Ontario Supreme Court
Randhawa v. Everest & Jennings Canadian Ltd.,
Date: 1996-05-24

SURAT RANDHAWA

and

EVEREST & KENNINGS CANADIAN LTD.

Ontario Court of Justice (General Division) Sharpe J.

Judgment – May 24, 1996.

B.A. Lecker, for plaintiff.

S.L. Crawford, for defendant.

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1 May 24, 1996. SHARPE J. (orally): – In this action for wrongful dismissal, the plaintiff has moved for summary judgment on the ground that there is no triable issue. The central issue is the application of the doctrine of issue estoppel as elaborated by the Court of Appeal in *Rasanen v. Rosemount Instruments Ltd.* (1994), 1 C.C.E.L. (2d) 161 (Ont. C.A.). The question is whether the defendant employer is estopped from asserting the defences it has pleaded in light of a decision adverse to its position by a Board of Referees pursuant to the *Unemployment Insurance Act.*

2 The background facts are as follows. The defendant is a manufacturer of wheelchairs and rehabilitation equipment. The plaintiff was employed by the defendant from February 1989. Initially the plaintiff worked as a sub-assembler. He then applied and received a promotion to the position of cut saw operator in January 1994. He remained in that position until early April 1994 when he was transferred to the position of machine operator. The reason for his transfer was that he developed a rash that appears to have been caused by a solvent used in the cut saw operator position. The evidence of both parties is that the plaintiff wished to return to his former position of a sub-assembler. The company could not accommodate the plaintiff as that position had been filled by another employee.

3 In mid-April the rash the plaintiff had developed flared up again. At this point there appears to be a significant difference on the evidence between the plaintiff and the defendant. It is clear that the plaintiff was absent from work from April 19. It is his evidence that he advised

his supervisor that he would be absent to attend a doctor's appointment and that he subsequently advised his supervisor that he was required to be away for a certain period of time on his doctor's advice. This is disputed by the defendant's evidence. There is also a dispute as to whether the plaintiff was asked to provide medical evidence with respect to his absence. The plaintiff's evidence is that he attempted to contact Ms. Caruk, the defendant's Personnel Officer, on a number of occasions, that he left messages and that she failed to respond. It is clear that on behalf of the company Ms. Caruk sent a telegram to the plaintiff on April 28 asking him to call immediately. It is admitted by the company that the telegram was sent to the wrong address and not received at that time by the plaintiff. In early May the plaintiff was advised that his employment had been terminated.

4 It is the plaintiff's position that his absence from work was justified and that he took appropriate steps to notify the employer of the reasons for the absence. The defendant's position is that the plaintiff either quit his job by absenting himself from work or that his failure to report for work gave the defendant grounds for termination.

5 It is my view that in light of the different version of facts presented, but for the issue of the Board of Referees' decision and the doctrine of issue estoppel, this would not be an appropriate case for summary judgment. It is clear that the parties have substantially different evidence as to the events and that if the factual issues have not been resolved by the Board of Referees' decision, a trial would be required.

6 I turn, then, to the proceedings before the Board of Referees. It is Ms. Caruk's evidence that in mid-June the company received a notice from Employment and Immigration Canada indicating that the plaintiff's claim for unemployment insurance benefits had been allowed. The company was advised that pursuant to the statute it had a right to appeal that decision to a Board of Referees. The company decided that it should appeal the decision and Ms. Caruk took appropriate steps to initiate the appeal. She attended before the Board of Referees in July of 1994 when the hearing was adjourned in order to permit the plaintiff to obtain legal advice. She attended again on February 10, 1995 before the Board of Referees for the hearing. The hearing was held before a three person board pursuant to the *Unemployment Insurance Act.* The issue before the Board was whether the plaintiff was entitled to benefits or whether he was disqualified pursuant to s. 28(1) of the Act which provides:

> A claimant is disqualified from receiving benefits under this part if he lost his employment by reason of his own misconduct or if he voluntarily left his employment without just cause.

As indicated by Ms. Caruk's affidavit, by a letter she wrote prior to the hearing and by the record of the decision of the Board of Referees which is before me, the company took the position that the plaintiff was disentitled primarily on the ground that he had quit his employment. After hearing evidence from both parties, the Board made the following finding:

> The Board finds the claimant did not lose his employment because of the alleged offence of not reporting to work. The claimant attempted to follow the steps provided by the employer but was unable to make contact with the correct individual. The employer was unaware of his calls and sent the termination telegraph to a wrong address. The use of the incorrect address as well as the unanswered calls precipitated the firing. Both parties wanted a positive decision but due to the poor communications practised, this did not happen and the claimant lost his job.

The Board of Referees unanimously concluded that the defendant's appeal should be dismissed and the earlier determination that the plaintiff is entitled to benefits be maintained.

7 The decision of the Court of Appeal in *Rasanen* elucidates the doctrine of issue estoppel in a similar context. As indicated by the reasons of Abella J.A., issue estoppel is intended to preclude relitigation of issues that have been determined in prior proceedings. The purpose of the doctrine is first, that there be an end to litigation and secondly, that the same party not be harassed twice for the same cause. Abella J.A. clearly distinguishes issue estoppel from what is known as cause of action estoppel or res judicata which precludes the bringing of an action when the same cause of action has already been determined by a court of competent jurisdiction. Abella J.A.'s decision applies the following three-part test for determining whether the doctrine of issue estoppel applies, taken from *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (H.L.) at page 935:

> 1. That the same question has been decided.
>
> 2. That the judicial decision which is said to create the estoppel was final; and,
>
> 3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The first question is whether the same issue been decided. The defendant argues that the answer to that question is no. In her very forceful submission, counsel for the defendant submitted that the question before the Board of Referees was entitlement to benefits under a government scheme while in this action, the issue is the rights of an employee at common law against his former employer. It was her submission that the statutory test of misconduct is different from the common law test of cause and that the issue decided by the Board was distinguishable from the issue which is raised by the pleadings in this case.

8 It is my view that this argument fails to make the distinction made by Abella J.A. between issue estoppel and cause of action estoppel or res judicata. The res judicata principle is a relatively narrow one which precludes the litigation of the same cause. It is clear from the Court of Appeal's decision that issue estoppel is a broader doctrine which may embrace the same factual issue even where that factual issue was decided in a context leading to different legal consequences.

9 While the legal characterization of the issue to be addressed by the Board of Referees is not identical to the issue raised by the pleadings here, it is clearly similar in law. Factually, it is identical, namely did the plaintiff voluntarily leave his job or did he misbehave in failing to notify his employer for the reason of his absence.

10 Precisely the same factual issue is raised in this action. The plaintiff and the defendant put their respective versions of the events to the Board of Referees and the Board of Referees found in favour of the plaintiff. It is my view that in the light of the findings made by the Board the legal position of the defendant in this law suit is untenable. Abella J.A.'s reasons in *Rasanen,* clearly contemplate the situation where different legal consequences or a different legal characterization will flow from the same factual question. At page 173 she states:

> There is no doubt that under the *Employment Standards Act* this question has a different linguistic and quantitative formulation than at common law. But a different characterization and process does not, in this case, mean a different question.

Later on she states as follows:

> Even if one accepts the argument that the referee did not have to decide whether there was a fundamental breach, he did have to decide whether reasonable alternate employment was offered, a crucial question in the wrongful dismissal action. In deciding

> that there was a reasonable alternative, the referee decided the central question of whether or not entitlement existed in the wrongful dismissal action.

These statements of principle contemplate the situation before me, namely, a common core of a factual dispute lending itself to various specific legal classifications or categorizations. In the end, both proceedings focus on the same questions, namely, did the plaintiff quit his employment or did he behave in a manner which might be described as misconduct or cause having failed to notify the employer of the reason for his absence. Accordingly, I find, on the basis of the reasoning in the *Rasanen* case that the same issue was before the Board of Referees.

11 The second question is whether the judicial decision was final. There are two steps to this second question, the first is the question of whether the proceedings were judicial. In my view the proceedings before the Board of Referees were no less judicial than those before the tribunal considered in the *Rasanen* case. Abella J.A. deals at length with the application of the issue estoppel to administrative tribunals and concludes that the doctrine does apply. I find that the proceedings here fit the test that is outlined in the *Rasanen* case. It was submitted in argument that the proceedings here should not be regarded as judicial in that evidence was not given under oath. In my view, that is not sufficient to deprive these proceedings of being characterized as judicial. First, I note from the record of the decision that a recording of the proceedings was taken. This indicates a certain level of formality. Moreover, it is my view that absence of an oath is the sort of informality contemplated by the principles enunciated by Abella J.A. (at page 174):

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action.

12 The second point is whether the decision is final. In my view the decision of the Board of Referees was final. The statute provides that the decision is subject to an appeal. Otherwise it is implicit in the statutory scheme that the decision is determinative of the rights of the parties. The absence of an explicit statutory statement that the decision is final does not deprive the

decision of being qualified as final when that is implicit and indeed obvious from the entire scheme of the Act.

13 The third issue is whether the parties to the judicial decision or their privies were the same. The employer chose to intervene in the Unemployment Insurance proceeding. It had a statutory right to become a party. It exercised that right and it became a party. It was the adversary to the plaintiff in those proceedings.

14 I note finally that there may well be situations where one would hesitate to apply the doctrine of issue estoppel where a party participated in an administrative hearing having insignificant consequences and the result of that hearing was then raised later in a suit which had enormous consequences. It may be that in such a situation one would have to consider carefully whether the party had an adequate opportunity to present its case. However, I am satisfied that in the circumstances before me, it is entirely appropriate to apply the doctrine and to hold that the defendant did have an adequate opportunity. We are dealing with a relatively low level employee. The amount at issue in this suit is small. The employer consciously chose to challenge the right of the employee to secure Unemployment Insurance benefits upon the same ground that is now raised in this suit. The employer forced a quasi judicial hearing on that point, presented its case and I can see no reason not to hold the employer bound by virtue of having participated in that hearing. The policies identified by Abella J.A. in *Rasanen,* namely the need to have an end to litigation and to avoid undue harassment of one party by another, are fully met in the circumstances. It follows that because of the Board of Referee's decision the defendant is precluded from raising the defence of either voluntary quitting or cause.

15 The remaining issues are those relating to damages. In argument, counsel for the plaintiff indicated that the claim for aggravated and punitive damages was being abandoned and that the matter was brought before this court solely for damages arising from the notice period. Accordingly the only two remaining issues are the length of the notice period and the question of mitigation. It is submitted by the defendant that there should be a trial on those issues and that the case is not appropriate for a Rule 20 determination.

16 With respect to the first issue, namely the question of the notice period, the defendant has placed no facts in dispute. There is case law that such an issue can be resolved on a summary judgment motion: see, e.g. *Walton v. Volpi* (1994), 6 C.C.E.L. (2d) 125 (Ont. Gen.

Div.). The parties are agreed that the legal standard is that defined by the decision of the Court of Appeal in *Bardal v. The Globe & Mail (The),* [1960] O.W.N. 253 (H.C.). The factors to be considered are:

(1) the character of the employment,

(2) the age of the employee,

(3) the position he held,

(4) his tenure and

(5) the availability of work.

As there appear to be no facts in dispute on any of those points, I find that this is an appropriate case to dispose of the matter by way of summary judgment.

17 The plaintiff is aged 51, the position he held was that of an hourly employee involving some skill but it was hardly a highly skilled position. He had no managerial responsibility. He had held the position for just over five years. With respect to availability of work there is really no evidence apart from the fact that the plaintiff has been unable to find work which, given the economic climate prevailing, is hardly surprising. In my view, looking at these various factors with particular reference to the age of the plaintiff and the cases that have been cited, an appropriate notice period would be twenty weeks.

18 The level of remuneration is said by the plaintiff to be $23,000. The defendant's evidence is that he was paid $9.67 a week. This results in a slight discrepancy and I accept the defendant's evidence of $9.67 an hour for a forty hour week which produces a weekly salary of $386.80. At twenty weeks, this comes to $7,736. The plaintiff is also entitled to benefits at $76.01 a month, $380.05, for a total of $8,116.05.

19 The second question is that of mitigation. Again, the defendant's position is that there must be a trial on this issue. However, this is a situation where the onus on the defendant. The defendant has submitted no evidence, and relies on the fact that the plaintiff travelled to India for family reasons in mid-August and on certain alleged inconsistencies in the plaintiff's evidence as to his effort to find work. The plaintiff has given evidence that he did attempt to find work. Given the fact that the notice period is a relatively short one, that the onus on this issue is on the defendant and that I am entitled to take a good hard look at the evidence, I find

that the issue of mitigation is of minimal significance and that the defendant has failed to make out a case warranting a trial on that issue.

20 Accordingly, I find the plaintiff entitled to summary judgment in the amount of $8,116.05.

Addendum: Since delivering these oral reasons, the decision of Hoillet J. in *Schweneke v. Ontario* (April 25, 1996) [reported at (sub nom. *Schweneke v. Ontario (Minister of Education)* 2 O.T.C. 183 (Gen. Div.) has come to my attention. In that case, Hoillet J. held that the decision of an Umpire under the *Unemployment Insurance Act* bound the parties under the doctrine of issue estoppel as enunciated in *Rasanen,* providing further authority for the conclusion I have made.

Motion granted.