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COURT OF APPEAL FOR ONTARIO

DOHERTY, AUSTIN AND GOUDGE JJ.A.

B E T W E E N :	)	Kevin Fox and
	)	Kenneth Alexander
CORRY HEYNEN	)	for the appellant
Plaintiff	)	
(Appellant)	)	
	)	Darryl A. Cruz
and	)	Jane A. Langford
	)	for the respondent
FRITO LAY CANADA LTD. and	)	
PEPSI-COLA CANADA LTD.	)	
	)	
Defendant	)	
(Respondents)	)	
	)	Heard: May 11, 1999

On appeal from the judgment of MacPherson J. dated November 12, 1997.
GOUDGE J.A.:

[1] After 23 years of working for the respondent Frito-Lay Canada, the appellant was fired on April 1, 1993. As a result, he sought compensation pursuant to the Employment Standards Act, R.S.O. 1990, c.E-14, (the Act). His claim under s.57 of the Act for termination pay was denied, but his claim under s.58 of the Act for severance pay was allowed. A year later he commenced this action for wrongful dismissal.

[2] MacPherson J. dismissed the action at trial finding that the denial of the appellant's claim for termination pay met all three requirements for the application of the doctrine of issue estoppel. He went on to indicate that had he reached the merits of the action he would have found that the respondent employer did not have just cause to dismiss the appellant and would have awarded damages for the period of notice that the parties had agreed was reasonable.

[3] There are two issues on this appeal.

[4] First, the appellant argues that the trial judge erred in finding that the "same question" requirement of issue estoppel is met in this case. He says that the question decided in the denial of his claim for termination pay is different from that presented in his civil action. For the reasons that follow I agree.

[5] Second, the respondent submits by way of cross-appeal that the trial judge erred in finding that it did not have just cause to dismiss the appellant. For the reasons that follow, I disagree.

THE FACTS

[6] For the 23 years of his employment the appellant worked for the respondent as a driver-salesman. He was acknowledged to be an excellent employee. Indeed, following his termination his immediate supervisor gave him a glowing letter of reference.

[7] On January 25, 1993, the appellant began a medical leave of

absence that was scheduled to last until March 8, 1993. On February 12, 1993, while still on leave, he was sentenced for two criminal convictions unrelated to his work. Instead of the suspended sentence he expected, he received a sentence of four months incarceration followed by eighteen months probation. Assuming good behaviour in jail, his expected release date was May 1, 1993. The appellant advised his employer of this state of affairs and on March 8th the respondent extended his leave temporarily while it considered what to do.

[8] On April 1, 1993, the respondent terminated the appellant. The termination letter read as follows:

> Basis[sic] the current information we have on file, your return to work was to have been March 8 1993 from your medical short-term disability. Since that time we have put you on a temporary leave of absence while we have investigated your return to work status. Since you are not able to return to work at this time, you are terminated for failure to return to work per Company Policy.

[9] After he was released from jail on May 1, the appellant asked the respondent to reconsider its decision, but it refused to do so. Subsequently, in October 1993, he filed his application under the Act seeking some compensation for his 23 years of service.

[10] His first claim was for termination pay in lieu of notice pursuant to s.57 of the Act. That section prescribes escalating periods of required notice or pay in lieu thereof depending upon the years of service of the terminated employee. It also specifies certain circumstances where this notice is not required. The relevant parts of s. 57 read as follows:

> 57(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,
>
> …
>
> (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
>
> and such notice has expired.
>
> …
>
> (10) Subsections (1) and (2) do not apply to,
>
> …
>
> (c) an employee who has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been

condoned by the employer;

(d) a contract of employment that is or has become impossible of performance or is frustrated by a fortuitous or unforeseeable event or circumstance; …

[11] The appellant's second claim was for severance pay under s.58 of the Act. In this section, termination includes both dismissal and lay-off. It provides for severance pay of up to 26 weeks regular wages for employees with more than five years of service who are terminated by an employer of sufficient size to have a payroll of at least $2.5 million. This section also sets out circumstances in which no severance pay is required. The relevant parts of s.58 are as follows:

58(1) In this section,

…

"termination" means,

(a) a dismissal, including a constructive dismissal,

(b) a lay-off that is effected because of a permanent discontinuance of all of the employer's business at an establishment, or

(c) a lay-off, including a lay-off effected because of a permanent discontinuance of part of the business of the employer at an establishment, that equals or exceeds thirty-five weeks in any period of fifty-two consecutive weeks,

and "terminated" has a corresponding meaning.

(2) Where,

…

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

…

(4) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work

week multiplied by the sum of,

(a) the number of the employee's completed years of employment and

(b) the number of the employee's completed months of employment divided by 12.

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week.

…

(6) Subsections (2), (3) and (4) do not apply to,

…

(c) an employee who has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer.

[12] The decision of the Employment Standards Officer on these two claims was communicated to the appellant on April 14, 1994, in the following letter:

This confirms that I have denied your claim for termination pay per Clause 57-(10)(d) of the Employment Standards Act. However, I have upheld your claim to severance pay.

As explained to you, based on the average weekly wage rate of $827.15, your severance pay entitlement is $18,955.52 gross.

The Employer will forward the said amount to you, less legal deductions, within 2 weeks. If you have not received the said payment by May 10, 1994, please call me.

[13] Neither the appellant nor the respondent sought to appeal this decision as permitted by the Act. However, a year later the appellant commenced this litigation claiming damages for wrongful dismissal.

ANALYSIS

[14] The first issue is whether the denial of the appellant's claim for termination pay under the Act triggers the application of the doctrine of issue estoppel thereby precluding this lawsuit. This doctrine prevents a party from relitigating an issue already decided in an earlier proceeding. The three requirements of the doctrine are well settled. They are: a) that the prior proceeding must have decided the same question as is in issue in the subsequent proceeding; b) that the decision said to create the estoppel be judicial and final; and c) that the

parties to the earlier decision be either the same or the privies of the parties in the subsequent proceeding.
[15] At trial the appellant took no issue with the third of these requirements. As to the second requirement, MacPherson J. determined that it was met by the decision of the Employment Standards Officer. His reasoning was subsequently confirmed by the decision of this court in Danyluk v. Ainsworth Technologies Inc. (1998), 42 O.R. (3d) 235 (Ont.C.A.).
[16] Hence, before this court the appellant properly conceded that only the first requirement remained in issue. The question is whether the issue in this wrongful dismissal litigation is the same as the issue decided in the previous proceedings, namely, the decision of the Employment Standards Officer.
[17] Relying primarily on the reasons of Abella J.A. in Rasanen v. Rosemount Instruments Ltd. (1994), 112 D.L.R. (4th) 683 (Ont. C.A.), MacPherson J. answered this question in the affirmative. He found that the issue in the wrongful dismissal litigation was the same as that determined against the appellant when his claim under the Act for termination pay was dismissed.
[18] In reaching this conclusion MacPherson J. did not have the benefit of this court's subsequently released reasons for judgment in Minott v. O'Shanter Development Co. [citation to be added], which explains and builds upon Rasanen. Laskin J.A. writing for the court in Minott made clear that Rasanen ought not to be read to stand for the proposition that termination under the Employment Standards Act always raises the same question as just cause at common law.
[19] Rather, he explained that the determination of whether the same issue requirement has been met depends on a careful analysis of the factual context and the statutory standard applied in the earlier proceeding. The specific issue determined in that earlier proceeding can thus be identified and compared to the issue to be resolved in the subsequent proceeding.
[20] This method of analysis is consistent with the observation of Morden A.C.J.O. in Rasanen, supra, at p.687 that the courts have taken a "fastidious approach" to the "same question" test. Although at a high level of generalization, two proceedings might seem to address the same question, this requirement of issue estoppel is met only if on careful analysis of the relevant facts and the applicable law the answer to the specific question in the earlier proceeding can be said to determine the issue in the subsequent proceeding.
[21] It is in this light that the "same question" requirement of issue estoppel must be addressed. The Employment Standards Officer made clear that the appellant's claim for termination pay was dismissed based on s.57(10)(d) of the Act. That section provides that no termination pay need be paid in the case of a "contract of employment that is or has become impossible of performance or is frustrated by a fortuitous or unforeseeable event or circumstance".
[22] This statutory standard is quite different from the legal question in the wrongful dismissal action, namely, whether the employee engaged in any misconduct that was sufficiently wrongful to constitute just cause for his dismissal. The finding that the appellant's contract of employment had become impossible to perform due to an unforeseeable event says nothing about the

relative wrongfulness of the employee's conduct. The finding by the Employment Standards Officer simply does not determine the question presented for decision in this action. The issues are not the same.

[23] In this action the employer did not rely on the common law doctrine of frustration. It was not pleaded and does not appear to have been raised at trial, where the only issue to be resolved on the merits of the litigation was whether the appellant was wrongfully dismissed, not whether the employment contract was frustrated. Hence, at trial the doctrine of frustration was not the basis of the issue estoppel argument. Likewise it was not argued on appeal. Hence, it is unnecessary to decide whether the statutory standard set out in s.57(10)(d) of the Act duplicates the common law doctrine for the purposes of the "same issue" analysis.

[24] In the same way, the Employment Standards Officer did not base the dismissal of the appellant's claim for termination pay on s.57(10)(c), which denies termination pay to an employee found guilty of wilful misconduct. Nor does the appellant argue that his wrongful dismissal action must succeed because his successful claim for severance pay necessarily reflects a finding that the statutory denial of entitlement for an employee guilty of wrongful misconduct (found in 58(6)(c)) did not apply to him. Hence, it is unnecessary to decide whether in the context of these facts the statutory standard of wilful misconduct found in both s.57(10)(c) and s.58(6)(c) raises the same issue as that to be decided in a wrongful dismissal action.

[25] In summary, given the way this action has been framed by the parties, I conclude that the Employment Standards Act proceedings did not determine the same issue as that to be addressed in this litigation. This requirement of issue estoppel has not been met and the doctrine therefore does not preclude the action. The appeal on this issue must be allowed.

[26] Turning to the issue raised by way of cross-appeal, MacPherson J. determined that the respondent did not have just cause to dismiss the appellant. As I have indicated I agree with this conclusion.

[27] The appellant was absent from work on sick leave from January 25 to March 8, 1993. He was on unpaid leave of absence from March 8 to April 1 when he was terminated. From then until his release from jail on May 1 he was absent without leave.

[28] While there is no doubt that this 30-day absence was due to the appellant's misconduct, MacPherson J. was correct in finding that it did not rise to the level of just cause for the appellant's dismissal.

[29] The appellant's misconduct which caused the absence was entirely unrelated to his employment. At trial the respondent offered two reasons for being unable to accommodate the absence. First, it was restructuring its sales force and required its employees to bid for the new routes on the basis of seniority. However, as the trial judge pointed out, the respondent was in touch with the appellant while he was in jail and could easily have solicited his preferences for a new route.

[30] MacPherson J. addressed the second reason offered as follows:

> The second reason Hostess advanced for terminating Mr. Heynen on April 1 was the difficulty his long absence posed in terms of coverage of his route. I acknowledge that this was a difficulty. However, in the context of 23 years of loyal and effective service, and bearing in mind that Hostess serviced his route with a replacement driver-salesman for the nine weeks immediately before April 1, I would label this difficulty "minor inconvenience"; it was, in my view, far removed from any fair interpretation of "just cause."

[31] I agree with this conclusion. In light of the appellant's length of service, his unblemished record and the demonstrated ability of the respondent to cover his absence there was nothing approaching just cause for his termination.

[32] I would, therefore, dismiss the cross-appeal.

[33] The parties are agreed that the appropriate payment in lieu of notice is an additional 10» months pay over and above the funds already received by the appellant as a result of the allowance of his claim for severance pay.

CONCLUSION

[34] The appeal is therefore allowed with costs. The action for wrongful dismissal succeeds. The respondents shall pay to the appellant the amount referred to above together with pre-judgment interest. Failing agreement on the rate of interest, the Court may be spoken to. There would seem to be no reason why the appellant should not have his costs of the action.

[35] The cross-appeal is dismissed with costs.

Released: September 27, 1999 "D.D." "S.T. Goudge, J.A."
"I agree Doherty, J.A."
"I agree Austin, J.A."