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eCaseNote
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FACING A POTENTIAL WRONGFUL DISMISSAL SUIT? PICK YOUR BATTLES!

Korenberg v. Global Wood Concepts Ltd.
2005 CanLII 46076 (Ont. S.C.J.)

Korenberg was a night supervisor for Global Wood Concepts Ltd. ("Global"). He was dismissed by Global on the basis that he had permitted employees to take materials from the workplace and allowed employees to leave the workplace before the end of their work shifts. After his dismissal, Korenberg applied for Ontario unemployment insurance benefits. Global intervened and gave evidence. His application was initially denied because he had lost his job due to his own misconduct, but his appeal to the Board of Referees pursuant to the *Employment Insurance Act* was allowed. Global appealed this decision to the Umpire, who dismissed the appeal.

Korenberg then brought an action in the Superior Court of Justice of Ontario against Global for wrongful dismissal, and he moved for summary judgment on the basis that the only defence pleaded by Global to this action was just cause. Korenberg's position was that because just cause had already been argued at the employment insurance hearings, Global was now estopped from making the same arguments.

Issue estoppel is a legal principle that prevents a party from re-litigating an issue. There are three elements that must be met before the doctrine will be applied. First of all, the issues have to be such as to be considered "the same". Secondly, the parties must be the same. Thirdly, the decision must be a final judicial decision. If these elements are met, the court must then look at whether or not it should exercise its discretion to refuse to apply the doctrine.

In this case, Justice Harvison Young agreed with Korenberg and found that Global was estopped from presenting a defence of just cause for the dismissal. Harvison Young J. found that the first element of the test had been met "*because in the present case the facts said to constitute cause are the same ones which the defendants raised, and were rejected by the Board*". As for the second element of the test, she found that Global had both participated in the hearing and had appealed the decision from the hearing. Global attempted to argue that it had attended the hearing solely for the purpose of bringing videotape evidence of Korenberg engaging in the conduct that was the reason for his dismissal and had not fully participated. Harvison Young J. disagreed, noting that "*[t]o find that it did not participate because, in effect, it could have participated more fully and adduced more evidence does not make sense and, in effect, allows it to relitigate in a manner that the very doctrine of issue estoppel is intended to prevent, and would work an injustice in this case to the plaintiff*". In any event, she noted that by appealing the Board of Referees decision, Global then became a party to the appeal.

The third element of the test was met as the parties agreed that it was a final decision. Having found that all three elements of the test for issue estoppel were met, Harvison Young J. then concluded that this was not an appropriate case in which to exercise the court's discretion to not apply the doctrine.

The Judge's treatment of the first element (the wording of the statute and the legislative regime) is noteworthy. She said:

> *...the purpose of the UE regime is clearly not identical to that of a civil action. Its purpose is to provide benefits to employees upon loss of their jobs and to provide a speedy administrative framework to do so. The scope of compensation and the amounts available may be greater than in a civil action. In other words, the purposes of the two regimes overlap but are not identical. <u>But the legal and factual issues at stake in particular cases may be sufficiently similar that the doctrine of issue estoppel is appropriately to be applied in the interests of achieving finality and ensuring</u>*

> *that justice is done...In this case, the fact that the legal and factual issues are so similar is a factor tending in favour of its application.* *(Emphasis added)*

While this statement is made outside the context of the same-issue analysis that is used in determining whether the first step of issue estoppel is met, it appears that Harvison Young J. is suggesting that the issue does not have to be the same, but similar.

Employers should take particular note of this case because it appears to equate the legal issue of determining, for employment insurance purposes, whether a claimant has engaged in misconduct with the legal issue of determining in wrongful dismissal proceedings whether or not an employee has been dismissed for just cause. The federal *Employment Insurance Act* provides that the Commission may to take into account any misconduct on the part of a claimant when making its decision whether or not to award unemployment benefits. The question in an unemployment benefits proceeding is whether or not a claimant is entitled to receive benefits. The presence of misconduct may be considered in answering this question, but is not necessarily determinative. It is arguable that this is different from the issue that a judge faces in a wrongful dismissal action. While saying that an employee has engaged in misconduct to such an extent that he or she should be denied employment insurance benefits is not necessarily the same as saying that an employee has engaged in misconduct to an extent that there was just cause to dismiss him or her, this case suggest that once an employer argues the former, it may then be prevented from arguing the latter.

Since this case was decided in Ontario, Newfoundland and Labrador courts are not strictly bound by the reasoning. Having said that, employers who are facing potential wrongful dismissal actions may want to think twice before becoming involved in employment benefits claims. Applying the logic of Harvison Young J., it is possible that a court may prevent an employer from arguing just cause for dismissal at a wrongful dismissal proceeding when an employer has made submissions before an employment insurance board. It may be worthwhile for an employer to forego any involvement in employment insurance proceedings in order to have its day in court.

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