SUPREME COURT OF NOVA SCOTIA
Citation: *Arnold v. O'Regan Halifax Limited*, 2022 NSSC 221

Date: 20220727
Docket: *Hfx* No. 512458
Registry: Halifax

Between:

Steve Arnold

Applicant

v.

O'Regan Halifax Limited

Respondent

Judge:	The Honourable Justice Darlene Jamieson
Heard:	July 19, 2022, in Halifax, Nova Scotia
Final Written	August 2, 2022
Counsel:	Blair Harris Mitchell for the Applicant Dante Manna for the Respondent

By the Court:

Background

[1] Mr. Arnold began his employment with O'Regan's in 1998 and was promoted to Sales Manager in 2001. On October 23, 2020, Mr. Arnold filed a complaint under the *Labour Standards Code*, R.S.N.S. 1989, c. 246 ("*Code*"), alleging that O'Regan's terminated him without notice or pay in lieu of notice ("Complaint"). In the complaint, he noted that the nature of his complaint was the termination of an employee with more than 10 years of service. He indicated that he was not seeking reinstatement.

[2] The Director of Labour Standards issued a decision ("Decision"), which found no violation of the *Code* and no bad faith on the part of O'Regan's. The Director concluded that "the Complainant's position was eliminated in good faith when he was laid off on April 23, 2020." The Director further found that the Complainant was not entitled to any remedy under ss. 71 or 72 of the *Labour Standards Code*. The written decision is dated November 10, 2021.

[3] On November 18, 2021, Mr. Arnold completed an "Appeal form" appealing the decision of the Director to the Nova Scotia Labour Board (the "Board"). As part of the appeal, Mr. Arnold stated that O'Regan's acted in bad faith and had been untruthful to him and to the Director during the process. He said he was concerned about how the matter was handled and his reputation. In the form itself he wrote: "I am appealing because my former employer acted in bad faith and used the pandemic as an excuse to terminate me without cause. I had been a loyal member of the OAG for 22 years with the over 19 years as a sales manager."

[4] A case management meeting was held on December 10, 2021. Mr. Arnold was in attendance, accompanied by Dalhousie Pro Bono Labour Standards Appeal Project team representatives. Counsel for O'Regan's was also in attendance. Dates were set for the hearing before the Board.

[5] By letter of January 19, 2022, counsel for Mr. Arnold advised the Labour Board and O'Regan's that Mr. Arnold was discontinuing the appeal.

[6] Mr. Arnold filed a notice of Application in Court on February 7, 2022, requesting an order:

> declaring that the termination of the Applicant's employment without cause and reasonable notice and without pay in lieu of notice is unlawful;
>
> for general and special damages for wrongful dismissal including pay in lieu of notice, inclusive of moral damages for breach of the Respondent's duty of good faith performance to the Applicant;…

[7] O'Regan's brought this motion submitting that this court has no jurisdiction to adjudicate the subject matter of the Director's final decision which, pursuant to s. 21(10) of the *Code*, may only be appealed to the Labour Board; or in the alternative, that Mr. Arnold discontinued the Labour Board Appeal in order to bring this Application. It says in doing so, Mr. Arnold is effectively seeking a *de novo* re-litigation of matters that have already been determined. The Respondent says this constitutes an abuse of process.

Legislative Provisions

[8] The *Labour Standards Code* establishes the minimum employment rules that employers and employees in Nova Scotia must follow. Section 6 of the *Code* explains the effect of the legislation:

> **Effect of Act**
>
> 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.

[9] Section 72 the *Code* sets out the minimum standards that an employer must meet when dismissing an employee without just cause:

> **Termination of employment by employer**
>
> 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

> (a) one week's notice in writing to the person if his period of employment is less than two years;
>
> (b) two weeks' notice in writing to the person if his period of employment is two years or more but less than five years;
>
> (c) four weeks' notice in writing to the person if his period of employment is five years or more but less than ten years; and
>
> (d) eight weeks' notice in writing to the person if his period of employment is ten years or more.
>
> …
>
> (3) Subsections (1) and (2) do not apply to
>
> (a) a person whose period of employment is less than three months;
>
> (b) a person employed for a definite term or task for a period not exceeding twelve months;
>
> (c) a person who is laid off or suspended for a period not exceeding six consecutive days;
>
> (d) a person who is discharged or laid off for any reason beyond the control of the employer including complete or partial destruction of plant, destruction or breakdown of machinery or equipment, unavailability of supplies and materials, cancellation, suspension or inability to obtain orders for the products of the employer, fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off;
>
> (e) a person who has been offered reasonable other employment by his employer;
>
> …
>
> (4) Notwithstanding subsections (1), (2) and (3), but subject to Section 71, 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.

[10] The application of s. 72 is subject to s. 71, which governs employees who have worked for an employer for 10 years or more. Section 71 provides that these longer term employees cannot be dismissed or suspended without just cause, unless they fall within certain exceptions:

> **Dismissal or suspension without just cause**

> 71 (1) Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g), (h) or (i) of subsection (3) of Section 72.
>
> (2) An employee who is discharged or suspended without just cause may make a complaint to the Director in accordance with Section 21.
>
> (3) An employee who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Board in accordance with Section 23 and such complaint shall be and shall be deemed to be a complaint within the meaning of subsection (1) of Section 23.

[11] An employee who believes they have been dismissed or suspended in contravention of s. 71 may make a complaint to the Director of Labour Standards in accordance with s. 21:

> **Complaint to or inquiry by Director**
>
> 21 (1) Where the Director receives a complaint in any form alleging that there has been a failure to comply with this Act, he or a person designated by him shall inquire into the complaint and may endeavour to effect a settlement.
>
> (2) Where the Director has reasonable grounds to believe that there has been a failure to comply with this Act, he or a person designated by him may inquire into the matter and endeavour to effect a settlement.
>
> (3) Notwithstanding Section 72, where, after inquiry pursuant to subsection (1) or (2), the Director concludes that any person has contravened a provision of this Act and he has been unable to effect a settlement, or any person has contravened the terms of a settlement under this Section, the Director may, in writing, order the contravening person, or the person responsible under this Act, to
>
> > (a) do any act or thing that in the opinion of the Director constitutes full compliance with this Act;
> >
> > (aa) pay an administrative penalty in accordance with the regulations;
> >
> > (b) rectify an injury caused to the person injured or make compensation therefor; and
> >
> > (c) for greater certainty and without limiting the generality of clauses (a) and (b), reinstate an employee who is the object of the contravention,
>
> but where the Director concludes that a complaint under Section 81 is made out he shall order the employer to pay over to the Board by a specified date the amount of pay found to be unpaid.
>
> …

> (5) Any person against whom the Director has made an order under this Section may, within ten days after the order is served on the person, file an appeal to the Board in accordance with the regulations and, where no such appeal is filed, the Director's order is deemed to be an order of the Board for the purpose of Section 88.
>
> …
>
> (6) Notwithstanding subsection (5), the Board may, either before or after the ten days referred to in that subsection, extend the time for filing an appeal.
>
> (7) Where, in the opinion of the Director, there has been no failure to comply with this Act or the terms of any settlement under this Section he shall so inform the complainant and advise him of his right to make a complaint to the Board and that he may wish the advice of legal counsel.
>
> (8) The Director is not required to serve notice upon or hear any person before making an order under this Section or advising a complainant that there has been no failure to comply with this Act.
>
> (9) Any person against whom the Director has made an order under this Section shall comply with the order unless the person has filed an appeal with the Board.
>
> (10) Subject to the rights under subsection (4) of Section 90 of persons other than persons against whom an order of the Director has been made, an order of the Director under this Section is final and conclusive and not open to review by any court by *certiorari* or otherwise or to appeal except to the Board as provided by this Section.

[12] If the Director finds no failure to comply with the *Code*, the employee may proceed to make a complaint to the Labour Board:

> **Complaint to Board**
>
> 23 (1) A complaint under subsection (2) of Section 31, subsection (3) of Section 43, subsection (3) of Section 56, subsection (3) of Section 60, subsection (2) of Section 67, subsection (2) of Section 70, subsection (3) of Section 78, Section 81A or subsection (1) of Section 83 or any other complaint to the Board by a complainant who has made a complaint to the Director and is not satisfied with the result shall be in writing.
>
> (2) The Board shall not proceed with any matter arising out of a complaint referred to in subsection (1) until the complainant has made a complaint in writing to the Director and either
>
> > (a) the Director has informed the complainant in writing that he will not entertain the complaint or that he is not proceeding with the matter; or
> >
> > (b) one month has elapsed and the complainant has not received notice of an order by the Director under subsection (3) of Section 21.

(3) In any proceeding before the Board with respect to any matter arising out of a complaint referred to in subsection (1) the parties shall be

(a) the complainant, who shall have the carriage of the complaint;

(b) the person alleged by the complainant to have failed to comply with this Act; and

(c) any other person specified by the Board upon such notice as the Board may determine, provided that at the hearing he is given an opportunity to be heard against his joinder as a party.

(4) The Board shall not proceed with any matter arising out of a complaint referred to in subsection (1) unless the matter to which the complaint to the Director refers occurred within the six months preceding

(a) the receipt of that complaint by the Director; or

(b) the initiation of an inquiry by the Director.

[13] The Board's duty and its remedial powers are dealt with at s. 26:

Duty of Board

26 (1) The Board, in determining any matter under this Act, shall

(a) decide whether or not a party has contravened this Act; and

(b) make an order in writing.

(2) Notwithstanding Section 72, where the Board decides that a party has contravened a provision of this Act the Board may order the contravening party to

(a) do any act or thing that, in the opinion of the Board, constitutes full compliance with the provision;

(b) rectify an injury caused to the person injured or to make compensation therefor; and

(c) for greater certainty and without limiting the generality of clauses (a) and (b), reinstate the employee,

but where the Board decides that a complaint under Section 81 is made out the Board shall order the employer to pay over to the Board by a specified date the amount of pay found to be unpaid.

[14] Section 20 provides for an appeal from an order or a decision of the Board to the Nova Scotia Court of Appeal:

Determination by Board and appeal to court

20 (1) If in any proceeding before the Board a question arises under this Act as to whether

> (a) a person is an employer or employee;
>
> (b) an employer or other person is doing or has done anything prohibited by this Act,
>
> the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question or review except as provided by subsection (2).
>
> (2) Any party to an order or decision of the Board may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.

Positions of the Parties

O'Regan's Position

[15] O'Regan's says that an employee who believes that their employer has wrongfully dismissed them effectively has two choices. First, they can choose to file a claim for wrongful dismissal in court. Second, they can file a complaint with the Director of Labour Standards alleging a breach of one or more provisions of the *Code*. The Respondent says "principal among the advantages of a complaint are the Director's remedial powers under s. 26 (*sic s. 21*) of the *Code*, which include the power to order reinstatement (a court has no such power) and the power to make an award of common law damages for reasonable notice if it finds a breach of s. 71 of the *Code*."

[16] O'Regan's says, however, that once the employee makes a decision between a court proceeding and a complaint under the *Code*, they must live with that choice. They are not entitled to switch forums if they become dissatisfied with the one they have chosen. In this case, Mr. Arnold made a choice to proceed via Complaint and his Complaint was unsuccessful. He is now trying to relitigate the same issues before this court.

[17] O'Regan's says the Application in Court is essentially an appeal of the Director's Decision and the court does not have the jurisdiction to hear the matter. The *Code* provides that such an appeal may only be made to the Nova Scotia Labour Board and then to the Nova Scotia Court of Appeal. O'Regan's says a comparison between the Decision and the Application in Court reveals that they are the same matter, involving the same parties, the same employment, the same issues and the same allegations and evidence. It says the present Application must be dismissed,

as Mr. Arnold may only pursue his options for appeal or judicial review of the Decision in the proper forum as permitted under the *Code*.

[18] O'Regan's says in the alternative that the Application in Court must be dismissed because it is an abuse of process. It says Mr. Arnold seeks to effectively re-litigate matters that have already been decided by the Director. The parties to the Complaint and to this proceeding are the same. O'Regan's says there is no doubt that the Director's Decision is final; s. 21(10) of the *Code* confirms that "an order of the Director under this Section is final and conclusive and not open to review by any court by *certiorari* or otherwise or to appeal except to the Board as provided by this Section." Since Mr. Arnold made a strategic choice to withdraw his appeal to the Board, the Director's Decision is final.

[19] O'Regan's submits that it is an abuse of process for Mr. Arnold to make a Complaint which would have entitled him to common law reasonable notice (if he had been successful) and now, given that he was unsuccessful, to switch forums to attempt to obtain the identical remedy before this court.

[20] O'Regan's says that allowing this Application to proceed poses a prejudice to O'Regan's because it will effectively erase the Director's prior findings in the Decision, including that Mr. Arnold's former position was eliminated in good faith, and force O'Regan's to defend itself for a second time against the same allegations.

[21] O'Regan's says that barring the claims would not create any unfairness to Mr. Arnold, as the Director's Decision was reached following extensive consideration of the facts and evidence of both parties, including written submissions, over a period of six months.

Mr. Arnold's Position

[22] Mr. Arnold says s. 21(10) of the *Labour Standards Code* does not deprive the court of the jurisdiction to hear this Application. He says the order of the Director is final and conclusive within the meaning of s. 21(10) insofar as the Director is exercising jurisdiction conferred on him by the *Code*. He says common law claims for wrongful dismissal damages and for breach of the duty of good faith are available to the employee independently of the provisions of the *Code*. He further says that s. 6 of the *Code* demonstrates that it was not intended to be an exclusive forum.

[23] Mr. Arnold submits that the Respondent is incorrect in describing the process before the Labour Board as an "appeal" of the Director's Decision. He says that an employee's right to bring the matter before the Labour Board is found in s. 71(3), which reads:

> 71(3) **An employee** who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Board in accordance with Section 23 and such complaint shall be and shall be deemed to be a complaint within the meaning of subsection (1) of Section 23.
>
> [Mr. Arnold's emphasis]

[24] Mr. Arnold says the *Code*'s use of the word "complaint" to the Labour Board, and not "appeal", emphasizes the legislature's view of the tentative nature of the Director's findings in such cases, and the legislative policy of ensuring a broad opportunity for the complaint to be heard, even after a Director's negative decision. He says this interpretation is further reinforced by s. 21(7), which states:

> (7) Where, in the opinion of the Director, there has been no failure to comply with this Act or the terms of any settlement under this Section **he shall so inform the complainant and advise him of his right to make a complaint to the Board and that he may wish the advice of legal counsel.**
>
> [Mr. Arnold's emphasis]

According to Mr. Arnold, the fact that legal counsel is suggested only at the stage of a complaint to the Board signals that the initial complaint does not sufficiently involve potential legal exposure or choices for the employee.

[25] Mr. Arnold says the consistent use of the term "complaint" instead of "appeal", the presumptive hearing *de novo* nature of its process on a complaint to the Board, and the statutory direction to raise the issue of legal advice with the employee only at the Board complaint stage all demonstrate that the process before the Director was not intended to be conclusive or final for the purposes of issue estoppel or abuse of process.

[26] Mr. Arnold further says the protections or remedies available under the *Code* do not parallel those available at common law. In some situations, the *Code* provides greater protections, including the possibility of reinstatement where an employee has worked for the employer for at least 10 years and has been terminated without just cause. In other situations, the *Code* provides lesser or different protections than the common law. In the case of an employee who has not worked for the employer for

at least 10 years, the *Code* sets certain minimum notice periods which may be shorter than "reasonable notice" at common law. The *Code* also creates certain exceptions where any employee, regardless of the length of tenure, can be dismissed without notice, such as where the termination arises from the elimination of the position due to factors beyond the employer's control, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off. No such exceptions to the employer's duty to provide reasonable notice apply at common law.

[27] Mr. Arnold disputes the Respondent's position that the Board has the jurisdiction to award common law damages, including moral damages. Mr. Arnold says the compensation available for unjust dismissal under the legislation was not meant to replicate the common law and there are insufficient parallels between the common law and the *Code* to give rise to issue estoppel or abuse of process.

[28] As to the Labour Board's jurisdiction to award damages for breach of the duty of honest performance of the employment contract, Mr. Arnold says the Respondent's reliance on the Board's decision in *Frechette v. 30004601 Nova Scotia Limited*, 2016 NSLB 101, is misplaced. He says the Board was not required to decide the point in order to dispose of the case, and it remains unsettled.

[29] Mr. Arnold further submits that a finding that an employer has genuinely eliminated an employee's position for objective reasons beyond the employer's control within the meaning of s. 72(2)(d) of the *Code* is not equivalent to a finding that the employer has complied with the duty of honest performance of an employment contract at common law. He says the Director's finding of "good faith" for the important but specific purposes of s. 71 reinstatement or compensation is not a finding that the termination has been carried out in compliance with the employer's duty of honest performance.

[30] Finally, Mr. Arnold says he should be allowed to bring his Application because the complaint process before the Director was "defective" in that the financial information he sought was not produced by O'Regan's. He says this information was essential to his complaint. He further says the process does not allow for procedures such as discovery examination and cross examination.

Law & Analysis

No jurisdiction?

[31] The first issue to be decided is whether Mr. Arnold's Application is statute barred pursuant to s. 21(10) of the *Labour Standards Code*. Again, that section provides:

> 21(10) Subject to the rights under subsection (4) of Section 90 of persons other than persons against whom an order of the Director has been made, an order of the Director under this Section is final and conclusive and not open to review by any court by *certiorari* or otherwise or to appeal except to the Board as provided by this Section.

[32] O'Regan's submits that the Director's Decision is an "order" under s. 21(10), and, as such, it can only be appealed to the Labour Board. It relies on a "Guide to the Labour Board" apparently prepared by the Labour Board, which the Respondent says confirms that the terms "Director's decision" and "Director's order" are interchangeable. The Guide states at p. 17:

> If the complaint cannot be resolved, Labour Standards staff will send a written decision (a Director's Order) to both parties. If one of the parties disagrees with the Director's decision about the complaint, they may appeal to the Board.

[33] In my view, it would be improper for the court to rely on this Guide to interpret s. 21(10), rather than the words used in the provision. Section 21(10) applies to "an order" of the Director. Pursuant to s. 21(3), an "order" is issued only where the Director concludes that any person has contravened the provisions of the *Code*. Any person against whom the Director has made such an order has the right to file an appeal to the Labour Board (s. 21(5)). Here, the Director issued a Notice of No Violation (No Failure to Comply). Where, as here, the Director finds no contravention of the *Code*, no order is issued. Instead, the Director is required to so inform the complainant and advise him of his right to make a complaint to the Board (s. 21(7)). I therefore find that the court's jurisdiction to hear Mr. Arnold's Application does not turn on s. 21(10). It does not necessarily follow, however, that the court should deal with Mr. Arnold's Application.

[34] In *Fredericks v. 2753014 Canada Inc.*, 2008 NSSC 377, the plaintiff employee was terminated by his employer. He filed a complaint pursuant to the *Labour Standards Code*, claiming that he was entitled to unpaid vacation pay and severance pay. A letter written by the Director to the plaintiff on February 17, 2003 advised that the Director found no failure to comply with the *Code*. The Director's letter further advised the plaintiff that he was entitled to make a complaint to the Labour Standards Tribunal (now the Labour Board) pursuant to s. 23(1) of the *Code*. The plaintiff did not do so. He then filed an action in court claiming that he was

dismissed without just cause and without notice. He also claimed unpaid pay for overtime hours worked and vacation time.

[35] The employer argued that the *Labour Standards Code* was a comprehensive statutory scheme for dealing with the plaintiff's claims, and therefore the court was barred from adjudicating them. Alternatively, the employer submitted that if the court had jurisdiction to hear the claims, then the claims were barred as being estopped by the Director's decision.

[36] Duncan J., as he then was, began by reviewing the policy of judicial deference to specialized tribunals in the field of labour relations:

> 12 The first argument put forward by the defendant finds its roots in the policy expressed by the Justice Binnie in *Vaughan v. Canada*, [2005] 1 S.C.R. 146:
>
> > "13 Labour relations has long been recognized as a field of specialized expertise. The courts have tended in recent years to adopt a hands-off (or deferential) position towards expert tribunals operating in the field, including arbitrators."
>
> 13 Speaking in *Adams v. Cusack*, [2006] N.S.J. No. 25, 2006 NSCA 9, Cromwell J.A. summed it up in these terms: "Workplace disputes should generally not go to court when there is a comprehensive statutory scheme for dealing with them". (at paragraph 1)
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> 14 The application of this principle is outlined in paragraph 13:
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> > **This hands-off policy applies not only where there are clear legislative provisions which expressly oust court jurisdiction. It also applies where the scheme as a whole makes it clear that the courts were intended to have " ... but a small role if any to play in determination of disputes covered by the statute.": *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057,* [1990] 1 S.C.R. 1298 at 1321.**
>
> 15 As to the extent of the application of the policy:
>
> > 18 The final general point is this. Deference may be due to a comprehensive dispute resolution scheme even if it does not address every conceivable complaint or provide access to third-party neutral adjudication.
>
> 16 Justice Cromwell set out the two steps of the "required analysis" necessary to the application of the policy:
>
> > The first is to examine the dispute resolution scheme in order to determine its intended ambit and the second is to examine the dispute to determine whether it falls within that intended ambit. At this second step, the court must look at the essential character of the dispute, determined according to

> its full factual context, not the legal characterization which the parties have chosen to place on it: see e.g. *Mortin* at paras. 15-20; *Vaughan* at para. 11; *Weber* at para. 49.
>
> [Emphasis added]

[37] The court was satisfied that the plaintiff's claims fell within the dispute resolution scheme under the *Code*:

> 17 In my opinion, the Code has established a "dispute resolution scheme" to address workplace complaints as between employers and employees in Nova Scotia, for a wide array of issues including, but not limited to, employee protection, holiday pay, industrial standards, minimum wages, equal pay, pregnancy and parental leaves and sick leave. Relevant to this action, the Code includes provisions for resolution of complaints for dismissal without just cause (sections 71-72), vacation pay (sections 32-36) and unpaid wages (sections 80-81).

[38] Duncan J. proceeded to review the provisions governing the complaint process under the *Code*, which, in his view, indicated that the court was intended to have a small role:

> 18 Under the Code the employee has the right to make a complaint to the Director of Labour Standards pursuant to s. 21, who "shall inquire into the complaint."
>
> 19 The Director has broad powers to issue orders to contravening employers to rectify the injury or to provide compensation, including but not limited to unpaid amounts as set out in s. 81.
>
> 20 The jurisdiction of the Director is limited to those matters which occurred within six months of receipt of the complaint or initiation of the Inquiry by the Director. (s. 21(3A))
>
> 21 There is a right of appeal to the Labour Standards Tribunal. (s. 21(5)). If the Director's order is not appealed, then
>
> > (10) Subject to the rights under subsection (4) of Section 90 of persons other than the employer, an order of the Director under this Section is final and conclusive and not open to review by any court by certiorari or otherwise or to appeal except to the Tribunal as provided by this Section.
>
> The order of the Director can be enforced as an order of the Supreme Court. (s. 90(2))
>
> 22 If the Director fails to make an "order" then, under s. 21(7), the complainant retains a statutory right to file the complaint directly to the Labour Standards Tribunal. (s. 23(1)).
>
> 23 Proceedings before the Tribunal are *quasi judicial* in nature. The members have the powers of commissioners appointed under the *Public Inquiries Act*, R.S.N.S.

1989, c. 372. There are requirements for notice of hearing, receiving of evidence under oath, public hearings, and maintaining a record of proceedings. *see* s. 17, and ss. 23-27

24 **The jurisdiction of the Tribunal to provide a remedy is very broad.** Like the Director it is limited to consideration of matters which occurred "within six months preceding" the receipt of the complaint by the Director or the initiation of the inquiry by the Director. (s. 23(4))

25 Both the Director and the Tribunal are independent of the employer and the employee.

26 **The court has a role, albeit a limited one.** The relevant provisions are:

> 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.

27 **This section preserves the right of an aggrieved party to pursue their rights or benefits in an alternate forum, on conditions. This right is also impacted by the following, which effectively forces the employee to chose a forum for a dispute over unpaid pay:**

> 82 Subject to section 83A, where the Director has received a complaint from an employee and the Director is satisfied
>
> > (a) that the employee is proceeding with or has commenced or was successful in an action for the recovery of the unpaid pay; or
> >
> > (b) that the employee is bound by a collective agreement, as defined in the *Trade Union Act*, and that the employee could file a grievance under that agreement for the recovery of unpaid pay,
>
> he shall not entertain the application.

28 The legislative intention to otherwise limit the role of the courts in reviewing the Tribunal's decisions is set out:

> 20(1) If in any proceeding before the Tribunal a question arises under this Act as to whether
>
> > (a) a person is an employer or employee;
> >
> > (b) an employer or other person is doing or has done anything prohibited by this Act,
>
> the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by subsection (2).

> (2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.
>
> [Emphasis added]

[39] The court was satisfied that the plaintiff's complaints fell within the authority of the Director and the Tribunal:

> 31 I am satisfied that the factual substance of the complaints before this court fell within the authority of the Director and of the Tribunal. I am also satisfied that the six month limitation period is not, in and of itself enough to conclude that the **Code** fails to provide adequate redress. Cromwell J., in *Adams, supra*:
>
> > ... as Steel, J.A. noted in *Harrison* (in a passage approved in *Vaughan* at para. 36), the dispute resolution mechanism does not have to provide for exactly the same remedy as would a court: what is important is that the scheme provide a solution to the problem.
> >
> > (at paragraph 32)
>
> 32 What remains open for consideration is whether any or all of the claims are nevertheless open for adjudication by this court.

[40] With respect to the claim for unpaid pay, Duncan J. found that the *Code* provided effective redress, and that, as a result, the plaintiff was obligated to exhaust that remedy:

> 40 In my view the legislature, in enacting section 82, preserved the right of an employee to pursue a claim for unpaid pay in an alternative forum to that provided by the **Code**, but not in addition thereto. **Once the employee elects his/her forum they are obligated to exhaust that remedy. The right to seek court intervention then is determined by the process selected.**
>
> 41 **In this case, having chosen to initiate a complaint under the Code, the plaintiff was required to rely on the dispute mechanism provided therein.** Judicial review would only be engaged in accordance with section 20 of the **Code**. If the claim had been initiated in the court, then it could not also be pursued with Labor Standards.
>
> 42 In such claims, there may be tactical or substantive advantages to the choice of forum made by an aggrieved employee. **It is not in the interests of an efficient and effective system for resolving disputes, nor do I believe the legislature intended, to provide claimants with the right to pick a forum and when dissatisfied with that result, pursue the same claim again in another forum.**
>
> 43 **On the circumstances of this case I conclude that the court must defer to the mechanism selected by the plaintiff under the Code to pursue his claims**

> **for unpaid pay. It is not relevant to this conclusion that the plaintiff abandoned his pursuit of the claim after the Director's Finding. There was a mechanism to resolve this aspect of the dispute and the role of the court would only be to act in accordance with its review authority under section 20.**
>
> [Emphasis added]

[41] The court reached a different conclusion with respect to the claim for wrongful dismissal, finding that the *Code* did not provide effective redress:

> 46 Does the *Code* provide effective redress for wrongful dismissal?
>
> 47 In *Deagle v. Shean Co-Operative Limited*, [1996] N.S.J. No. 504 (NSCA), the employer argued that an existing order of the Labour Standards Tribunal estopped their former employee from advancing a claim for damages arising from wrongful dismissal. Writing on behalf of the court, Flynn, J.A. said:
>
> > 17 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.
> >
> > 18 Further, the Act clearly contemplates additional benefits being sought by the Respondent in another forum.
> >
> > 19 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."
> >
> > 20 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.
>
> 48 The policy of judicial deference to specialized tribunals in the field of labour relations was already enunciated by the time of *Deagle* -- the cases of *St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, perhaps being the most notable to that time. It must be taken that the court in *Deagle* was alert to the policy.
>
> 49 Subsequent judicial statements such as those in *Vaughan* and *Adams* have not changed the underlying principle as Flynn J.A. saw it. **To restate it in the current context, a claim for wrongful dismissal does not attract effective redress under the *Labour Standards Code* (Nova Scotia). It provides a statutory minimum. Section 6 of the Code preserves to the plaintiff the more favourable benefit or rights in the common law that a court may find, and which are not otherwise available.**
>
> [Emphasis added]

The court proceeded to adjudicate the wrongful dismissal claim.

[42] More recently, in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, the Supreme Court of Canada considered the unjust dismissal provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2, which Abella J. described as having "significant structural similarities" to the Nova Scotia *Labour Standards Code* provisions:

> 65 It is worth noting that the Code's scheme, which was enacted in 1978, was preceded by similar Unjust Dismissal protection in Nova Scotia in 1975, and followed by a similar scheme in Quebec in 1979. **Unlike other provinces, the Nova Scotia and Quebec schemes display significant structural similarities to the federal statute.** They apply only after an employee has completed a certain period of service and do not apply in cases of termination for economic reasons or layoffs. **Like the federal scheme, the two provincial ones have been consistently applied as prohibiting dismissals without cause, and grant a wide range of remedies such as reinstatement and compensation.**
>
> [Emphasis added]

[43] Unjust dismissal is dealt with at ss. 240-245 of the *Canada Labour Code*. Section 246 states:

> 246 (1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

[44] Abella J. held that although s. 246(1) permits a dismissed employee to pursue their remedy in court rather than under the provisions of the *Canada Labour Code*, once the employee chooses to make a complaint under the Code, only those provisions apply:

> [64] It is true that under s. 246, dismissed employees may choose to pursue their common law remedy of reasonable notice or pay in lieu in the civil courts instead of availing themselves of the dismissal provisions and remedies in the Code. **But if they choose to pursue their rights under the Unjust Dismissal provisions of the Code, only those provisions apply.** As Prof. Arthurs observed in his Report:
>
> > ... the two types of proceedings differ most importantly in other respects. The first relates to remedies. If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course - that is, for whatever period of notice would have been "reasonable." If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages. By contrast, if successful before an Adjudicator under Part III, an employee is entitled both to reinstatement and to compensation, not only for the duration of the notice period, but for all losses attributable to the discharge. **These are potentially more extensive and expensive remedies than those a court might award.**
>
> [Emphasis added]

[45] Accordingly, since Mr. Arnold chose to pursue his rights under the unjust dismissal provisions of the *Code*, this court should only adjudicate his claims if, in the court's assessment, the claims do not fall within the intended ambit of the workplace dispute resolution scheme set out in the *Code*, or, if they do, that the *Code* cannot provide him with effective redress. Otherwise, the court must defer to the mechanism selected by Mr. Arnold under the *Code* to pursue his claims.

[46] Mr. Arnold's claims for financial compensation resulting from his dismissal without just cause clearly fall within the authority of the Director and the Labour Board. But does the *Code* provide effective redress?

[47] Although the court in *Fredericks, supra* held that the *Code* does not provide effective redress for wrongful dismissal where an employee has been terminated without notice in breach of s. 72, the Respondent submits, and I agree, that the same cannot be said where an employee with 10 or more years of service has been terminated without just cause in breach of s. 71.

[48] An employee with fewer than 10 years of service is not entitled to anything beyond the minimum notice payments set out in s. 72. Neither the Director nor the Board is empowered to order anything in excess of those amounts, even if the employee would be entitled to a longer period of reasonable notice at common law. An employee seeking common law damages in addition to the notice payments available under the *Code* must seek a remedy in court. Where an employee alleges a breach of s. 71, however, the Director and the Board have broad remedial power to order compensation similar to that available at common law.

[49] In *Abridean International Inc. v. Bidgood*, 2017 NSCA 65, an employee with more than 14 years of service was dismissed and offered eight weeks' working notice of termination. He filed a complaint with the Director saying his employer had violated s. 71 of the *Labour Standards Code*. The Director found that the employer had violated s. 71, and that 12 months' pay in lieu of reasonable notice constituted an appropriate remedy under the circumstances. The employee did not want to be reinstated.

[50] The Director's order was upheld on appeal to the Labour Board. The employer appealed the Board's decision to the Court of Appeal, arguing, among other things, that the Board exceeded its jurisdiction under s. 26 of the *Code* in determining that it had the authority to award common law reasonable notice. The Court of Appeal disagreed:

> [52] I have already rejected the appellants' complaint that the Board failed to "…make[s] a reasoned determination that the intended remedy of reinstatement is inappropriate …". I will now dispense with their conjoined argument that having "elected" to "…make a statutory claim pursuant to Section 71(1) of the *Code",* Mr. Bidgood "is not entitled or empowered to select the desired remedy".
>
> [53] The simple and complete answer to the appellants' submission is that the Board did consider and rejected the idea that Mr. Bidgood's reinstatement would be appropriate in the circumstances. After coming to that conclusion the Board went on to assess the amount of compensation that would be appropriate. In this, the Board did exactly what it was statutorily empowered to do. There was no "delegation" of the Board's "decision-making powers". **In their factum the appellants concede that "…once it concludes that reinstatement is inappropriate", the Board's broad statutory remedial powers include the power to award compensation and that "awarding compensation [is] based on common law principles applicable to reasonable notice…". Respectfully, that is precisely what the Board did.** We see this in tracking the Board's reasoning in its Order:

> [20] Even if the Board should find that the original contract violates Section 6 of the *Code*, he argued that the Board has no jurisdiction to award the common law remedy of reasonable notice, where reinstatement is inappropriate. The purpose of the *Labour Standards Code* is to provide a minimum floor of rights; if a complainant wants more than that minimum, they can pursue that remedy through the courts: *Fredericks v. 2753014 Canada Inc.* 2008 NSSC 377; *Re Tibert v. Hage* 2015 CarswellNS 1976 (NSLB).
>
> [21] He argued that if the Board finds that it has jurisdiction, any award of pay in lieu of notice should be reduced because the Complainant did not make sufficient efforts to mitigate his damages. Further, any amount of notice awarded should also include the eight weeks notice that was given.
>
> …
>
> [26] Counsel for the Complainant argued that the Board's power to award damages where reinstatement is not appropriate under Section 71 is the obvious implication of Sections 21 and 26 of the Code. There is no authority for the proposition that employees who have been discharged contrary to Section 71 only have the right to reinstatement, and any such interpretation would be unreasonable.
>
> [27] She argued that the twelve month notice period ordered by the Labour Standards Officer was reasonable, though fourteen months could have been ordered. The Officer could arguably have factored in the two month notice period in deciding the amount of damages, since the Complainant worked through his notice period. Finally, she argued that the Complainant reasonably mitigated his damages.

[54] Then, after concluding that Mr. Bidgood's employment ran from August 2000 to February 2015 the Board goes on to describe its power to award damages to Mr. Bidgood in lieu of his reinstatement:

> [39] We conclude that the test for the application of Section 11 has been met, that the Complainant's period of service runs from August 2000 to February 2015, and that Section 71 applies.
>
> [40] There is no question that the Board has the power to reinstate where there is a breach of Section 71 *Re Sobeys Stores Ltd. v. Yeomans* [1989] S.C.R. 238. However, there may be situations where reinstatement is not appropriate, perhaps because the Complainant has found other employment, or because the employment relationship has been irretrievably severed; there may be other situations, like here, where the Complainant is not seeking reinstatement, and nor has the Director ordered it. **The Labour Standards Tribunal, and later the Labour Board, has regularly ordered damages in lieu of reinstatement.** [See, for example: *Re Van't Hof v. South Shore District Health Authority* (LST 1795), *Re Kilcup v.*

> *Crown Fibre Tube Inc.* (LST 2064), *Re Beck v. Hackmatack Farm* (LST 2297), *Re Greenwood v. Richelieu Hardware* (LST 2358)]
>
> **[41] The Board has wide authority to order damages, pursuant to Section 26 of the *Labour Standards Code*:**
>
> …
>
> [43] Having found that the Board has jurisdiction to award damages leaves the question of what constitutes appropriate damages in this situation. …
>
> [55] **The soundness of the Board's reasoning cannot be questioned. Even a cursory canvass of this Court's own jurisprudence supports the Board's interpretation and application of its broad remedial powers to craft a fair level of compensation for Mr. Bidgood, by awarding him damages in lieu of his not being reinstated to his former position.** See for example, *Deagle v. Shean Co-operative Ltd,* 1996 NSCA 217; *Kaiser v. Dural,* 2002 NSCA 69; *Coleman v. Sobeys Group Inc.*, 2005 NSCA 142; and *Hillside Pines Home for Special Care v. Beck,* 2016 NSCA 85.
>
> [56] Nothing in the record causes me to doubt the reasonableness of the Board's exercise of its statutory jurisdiction to award damages to Mr. Bidgood in lieu of his reinstatement.
>
> [Emphasis added]

[51] Mr. Arnold submits that even if compensation based on common law reasonable notice principles is available under the *Code*, neither the Director nor the Board has the jurisdiction to award moral damages. As a result, he says, the *Code* cannot provide him with effective redress for all his claims. I disagree. In my view, the broad remedial powers set out at ss. 21(1)(3) and 26(2) of the *Code* include the power to order moral damages for employees with 10 or more years of service. Both the Director and the Board are empowered to order an employer to "rectify an injury caused to the person injured or to make compensation therefor". Moral damages can be awarded to compensate an employee for harm caused by the employer's conduct in dismissal where that conduct involves a breach of the duty of good faith implied in every contract of employment. In other words, moral damages are intended to compensate an injury to the employee caused by the employer's acts of bad faith or unfair dealing on dismissal.

[52] Mr. Arnold says it is non-sensical from a policy perspective for there to be moral damages available to employees with 10 or more years of service but not to those with less service. First of all, a court action for reasonable notice above and beyond the s. 72 minimum notice period and moral damages remains open to an employee who has less than 10 years, based on the court's findings in *Frederick,*

supra and *Deagle, supra*. In my view, interpreting the jurisdiction under the *Code* to include moral damages is in keeping with the legislation that provides effective redress for employees with more than 10 years' service.

[53] Although there are no reported decisions of the Nova Scotia Labour Board awarding moral damages, the issue has been raised before the Board and there has been no finding that such damages are beyond its jurisdiction: see, for example, *Frechette, supra*, and *Newell v. Marriott Hotels of Canada Ltd (Halifax Marriott Harbourfront Hotel)*, 2014 NSLB 47.

[54] Moral damages are regularly awarded for breach of the unjust dismissal provisions of the *Canada Labour Code*, which, as noted earlier, have significant structural similarities to the Nova Scotia provisions. Section 242(4) sets out the remedies available under the *Canada Labour Code*:

> 242(4) If the Board decides under subsection (3) that a person has been unjustly dismissed, the Board may, by order, require the employer who dismissed the person to
>
> > (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
> >
> > (b) reinstate the person in his employ; and
> >
> > (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

[55] In *Ford v. King's Transfer Van Lines Inc.*, [2013] C.L.A.D. No. 323, Adjudicator Luborsky wrote:

> 55 While the foregoing disposes of the remedial relief available to the Complainant under subsections 242(4) (a) and (b) of the Code, there remains consideration of subsection 242(4) (c), which authorizes an adjudicator to, "do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal." **As Adjudicator Gorsky noted in a comprehensive review of the principles underlying the assessment of damages for unjust dismissal beginning at para. 90 in *Schinkel v. Brico Transportation Services Ltd.*, [2008] C.L.A.D. No. 378 (Gorsky, Adj.), the "make whole" approach engendered by this and the other remedial subsections of the Code permits an award of damages on account of "mental distress" (at para. 104) or what has also been characterized as "aggravated", "Wallace" "bad faith" and "moral damages" arising out of the manner of the dismissal and its reasonably foreseeable consequences.** See also the discussion of the availability and determination of such damages under the Code in *Charles and Lac La Ronge*

> *Indian Band*, *supra*, which assessed $2,500 at para. 250 for mental distress, *Wygant v. Regional Cablesystems Inc.*, allowing $7,500 as damages for mental distress, anguish and depression at paras. 149 - 153; and in extreme circumstances an award of $85,000 at para. 95 in *Joseph v. Tl'azt'en First Nation*, *supra*, as aggravated damages for harm to the unjustly dismissed employee's "prospect of future employment, to his mental and physical health and well-being, to his integrity and dignity, and to his personal and professional reputation."
>
> [Emphasis added]

[56] In my view, moral damages fall within the broad remedial provisions of both the *Canada Labour Code* and the Nova Scotia *Labour Standards Code*.

[57] I would also note that in cases like Mr. Arnold's where an employer argues that s. 71(1) does not apply because the employee's position was eliminated, "the relevant consideration is the employer's good faith" (*Sutton v. Halifax Developments Ltd.*, [1995] N.S.J. No. 278 (C.A.) at para. 14. See also *Ben's Ltd. v. Decker*, [1995] N.S.J. No. 268 (C.A.), at para. 38). In other words, the employer's good faith, or lack thereof, is squarely before the Director or the Board. Where the Director or the Board is satisfied that the employer dismissed the employee in bad faith and that the employee suffered injury as a result of the manner of dismissal, compensation should be awarded under ss. 21(1)(3) and 26(2) of the *Code*.

[58] I am satisfied that the *Code* provides Mr. Arnold with effective redress for his claims and, as in *Fredericks, supra,* the court must defer to the mechanism selected by Mr. Arnold under the *Code* to pursue those claims. Again, as in *Fredericks, supra,* it is not relevant to this conclusion that he abandoned his pursuit of the claims after the Director's Decision. There was a mechanism to resolve Mr. Arnold's claims and, if he was still not satisfied, he could have appealed to the Nova Scotia Court of Appeal as permitted under the *Code*.

Abuse of process

[59] Even if I am wrong that the court must defer to Mr. Arnold's selection of forum, I find that Mr. Arnold's Application is an attempt to re-litigate issues that have already been decided and, for that reason, it amounts to an abuse of process.

[60] Abuse of process is addressed in Civil Procedure Rule 88:

> **Scope of Rule 88**

88.01 (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.

(2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.

(3) This Rule provides procedure for controlling abuse.

Remedies for abuse

88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

[61] The leading case on abuse of process is *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77. In that case, the Supreme Court of Canada stated:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the

> accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

…

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel**.** See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. …

38 **It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one** (*Lange*, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, *supra*, at pp. 347-48):

> **The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation.** Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>
> [Emphasis added]

[62] In *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, the Supreme Court set out the principles underlying the interrelated doctrines of issue estoppel, collateral attack, and abuse of process:

> [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
>
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[63] There is considerable overlap between Mr. Arnold's Application in Court and the Director's Decision. Mr. Arnold makes the following claims in his Application in Court:

> [14] The termination was without cause, and without reasonable or any notice or pay in lieu of Notice.
>
> [15] The conduct of the Respondent represented a breach of the Respondent's good faith performance in its contract of employment with the Applicant, during and to the time of termination including in, the effort to demote and then terminate the Applicant's employment without just cause, in whole or in part because of the Applicant's health and safety concerns.
>
> [17] The Applicant therefore claims damages for dismissal without notice, and moral damages for the Respondent's breach of duty of honest performance of its contract of employment with the Application.

[64] As the Respondent notes in its brief, Mr. Arnold's claim raises two separate issues which have already been determined by the Director. The first is the matter of his termination. Mr. Arnold claims in his Application that he was terminated without cause and without reasonable notice or pay in lieu of notice. In his Complaint to the Director, he also alleged that he was terminated without cause and without sufficient notice or pay in lieu of notice, contrary to s. 71 of the *Code*. O'Regan's argued Mr. Arnold's discharge was beyond its control due to the pandemic and that he was offered reasonable other employment (2 other positions). The Director found no breach of s. 71 and that there was no need to address the s. 72(3)(d) and (e) exceptions to notice that O'Regan's claimed were applicable. The Director further noted that Mr. Arnold was provided with a lump-sum payment of $50,000, which was more than eight weeks' pay in lieu of notice. The Director found that Mr. Arnold was not entitled to any remedy under ss. 71 or 72 of the *Code*.

[65] The second issue raised by Mr. Arnold in his Application in Court relates to whether O'Regan's terminated Mr. Arnold in good faith. Mr. Arnold alleges that O'Regan's breached its duty of good faith performance under the employment contract when it terminated him because of his "health and safety concerns".

[66] In his Complaint to the Director, Mr. Arnold alleged that O'Regan's had breached s. 71 of the *Code*, which provides that an employer cannot terminate an employee with more than 10 years of service without just cause unless certain exceptions apply. In determining whether there was a breach of s. 71, the Director considered whether O'Regan's discharged Mr. Arnold for reasons beyond its control in circumstances where it had exercised due diligence to foresee and avoid the cause of discharge. Finding no violation of s. 71, the Director concluded that "the Complainant's Sales Manager position was eliminated in good faith by the Respondent", and that "the elimination of the position was not directed at the Complainant". These findings are incompatible with the allegation in Mr. Arnold's Application in Court that O'Regan's acted in bad faith in trying to "demote" him or that he was terminated for raising "health and safety" concerns, or any other reason particular to Mr. Arnold.

[67] As the Respondent notes in its brief, the Director's Decision does not specifically address Mr. Arnold's claim that he was terminated for raising health and safety concerns related to Covid 19. That was a new issue which Mr. Arnold raised for the first time in his complaint to the Labour Board filed in November 2021 and withdrawn in January 2022. In my view, this fact does not assist Mr. Arnold. If he believed he was dismissed for raising health and safety concerns, that issue should

have been raised before the Director. Moreover, Mr. Arnold did make that allegation in his complaint to the Labour Board, but then chose to abandon his complaint in favour of filing this Application.

[68] As to whether the Director's Decision was "final", I disagree with the Respondent's position that the answer is found in s. 21(10) of the *Code*. As I noted earlier, s. 21(10) applies to an "order" of the Director. That said, I also disagree with Mr. Arnold's position that the *Code*'s use of the term "complaint" instead of "appeal" to the Board, the presumptive hearing *de novo* nature of its process on such a complaint, and the statutory direction to raise the issue of legal advice with the employee only at the Board complaint stage demonstrate that the process before the Director was not intended to be conclusive or final.

[69] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, the Supreme Court of Canada concluded that a decision by an employment standards officer to dismiss a complaint under the Ontario *Employment Standards Act*, 1996, S.O. 1996, c. 23 ("*ESA*") was both a "judicial" and "final" decision capable of giving rise to issue estoppel.

[70] The *ESA*, like the Nova Scotia *Labour Standards Code*, establishes certain minimum employment standards for the protection of employees. Both statutes also provide a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with those standards. The objective of this summary procedure "is to make redress available, where it is appropriate at all, expeditiously and cheaply" (*Danyluk*, para. 27). Binnie J., for the court, explained the *ESA* procedure and its benefits as follows:

> 27 … In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).
>
> 28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. **It is a rough-and-ready procedure that is wholly**

> **inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.**
>
> 29 **There are many advantages to the employee in such a forum.** The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There are corresponding disadvantages. **The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review").** The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.
>
> [Emphasis added]

[71] Notwithstanding the "rough and ready" nature of the complaint procedure, and the *ESA* officer's lack of legal training, the Supreme Court held that the *ESA* officer's adjudication of the complaint was of a judicial nature:

> 39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.
>
> 40 One distinction between administrative and judicial decisions lies in differentiating adjudicative from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur*, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.
>
> 41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. **While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts.** This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (1998), vol. 2, s. 7:1310, p. 7-7.
>
> 42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

[Emphasis added]

[72] As to the finality of an *ESA* officer's decision, Binnie J. wrote:

> 56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.
>
> 57 **Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.**
>
> [Emphasis added]

[73] Accordingly, I find that as a result of Mr. Arnold's abandonment of his complaint to the Labour Board, the Director's Decision was final for the purposes of the *Labour Standards Code*.

[74] In sum, I find that Mr. Arnold's Application is, in effect, an attempt to re-litigate issues that have already been decided, or should have been decided, by the Director under the *Code*. The Director's Decision involved the same parties, the same issues, and, by virtue of Mr. Arnold's abandonment of his complaint to the Board, the Director's Decision was final.

[75] Mr. Arnold argued that the process before the Director was inherently defective (lack of document production, discovery, and cross examination), and, as a result, employees should be permitted to also bring actions in court so that they can avail themselves of such processes. Mr. Arnold relied on *Limebeer* v. *Canadian Tire Corp. Ltd.*, 2013 ONSC 2735, and *Danyluk, supra*, in support.

[76] In *Limebeer*, the plaintiff was terminated by his employer after he admitted to taking property out of his employer's work place without authorization. He then filed a claim filed under the *ESA*, seeking termination and severance pay. The *ESA* officer received information from the employer and, one week later, and without speaking to the plaintiff, decided that the plaintiff had committed theft, and denied his claim. A few months later, the plaintiff filed an action for wrongful dismissal. The employer then brought a motion for dismissal of the action on the grounds that it was barred by s. 97(2) of the *ESA*, which states:

> An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment

[77] In the alternative, the employer argued that the action should be dismissed on the basis of issue estoppel.

[78] The court held that s. 97(2) of the *ESA* provided it with no discretion to permit the action to continue. The court went on to state:

> 23 The appropriate course for Mr. Limebeer to chart now is the following. He ought to take immediate steps to revive his appeal to the OLRB. He ought to provide these Reasons for Decision to the OLRB. He ought to exhaust all of his remedies under the ESA and, if still unsatisfied, he may then consider an Application for judicial review.
>
> 24 For what it is worth, I encourage the OLRB to adjudicate Mr. Limebeer's appeal on its merits and grant to him a full hearing. **I am concerned that this man never had a chance to challenge the employer's information before the decision maker at first instance. I am concerned that Mr. Limebeer's complaint appears to have been dismissed solely on the basis of the employer's submissions.** I am concerned that Mr. Limebeer's alleged confession to CTC has been swallowed whole by the tribunal without any consideration for Mr. Limebeer's position that it was, in essence, a false admission.
>
> 25 In the event that, notwithstanding my concerns about the interests of justice, the OLRB refuses to hear the appeal, then Mr. Limebeer has a potential remedy in terms of judicial review.
>
> 26 In the circumstances, it is unnecessary for me to address the CTC's alternative argument regarding issue estoppel. **Suffice it to say that I would have dismissed that argument. I would not have applied the doctrine. I would have allowed the court action to proceed.** I would have found that the three preconditions have been met (the same question in both proceedings; the earlier decision was final; and the same parties in both proceedings), however, I would have exercised my residual discretion to not apply the doctrine because its application here would cause a real injustice: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
>
> [Emphasis added]

[79] In *Danyluk*, the Supreme Court of Canada declined to apply issue estoppel to bar the plaintiff's court action for wrongful dismissal after her complaint under the *ESA* was dismissed. The Supreme Court held that it would be unjust to apply the doctrine, primarily because the plaintiff had not been made aware of the employer's submissions in the *ESA* claim or given an opportunity to respond to them before the *ESA* officer rejected her claim. In exercising the court's discretion to allow the action to proceed, Binnie J. wrote:

> 80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue

> estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:
>
> > The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.
>
> Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

[80] In my view, those decisions are distinguishable because the complainants in both cases were clearly denied procedural fairness. The fact that a dispute resolution process does not provide for discovery or cross-examination does not mean that it is procedurally unfair or "defective". As for the fact that the Director made her decision without financial information from O'Regan's, that relates to the substance of the decision rather than to procedural fairness. If Mr. Arnold felt that such information was essential for O'Regan's to prove that his termination fell within the circumstances outlined in s. 72(3)(d), he could have raised the issue in his complaint to the Labour Board (which he initiated but then abandoned), and, if still not satisfied, in an appeal to the Nova Scotia Court of Appeal.

[81] Although the Respondent chose to invoke the broader doctrine of abuse of process rather than issue estoppel, I find that the requirements of both are met in this case. Even where these doctrines are made out, however, the court has a residual discretion not to apply them where doing so would create an unjust or unfair result (*Danyluk*, *supra*; *Toronto (City) v. CUPE Local 79*, *supra*). In *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, the Supreme Court of Canada reviewed the factors the court should consider when deciding whether to exercise this residual discretion:

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.
>
> (a) *Fairness of the Prior Proceedings*

[40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

[41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. **These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.**

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

[42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. **We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.**

[43] Two factors discussed in *Danyluk* — "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the

> scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.
>
> …
>
> [45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.
>
> [46] There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal …
>
> [47] Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.
>
> [48] These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.
>
> [Emphasis added]

[82] In my view, applying the doctrine of abuse of process to bar Mr. Arnold's Application for wrongful dismissal would not create unfairness in either of the ways described in *Penner*. Unlike the employees in *Limebeer* and *Danyluk*, Mr. Arnold was not deprived of notice of the employer's allegations or its submissions, nor of his right to be heard during the complaint process before the Director. Moreover, while the dispute resolution process for adjudicating Mr. Arnold's claim that he was

dismissed without cause under the *Code* differs from the court process, there is no significant difference in the purpose or the stakes of the two proceedings. It would therefore not be unfair to use the results of the complaint process to preclude the subsequent court proceeding.

[83] In considering the importance of finality of litigation, the aim of avoiding duplicity, the potential for inconsistent results, avoiding unnecessary costs and use of resources, and ensuring just results, I am of the view that allowing this litigation to proceed would be an abuse of process, and the application must be dismissed.

Conclusion

[84] When Mr. Arnold was terminated without just cause by O'Regan's, he had two options. He could either pursue his rights under the unjust dismissal provisions of the *Labour Standards Code* or file a wrongful dismissal claim in court. Once Mr. Arnold decided to initiate a complaint under the *Code*, he was obligated to exhaust that remedy. Mr. Arnold's claims fell within the intended ambit of the *Code* and effective redress was available under it. As a result, the court must defer to the mechanism selected by Mr. Arnold under the *Code* to pursue his claims.

[85] In the alternative, Mr. Arnold's Application in Court is an attempt to re-litigate matters which have already been decided, or should have been decided, by the Director of Labour Standards. It would be an abuse of process to permit Mr. Arnold to pursue the same claims in a different forum after receiving a decision with which he disagrees.

[86] The Application is dismissed with costs to the Respondent. I ask that counsel for the Respondent prepare the order. If the parties are unable to agree on costs, I direct the Respondent to submit its position on costs to me within 20 days of receipt of this decision. Mr. Arnold shall have 10 days to reply from the date of receipt of the Respondent's submission on costs.

Jamieson, J.