 8, that he was fired because he was disabled, because he was "damaged goods," and the findings of fact of the trial judge in ¶'s 15 and 36 of his decision previously reproduced in ¶'s 11 and 12, I am satisfied the board did not err in finding the first precondition to the application of issue estoppel was met.

[37] There was agreement by the parties that the second precondition to issue estoppel was met in that the court's decision was final.

[38] With respect to the third precondition to issue estoppel, the mutuality of the parties, the board acknowledged that the parties before the board were different from the parties before the trial judge in that the Commission is automatically a party for the complaint hearing before the board pursuant to s. 33 of the **Act** and it was not a party to the wrongful dismissal action. The board determined the addition of the Commission as a party did not prevent the application of issue estoppel after considering the role of the Commission in the complaint process in this case and the remedies being sought on this case.

[39] The board stated:

> What is the effect of having the Commission represented as a separate party in a human rights hearing? At the Board of Inquiry stage the role of counsel for the Commission is to place relevant information before the Board, primarily by calling evidence. In reality, in many cases including this proceeding an individual

complainant is not represented by counsel and relies on Commission counsel to put forward their case. Despite appearances or perceptions (especially of those who are respondents to human rights proceedings) this does not mean that the Commission or it's counsel represents one side or the other. Rather the Commission must act fairly as between the parties.

It is also the case that in some matters the Commission may wish to pursue certain remedies that differ from, or extend beyond those sought by the individual complainant. The Nova Scotia *Act* unlike some other Canadian human rights legislation is quite open-ended about the remedial powers available to a tribunal. Section 34(8) of the *Act* states:

> A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and rectify any injury caused to any person or class of persons or to make compensation therefor.

This provision, the past practises of Boards of Inquiry appointed under the *Act* and the experience of human rights tribunals elsewhere in Canada (albeit that their statutes may be differently worded) make clear that this Board does have remedial powers that are available to it that are not available to a Supreme Court judge hearing a civil suit for wrongful dismissal. Companies that have been found to be in violation of the statute can be ordered for example to take remedial action to redress systemic problems or to rehire an employee that has been dismissed.

However in this case Dural is no longer engaged in business in this jurisdiction. Furthermore, Mr. Kaiser, at least in part because of his ongoing health condition, does not seek to be re-employed. In his argument, in response to a question from the Board, Mr. MacDonald indicated that if the matter proceeded to a full hearing the Commission would likely seek as a remedy only additional monetary damages (akin to non-pecuniary general damages) and an apology.

[40] The Commission has not satisfied me that the board erred in finding that the third precondition of issue estoppel had been met even though the Commission was nominally an additional party to the proceeding before it. Mr. Kaiser and the Commission were parties to both the wrongful dismissal action and the complaint. Therefore the rational for the mutuality principle, to ensure a person's legal rights may not be concluded without an opportunity to litigate them, has been met as between them. (p. 617 **J. Fleming, G. Hazard & J. Leubsdorf, *Civil Procedure*, 4th ed. (Boston: Little, Brown, 1992)**. The only difference here is that the Commission has become an additional party to the complaint. While the remedies

sought by the Commission in some complaints may provoke a substantial interest in the proceeding, given the facts of this appeal where Mr. Kaiser is not seeking reinstatement and Dural no longer carries on business in Nova Scotia, its interest in the remedies that may be granted by the board are minimal if any. Given these considerations, the parties to both the wrongful dismissal action and the complaint are for all intents and purposes the same.

[41] After satisfying itself that the three preconditions to issue estoppel had been met, the board went on to consider whether it should exercise its discretion and estop the Commission and Mr. Kaiser from a full hearing before the board. It considered the cost of a second five day hearing with virtually all the same witnesses that appeared before the trial judge and the limited remedies being sought in this particular case and concluded that to have a week-long rehearing to basically give Mr. Kaiser another "bite at the cherry" was not appropriate. The board also considered the fact that the trial judge had found there was no discriminatory conduct by Dural.

[42] As previously referred to in ¶ 24, the Supreme Court of Canada at ¶'s 18 and 19 of **Danyluk v. Ainsworth Technologies Inc.** [2001] 2 S.C.R. 460 states:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. ... An issue, once decided should not generally be re-litigated to the benefit of losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.

[43] Considering the importance of finality in litigation referred to above along with the aim of avoiding duplicity, potential inconsistent results, undue costs, inconclusive proceedings, and ensuring just results in the particular case, I am satisfied the board did not err in exercising its discretion to estop the Commission

and Mr. Kaiser from proceeding to a full hearing before the board on Mr. Kaiser's complaint.

[44] Accordingly I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:

Chipman, J.A.

Saunders, J.A.