

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES WONG

Plaintiff

-and-

GWICH'IN TRIBAL COUNCIL

Defendant

Defendant's Application for Summary Judgment

Heard at Yellowknife: August 27, 2019

Written Reasons filed: December 3, 2019

**REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K.M. SHANER**

Counsel for the Applicant/Defendant: Jonathan P. Rossall, Q.C.

Counsel for the Plaintiff/Respondent: Colleen Verville

Date: 2019 12 03

Docket: S-0001-CV 2014 000104

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REASONS FOR JUDGMENT

[1] This is the Defendant's application for summary judgment.

BACKGROUND

[2] The Defendant (GTC) employed Mr. Wong as its Chief Financial Officer, starting in 2011. Mr. Wong says that on August 26, 2013, the President of GTC demanded his immediate resignation and threatened that if he did not provide it, his employment would be terminated. Mr. Wong submitted the resignation letter. The President of the GTC accepted it on August 28, 2013. Mr. Wong remained at his employment for four more days following the resignation, to assist with the transition.

[3] On October 8, 2013, Mr. Wong made a written complaint to the Employment Standards Officer under s. 66(1) of the *Employment Standards Act*, SNWT 2007, c 13. He set out the circumstances leading to his resignation, that is, that it was made under duress and therefore, involuntary. He asserted he had, in effect, been terminated from his position without cause or notice. He sought termination pay in the amount of four months' salary and payment of a performance bonus in accordance with the terms of his employment contract.

[4] Mr. Wong did not seek legal advice before filing the complaint. In this application he deposed that he did not have the financial means to hire a lawyer at the time.

[5] In a written decision rendered February 14, 2014, the Employment Standards Officer said she had reviewed what Mr. Wong and the GTC submitted in relation to the complaint. She did not provide Mr. Wong with a copy of the GTC's response to his complaint, so he did not have an opportunity to reply to the GTC's submission. The Officer found that Mr. Wong's resignation was voluntary. Mr. Wong was provided with a copy of the decision and advised of his right to appeal.

[6] Mr. Wong filed an appeal with the Employment Standards Appeal Office on February 21, 2014. He subsequently received summary legal advice from a lawyer at the outreach clinic at the Legal Aid Commission. After receiving that advice, he withdrew the appeal.

[7] This lawsuit was filed on July 3, 2014. In it, Mr. Wong alleges his resignation was involuntary, having been made under the threat of dismissal and therefore, he was constructively dismissed without cause. He seeks damages for wrongful dismissal, special and exemplary damages, interest and costs.

[8] The GTC says Mr. Wong resigned voluntarily.

ISSUES

[9] The GTC asks for summary judgment on the basis that the issues raised in the suit were determined definitively by the Employment Standards Officer and thus, the doctrine of issue estoppel precludes Mr. Wong's claim. It argues that the nature of the issue and the record are such that the Court can make a fair and just decision without the necessity of a trial.

[10] Mr. Wong argues, first, that this case is not appropriate for summary judgment because a wider level of inquiry is demanded to determine whether Mr. Wong was, as he claims, constructively dismissed from his position. Second, he submits that issue estoppel is not applicable because the Employment Standards Officer's decision was not final and, accordingly, the requirements for its application are not met. Third, the GTC should be estopped from bringing this application by reason of delay in bringing it forward, as well as in answering undertakings from examinations for discovery. Finally, Mr. Wong says that even if issue estoppel applies, the Court should exercise its discretion to allow the lawsuit to proceed and dismiss the GTC's application.

[11] The issues can be stated as follows:

- a. Is this an appropriate case for summary judgment in that the existing record allows the Court to render a fair and just decision without the need for oral evidence?;
- b. Does issue estoppel apply?;
- c. If issue estoppel applies, should the Court exercise its discretion in favour of Mr. Wong and not apply it?

ANALYSIS

Is this an appropriate case for summary judgment?

[12] A defendant's application for summary judgment is governed by rr. 175 and 176 of the *Rules of the Supreme Court of the Northwest Territories*:

175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

[13] This Court has adopted the principles in *Hryniak v Mauldin*, [2014] SCC 7, [2014] 1 SCR 87, 2014 CarswellOnt 640 in applying these rules. *Leishman v Hoechsmann et al*, 2016 NWTSC 27 (CanLii), 2016 CarswellNWT 37; *Callidus v Deepak International et al*, 2016 NWTSC 71 (CanLii), 2016 CarswellNWT 7. The question is whether there is a genuine issue that requires a trial to resolve. Guidance on this question was provided by *Hryniak* as follows:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts,

and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[14] In my view, the nature of both the issue and the record makes this an appropriate case for summary judgment proceedings.

[15] This application does not require the Court to review the correctness or reasonableness of the Employment Standards Officer's decision, nor consider and determine the merits of either party's position in the main lawsuit. Rather, what must be determined is whether issue estoppel precludes Mr. Wong's lawsuit for wrongful dismissal. This can be readily determined from the record. The content and basis of Mr. Wong's complaint under the *Employment Standards Act*, the relief he sought, the issue that was before the Employment Standards Officer, the Officer's decision, and the steps Mr. Wong took to appeal, are all undisputed. There is no need for the Court to assess credibility to make the legal and factual findings required to determine, fairly and justly, the question posed by the GTC in this application.

Does Issue Estoppel Apply?

[16] Issue estoppel precludes re-litigation of issues and material facts previously decided in another proceeding. *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20, [2001] 2 SCR 460; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23, [2003] 3 SCR 7. Its underlying purpose has been stated many times. It was described this way by Binnie, J. in *Danyluk*:

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. . . . An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative

litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided

[17] It is for the moving party to prove that the requirements for issue estoppel are met. *Danyluk*, at para 33.

a. Threshold Question: Is the decision a judicial one?

[18] There is a fundamental threshold requirement that the previous decision be made judicially. To be considered a “judicial” decision, three distinct requirements must be present. First, it must be made by an institution that is capable of receiving and exercising judicial authority. Second, as a matter of law, the particular decision must be one that was required to be made in a judicial manner. Third, as a question of mixed fact and law, the decision was made in a judicial manner. *Danyluk*, para 25.

[19] The Employment Standards Officer is appointed under s. 53 of the *Employment Standards Act* and is authorized by the *Act* to exercise both administrative and adjudicative functions. Section 61(1) of the *Act* provides that an employee can make a written complaint to the Officer on a number of grounds, including that the employer terminated the employment contract without notice or payment in lieu of notice. The Officer exercises an administrative function in investigating the complaint. If the Officer is unable to resolve the complaint by mediation then, using the information gathered on investigation, she makes a decision on the merits. This is clearly an adjudicative function.

[20] GTC’s counsel filed a number of cases in which an authority equivalent to the Northwest Territories’ Employment Standards Officer was found to have made a judicial decision. *Danyluk*, *supra*; *Wong v Shell Canada Ltd*, [1995] AJ 979, 35 Alta LR (3d) 1; *Thukral v Durabilt Windows & Doors Inc*, 2017 ABPC 237. In reviewing the powers and authorities of the Employment Standards Officer under the Northwest Territories’ legislation, I am satisfied that all of the foregoing requirements are met and that the Officer’s decision in this case was made judicially.

b. The Requirements of Issue Estoppel

[21] There are three requirements which must be satisfied to establish issue estoppel, namely: the same issue was decided in the previous proceeding; the decision creating the estoppel was final; and the parties were the same. *Danyluk*, para 25; *Toronto (City) v CUPE*, para 23.

[22] There is no question that the parties were the same and so the focus is on whether the other two requirements have been satisfied.

i. Same issue

[23] This has been met. The Employment Standards Officer decided the same key issue that arises in this lawsuit, and upon which the entire lawsuit hinges. That issue is, of course, whether Mr. Wong was constructively dismissed or whether he voluntarily resigned, as the GTC contends. The Employment Standards Officer found that Mr. Wong voluntarily resigned from his position. While the Statement of Claim contains more detailed allegations than the complaint regarding what led Mr. Wong to tender his resignation, the essential points, as well as the issue, are the same.

ii. Final decision

[24] In *Ernst & Young Inc v Central Guaranty Trust Co.*, 2006 ABCA 337, [2007] 2 WWR 474 the Alberta Court of Appeal discussed the meaning of a “final” decision, stating:

[37] The second precondition for issue estoppel is met if a decision is final in the sense that it determines the question between the parties conclusively. A decision is final if the court that made it “has no further jurisdiction to rehear the question or to vary or rescind the finding”.

[25] There is nothing in the *Employment Standards Act* authorizing the Officer to rehear, vary or rescind this decision.

[26] It is noteworthy that s. 70 of the *Act* provides that the Officer can revoke or amend an “order” at any point up to the disposition of an appeal, if there is one.

70. (1) The Employment Standards Officer may revoke or amend an order made under this Act or a declaration made under section 95.

(2) If the order or declaration has been appealed to an Adjudicator, the Employment Standards Officer may revoke it at any time before the Adjudicator makes an award.

(3) If the Employment Standards Officer revokes an order, the Employment Standards Officer shall return any money paid to the Employment Standards Officer under the order.

[. . .]

[27] This does not, in my view, give the Officer the power to revisit a decision such as the one here, where the employee's complaint is dismissed. The wording of s. 70 on its own leads to the conclusion that the Officer's power to revoke or rescind is limited to monetary orders made against an employer. This is supported further by ss. 67 and 69. Section 67 requires the Officer to serve the employee with notice of any decision which determines the employer has not contravened s. 61 of the *Act*.

[28] Section 69 sets out the required contents of an "order", which clearly contemplate that an "order" is limited to orders made against an employer:

69. (1) An order made under this Act must

(a) name the employer to whom the order is directed;

(b) name the one or more employees in respect of whom the order is made; and

(c) specify the amount payable in respect of each employee named in the order.

[29] The Officer's decision was subject to review by an adjudicator through the appeal process set out in the *Employment Standards Act*. Mr. Wong filed an appeal, but withdrew it before it could be heard, opting instead to file this lawsuit. This militates strongly in favour of a finding that the decision was final. This is analogous to the situation in *Danyluk*, where it was held (at para 57) that the employee's failure to take advantage of an internal review procedure rendered an Ontario employment standards officer's decision final.

[30] I find that the Employment Standards Officer's decision was final. All of the requirements of issue estoppel have been met.

Should the Court Exercise its Discretion in Favour of Mr. Wong?

[31] The Court may exercise its discretion and refuse to apply issue estoppel where its application would result in injustice. The party asking the Court to apply its discretion bears the burden of proving the injustice. *Danyluk*, at paras 62-64; *Schwencke v Ontario*, [2000] OJ 298 (CA) at para 38, 47 OR (3d) 97.

[32] There is no hard and fast list of factors to which the Court must adhere in determining if it should exercise its discretion. It is a highly contextual exercise. However, the case law, most notably, *Danyluk*, offers guidance with respect to what the relevant factors may be. These include:

- a. the wording of the enabling statute;
- b. the purpose of the legislation;
- c. the availability of an appeal;
- d. the procedural safeguards within the process;
- e. the decision-maker's expertise;
- f. the circumstances giving rise to the prior decision; and
- g. any potential injustice that might result from the application, or non-application, of issue estoppel.

[33] Mr. Wong also argues that issue estoppel is an equitable doctrine and that the GTC's delay in bringing this matter forward and the fact that it has not yet satisfied all of the undertakings given during examinations for discovery should preclude it from obtaining relief. In my view, neither of these things operate against the GTC in this application.

[34] First, as pointed out by Binnie, J. in *Danyluk*, at para 63, issue estoppel is a common law doctrine, not an equitable one. This is perhaps a small point, but it is important.

[35] Second, and more to the point, the question of whether the Officer's decision gives rise to issue estoppel is entirely independent from how either of the parties has conducted themselves throughout the lawsuit. This is far different than the situation where, for example, one party complains about delay while it has itself not been diligent in fulfilling its obligations under the *Rules*. The fact is, Mr. Wong sought relief in another forum, giving rise to a legitimate and substantive legal issue. A delay in fulfilling undertakings, though it may have other implications for a party, does not change this.

[36] I now turn to the other factors.

a. The Wording of the Employment Standards Act

[37] Mr. Wong points to s. 103 of the *Employment Standards Act*, which states:

No civil remedy of an employee against his or her employer for arrears of wages is suspended or affected by this Act.

[38] As borne out in authorities from other jurisdictions, this does not preclude the application of issue estoppel. In *Wong v Shell Canada*, for example, the Alberta Court of Appeal considered an almost identical provision and concluded that it does not preclude the application of issue estoppel, stating (at para 16):

[...] The legislature has provided the employee with a choice of forum. The employee may commence an action or may pursue remedies under the Code. The legislation does not provide that both remedies may be pursued by the employee in respect of the same complaint.

[39] The Court in *Wong v Shell Canada* noted that the same conclusion was reached by the Ontario Court of Appeal in *Rasanen v Rosemount Instruments Ltd*, [1994] OJ 200, 1994 CarswellOnt 960, 17 OR (3d) 267. In that case, the Ontario Court of Appeal was considering a provision identical to that in the Northwest Territories' *Employment Standards Act*.

b. The Purpose of the Legislation

[40] Like many administrative regimes, the *Employment Standards Act* provides an economical, fast and user-friendly means of resolving disputes through the Employment Standard Officer at the first instance.

[41] Arguably, the process before the Officer is better suited to straightforward disputes, rather than to the determination of more complex employment issues. Proceedings before the Officer are conducted on paper. The Officer does not hear *viva voce* evidence and thus, the statements put before the Officer are not tested under cross-examination. There are no formal disclosure requirements equivalent to what would be required in a trial, nor pre-hearing examinations for discovery. This necessarily limits each party's ability to test the veracity and reliability of evidence and to analyze the extent to which the evidence is capable of supporting

the other's position in proceedings before the Officer. It also limits the Officer's ability to assess the credibility and reliability of the evidence before her.

[42] All of that said, it is important to bear in mind that the processes the legislature created in the *Employment Standards Act* represent a valid alternative for resolving many types of employment disputes. These are no less legitimate than those of the Court. Each offers different procedures, protections and, in some cases, remedies. In the case of wrongful termination, both have jurisdiction to decide the issue. Ultimately, it is up to the aggrieved party to choose which forum best suits the issues in a particular complaint.

[43] A factor put forth by Mr. Wong is remedy, particularly, the disparity between the damages he seeks in this suit and the relief the Employment Standards Officer can grant. In this lawsuit he seeks, in addition to damages for wrongful dismissal, exemplary and special damages, interest and costs.

[44] The Employment Standards Officer does not have jurisdiction to award exemplary and special damages, interest or costs, but she can, under s. 66 of the *Act*, award "compensation" for wrongful dismissal if she finds the employee has been terminated without cause or notice. The Officer can award up to 12 months' worth of compensation. The term "compensation" is not defined and, other than limiting it to the 12 months, there is no specified monetary limit on the amount. Presumably, Mr. Wong would have been awarded compensation in an amount equivalent to the notice provisions in his employment contract if the Officer had found in his favour.

[45] In contrast to those of the Employment Standards Officer, the powers of an adjudicator on appeal, as well as the appeal process itself, are far more robust. The adjudicator may determine the process to be followed, subject to the *Act*. Adjudicators are vested with the powers of a board under the *Public Inquiries Act*, RSNWT 1988 c P-14. They can hear *viva voce* testimony and, upon the request of a party, may issue binding notices to witnesses to attend and give evidence under oath or affirmation. They can compel the attendance of witnesses. They are expressly required by s. 75(4) of the *Employment Standards Act* to give both parties an opportunity to be heard and to present evidence. Under s. 79(1) adjudicators can confirm, revoke, amend or substitute anything that is subject to appeal and they may award costs.

c. Availability of Appeal

[46] There is no question that Mr. Wong could – and did – bring an appeal under the *Act*. His decision to withdraw the appeal in this case works against him.

d. The Safeguards Available to the Parties

[47] The Employment Standards Officer, like other administrative decision-makers, is bound by the rules of fairness and natural justice. However, the process before the Officer has limited structure and there are no other procedural safeguards expressed in the *Act*.

[48] One of the issues Mr. Wong raises is that he was not given an opportunity to review or respond to the GTC's submissions before the Officer made the decision. Respectfully, however, this did not render the process manifestly unfair. Mr. Wong knew why he had been asked to resign. In any event, any unfairness of this nature would have been corrected on appeal, had Mr. Wong continued with it. He would have had a full opportunity to be heard, to hear the GTC's evidence and submissions, and to reply.

e. The Officer's Expertise

[49] The *Employment Standards Act* does not expressly require the Officer to have specialized skills or experience in employment or contract law as a condition of appointment. It is to be expected that there will be times when there are legal and factual issues so complex that they cannot be fairly and justly addressed in that forum. It must be recognized, however, that the Officer is required to administer the *Act* and she is called upon to rule on the validity of complainants, including whether employment has been terminated without cause. This necessarily implies the Officer will have knowledge of the law surrounding wrongful dismissal.

[50] In this case, the Officer was called upon to decide a relatively straightforward factual issue, namely, whether Mr. Wong resigned voluntarily or was dismissed. Mr. Wong provided her with a clear statement of the facts leading up to the resignation and his position on why it was not voluntary. There is nothing to suggest the question required a significantly different skill set to decide.

f. The Circumstances Leading to the Prior Proceeding

[51] Mr. Wong deposes that when he submitted the complaint to the Employment Standards Officer he was unemployed and he could not afford a lawyer.

[52] Other courts have noted that employees apply for termination pay from a position of economic vulnerability, having lost their employment. The employee's decision to use the administrative forum may be driven by urgent circumstances which, in turn, impede the employee's ability to put the case forward adequately. *Perez v GE Capital Technology Management Services Canada Inc* [1999] OJ 3175, at para 41, 1999 CarswellOnt 2644; *Danyluk*, para 78.

[53] Respectfully, I find Mr. Wong's broad statement that he was unemployed and could not afford a lawyer is insufficient to prove he had no choice but to go to the Employment Standards Officer. It lacks detail. There is no evidence as to whether he attempted to obtain legal advice before he filed his complaint, nor is there evidence to indicate he was without the means or otherwise lacked the ability to obtain at least summary legal advice.

[54] It is also important to note that Mr. Wong was the Chief Financial Officer of a large organization. Based on his description of his employment responsibilities, he was required to have and use considerable skill and judgment. In other words, he possesses a degree of sophistication that arguably makes him less vulnerable.

g. The Potential Injustice

[55] This requires the Court to step back and look at all of the circumstances and ask whether applying issue estoppel would result in an injustice. *Danyluk*, at para 80.

[56] The process under the *Employment Standards Act* was something Mr. Wong chose. The GTC responded in this forum. I am mindful that there are limitations on the jurisdiction of the Employment Standards Officer, as well as the relatively informal nature of the process before her. Nevertheless, what is offered under the *Employment Standards Act* is, as I said, a legitimate alternative to the courts. Unlike the applicant in *Danyluk*, it cannot be said in this case that Mr. Wong was denied the opportunity to be heard and to have the fundamental issue in his case fairly adjudicated. Further, being dissatisfied with the answer he received from the Officer, he had the opportunity to – and did – appeal the decision to a much more structured and robust process. Mr. Wong declined to follow through on that. Again, that was his choice.

[57] In all of the circumstances, I am not satisfied that the application of issue estoppel in this case would cause injustice to Mr. Wong. I therefore decline to exercise my discretion in his favour.

CONCLUSION

[58] The GTC's application for summary judgment is granted.

[59] Costs normally follow the event. If the parties wish to make submissions on costs, however, they may arrange to do so through the Supreme Court Registry.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
3rd day of December 2019

Counsel for the Applicant/Defendant: Jonathan P. Rossall, Q.C.

Counsel for the Plaintiff/Respondent: Colleen Verville

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