Minott v. O'Shanter Development Company Ltd.

[Indexed as: Minott v. O'Shanter Development Co.]

42 O.R. (3d) 321
[1999] O.J. No. 5
Docket No. C22056

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Court of Appeal for Ontario
Carthy, Laskin and Goudge JJ.A.
January 7, 1999

Employment -- Wrongful dismissal -- Cause for dismissal -- Long-term loyal employee dismissed from position as maintenance worker for not reporting to work on day following two-day suspension -- Evidence supporting trial judge's finding that employee merely confused about days on which suspension effective -- Even if employee wilfully refused to report for work for one day employer not having cause for summary dismissal given length and quality of employment and lack of warning that employee's job in jeopardy.

Employment -- Wrongful dismissal -- Issue estoppel -- Employee dismissed for refusing to report for work for one day -- Employee applying for unemployment insurance benefits -- Board of Referees found that employee disqualified from receiving benefits for three weeks because he lost job "by reason of his own misconduct" under s. 28(1) of Unemployment Insurance Act -- Finding of Board of Referees not giving rise to issue estoppel barring employee's action for wrongful dismissal -- Issue whether employee lost job by reason of misconduct for purposes of s. 28(1) of Unemployment Insurance Act not same issue as whether just cause for dismissal existed -- Parties in both proceedings not same as employer did not appear as party in proceedings before Board of Referees -- Court having discretion to refuse to apply issue estoppel

where to do so would cause unfairness or work injustice -- Even if requirements of issue estoppel met application of doctrine would be unfair in circumstances -- U nemployment Insurance Act, R.S.C. 1985, c. U-1, s. 28(1).

Employment -- Wrongful dismissal -- Notice -- Maintenance worker dismissed at age 43 after 11 years' service -- Court of Appeal has not set upper limit of 12 months' notice for all non-managerial or non-supervisory employees -- Application of "rule of thumb" of one month's notice for each year's service inappropriate as detracting from necessary flexibility of approach to calculation of reasonable notice -- Trial judge's award of 13 months' notice not unreasonable.

The plaintiff was employed by the defendant for 11 years as a maintenance worker. Throughout that period, he was a good worker and a loyal employee. Because of a minor dispute with his supervisor, the plaintiff was suspended for two days. When he did not report for work on the day following his suspension, he was summarily dismissed. He applied for unemployment insurance benefits. The Unemployment Insurance Commission decided that he was disqualified from receiving benefits for six weeks because he had lost his job "by reason of his own misconduct" under s. 28(1) of the Unemployment Insurance Act. The plaintiff appealed the Commission's decision to a Board of Referees. A hearing was held, and the plaintiff attended and gave evidence. The defendant was given notice of the hearing and the right to be present, but chose not to attend. The Board upheld the finding that the plaintiff had lost his job by reason of his own misconduct, but concluded that the period of disqualification was too severe. The

Board reduced the period of disqualification from six weeks to three weeks. The plaintiff did not exercise his right of appeal.

The plaintiff brought an action for damages for wrongful dismissal. At the beginning of the trial, the defendant moved to dismiss the action on the ground of issue estoppel, arguing that the finding of the Board of Referees conclusively determined that the plaintiff had been fired for cause. The

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trial judge dismissed the motion. After a trial, she concluded that the plaintiff had been wrongfully dismissed and determined that the appropriate notice period was 13 months. The defendant appealed.

Held, the appeal should be dismissed.

The trial judge believed the plaintiff's assertion that he believed he had been suspended for Tuesday, November 13 and Wednesday, November 14, rather than for Monday, November 12 and Tuesday, November 13 as claimed by the defendant, and that his failure to report for work on November 14 was the result of a misunderstanding. That conclusion was open to her on the evidence. Even if the plaintiff knew he was expected to work on November 14, however, his refusal to do so did not give the defendant cause to dismiss him. Wilfully missing a day's work might, in a rare case, justify dismissal, but it did not justify dismissal in this case, where the plaintiff had a long record of loyal service and was not given any warning that his job was in jeopardy.

The three requirements of issue estoppel are: (1) that the same issue 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. In this case, neither the first requirement nor the third requirement was met.

A finding that an employee has lost his job by reason of his own misconduct under s. 28(1) of the Unemployment Insurance Act is not the same question as whether his employer had just cause to fire him. Misconduct under the Act cannot automatically be equated with just cause for dismissal at common law. Just cause for dismissal at common law demands a broader inquiry than the search for misconduct under the Act. To decide whether an employer had just cause for dismissal, a court may have to take into account a host of considerations: the seriousness of the employee's misconduct; whether the misconduct was an isolated incident; whether the employee received warnings; the employee's length of service; how other employees were

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disciplined for similar incidents; and any mitigating considerations. Misconduct under the Act focuses more narrowly on the employee's actions that led to the dismissal.

The Board of Referees' decision met the finality component of issue estoppel, even though the plaintiff could have appealed the decision to an umpire. The Board of Referees did not have the power to revise or rescind its decision. Thus, the Board's finding of misconduct decided the plaintiff's right to unemployment insurance benefits subject to appeal. The Board's decision, therefore, was final. The Board's decision was also a judicial decision. The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel even though the tribunal's procedures do not conform to the procedures in a civil trial. Provided the tribunal's procedures meet fairness requirements and provided the tribunal is carrying out a judicial function, its decision will be a judicial decision. Fairness requirements were satisfied because the plaintiff knew the case he had to meet, he was given a reasonable opportunity to meet it and he was given an opportunity to state his own case. Moreover, the Board was carrying out a judicial function.

Deciding whether the requirement that the parties be the same has been met causes difficulty where, as here, one of the parties to the second proceeding is entitled to participate actively in the first proceeding and to exercise fully the rights of a party in that proceeding, but chooses not to do so. In such cases, whether a person is a party for the purpose of issue estoppel depends on its degree of participation. Because the defendant did not actively participate in the hearing before the Board of Referees, it was not a party for the purpose of issue estoppel. While the defendant did, at the invitation of the Commission, file a written statement in response to the plaintiff's application for benefits, this limited participation was not sufficient to make the defendant a party for the purpose of issue estoppel.

The doctrine of non-mutual issue estoppel, which has its roots in American jurisprudence, should not be applied. That doctrine permits a judgment to operate in favour of a non-

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party. Applied here, it might permit an employer to refrain from participating in a hearing before a Board of Referees yet rely on a favourable Board decision in a subsequent wrongful dismissal action. By adopting a "wait and see" approach to the Board's decision, an employer could rely on issue estoppel if the employee lost, but be no worse off if the employee won, because issue estoppel could not be applied against an employer who had not had its day in court. Applying non-mutual issue estoppel would allow the employer to "have it both ways". In these cases, issue estoppel should be mutual. An employer should only be able to invoke issue estoppel for a favourable decision if issue estoppel could also be invoked against it for an unfavourable decision.

The court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue. Applying issue estoppel to the findings of an administrative tribunal such as a Board of Referees under the Employment Insurance Act, S.C. 1996, c. 23 to foreclose a subsequent civil proceeding may be unfair or work an injustice. Even if the prerequisites for issue estoppel were met in this case, it would be appropriate to exercise discretion to refuse to apply issue estoppel to the finding of misconduct made by the Board of Referees.

A trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact.

The Ontario Court of Appeal has not set an upper limit of 12 months' notice for all non-managerial or non-supervisory employees. Moreover, a rule of thumb that an employee is entitled to one month's notice for every year worked should not be applied. To do so would undermine the flexibility that must be used in determining the appropriate notice period. The trial judge's award of 13 months' notice was not unreasonable

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considering the plaintiff's age, his lack of formal education, his limited skills and the recession in the construction industry. Even if it was slightly outside of the high end of an acceptable range, to reduce it would amount to unwarranted tinkering.

Angle v. M.N.R., [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397, 74 D.T.C. 6278, apld

Bardal v. Globe and Mail Ltd. (The) (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.); Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147, 23 B.L.R. (2d) 70, 14 C.C.E.L. (2d) 1, 95 C.L.L.C. 210-038 (C.A.), revg (1995), 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15, 94 C.L.L.C. 14,032 (Gen. Div.); Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683, 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024 (C.A.) [leave to appeal refused (1994), 19 O.R. (3d) xvi, 7 C.C.E.L. (2d) 40n, 178 N.R. 80n (S.C.C.)], consd

Other cases referred to

Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41 (H.L.); Australian Securities Commission v. Marlborough Gold Mines Limited (1993), 177 C.L.R. 485 (Aust. H.C.); Bullen v. Proctor & Redfern Ltd. (1996), 20 C.C.E.L. (2d) 36, 47 C.P.C. (3d) 280 (Ont. Gen. Div.); Canada (Attorney General) v. Jewell (1994), 175 N.R. 350, 94 C.L.L.C. 14,046 (F.C.A.); Canada (Attorney General) v. Tucker, [1986] 2 F.C. 329, 66 N.R. 1, 11 C.C.E.L. 129 (C.A.); Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20, 71 C.P.R. (3d) 417; Carl Zeiss Stiftung v. Rayner Keeler Ltd., [1967] 1 A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, 110 Sol. Jo. 425; Fakhari v. Canada (Attorney General) (1996), 197 N.R. 300 (F.C.A.); Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.); Hough v. Brunswick Centres Inc . (1997), 28 C.C.E.L. (2d) 36, 9 C.P.C. (4th) 111 (Ont. Gen. Div.); Isaacs v. M.H.G. International Ltd. (1984), 45 O.R. (2d) 693, 3 O.A.C. 301, 7 D.L.R. (4th) 570, 4 C.C.E.L. 197 (C.A.); Knight v. Indian Head School

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Division No. 19, [1990] 1 S.C.R. 653, 83 Sask. R. 81, 69 D.L.R. (4th) 489, 106 N.R. 17, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010 (sub nom. Indian Head School Div. v. Knight); MacDonald Tobacco Inc. v. Canada (Employment and Immigration Commission), [1981] 1 S.C.R. 401, 121 D.L.R. (3d) 546, 36 N.R. 519, 82 C.L.L.C. 14,115; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 7 O.R. (3d) 480n, 91 D.L.R. (4th) 491, 134 N.R. 386, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 11 C.P.C. (3d) 140 (sub nom. Lefebvre v. HOJ); McKay v. Eaton Yale Ltd. (1996), 31 O.R. (3d) 216, 31 C.C.E.L. (2d) 295, 97 C.L.L.C. 210-002 (Gen. Div.); Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19 , 1 C.P.C. (4th) 49 (Ont. Gen. Div.); Schweneke v. Ontario (1996), 1 C.P.C. (4th) 35 (Ont. Gen. Div.); Toronto Police Services Board v. Toronto Police Assn. (1998), 71 L.A.C. (4th) 289; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 123 Man. R. (2d) 1, 152 D.L.R. (4th) 1, 219 N.R. 161, 159 W.A.C. 1, 36 C.C.E.L. (2d) 1, 97 C.L.L.C. 210-029, 3 C.B.R. (4th) 1; Wood v. Nor-Sham (Markham) Hotels Inc. (1998), 35 C.C.E.L. (2d) 206 (Ont. Gen. Div.)

Statutes referred to

Employment Insurance Act, S.C. 1996, c. 23, ss. 30(1), 46(1), 51, 114(1), 115
Unemployment Insurance Act, R.S.C. 1985, c. U.1 (rep. 1996, c. 23, s. 155), ss. 1, 28(1), 42, 79(1), 80

Rules and regulations referred to

Employment Insurance Regulations (Employment Insurance Act), SOR/96-322, ss. 78-80, 83(1)

Authorities referred to

England, Christie and Christie, Employment Law in Canada, 3rd ed. (1998), p. 14.93
Fisher, "Measuring the Rule of Thumb in Wrongful Dismissal Cases" (1998), 31 C.C.E.L. (2d) 311
Goodman and Murray, "Ties that Bind at Common Law: Issue Estoppel, Employment Standards and Unemployment Insurance

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Adjudication" (1997), 24 C.C.E.L. (2d) 291, p. 310
Grossman, "No Estoppel", 7 E.M.P. Bul. 2 (April 1997)
Harris, Wrongful Dismissal, loose-leaf, s. 4.36(g)
Holmested and Watson, Ontario Civil Procedure, vol. II, s. 21
Levitt, The Law of Dismissal in Canada, 2nd ed. (1992), 808.11
Restatement of Law (Second), Judgment 2d (1982), ss. 28(3), 83(2)(e), p. 279 and para. 28 "Exceptions to the General Rule of Issue Preclusion"
Rudner, The 1998 Annotated Employment Insurance Statutes (1997), p. 607
Spencer-Bower, Turner and Handley, The Doctrine of Res Judicata, 3rd ed. (1996), pp. 76, 110-11

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APPEAL from a judgment for the plaintiff in an action for damages for wrongful dismissal.

Robert A. Maxwell, for appellant.
James C. Morton and Shelly Brown, for respondent.

The judgment of the court was delivered by

LASKIN J.A.: -- This appeal of a wrongful dismissal award raises these main issues: first, does a long-term employee's deliberate refusal to report for work, even for a single day, give an employer cause for dismissal; second, does the finding of a Board of Referees under the Employment Insurance Act, [See Note 1 at end of document.] S.C. 1996, c. 23, as amended, that an employee lost his job "by reason of his own misconduct" prevent the employee from maintaining an action for wrongful dismissal; third, should courts calculate the period of reasonable notice to which an employee is entitled if dismissed without cause by using the rule of thumb that one year's service equals one month's notice, and has this court established an upper limit of 12 months' notice for all non-managerial or non-supervisory employees?

The respondent Timothy Minott worked in the maintenance department of the appellant O'Shanter Development Company Ltd.

for 11 years. He was a good worker and a loyal employee. Until the last week of his employment in November 1990, O'Shanter had no reason to complain about him. In that last week, however, because of a minor dispute with his supervisor, Minott took two days off without permission. He was suspended for two days. When he did not show up for work on the day following his suspension, he was fired.

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Minott applied for unemployment insurance benefits. A Board of Referees found that Minott's misconduct disqualified him from receiving benefits for three weeks. He then sued O'Shanter for damages for wrongful dismissal. At the beginning of trial, O'Shanter moved to dismiss the action on the ground of issue estoppel, arguing that the finding of the Board of Referees conclusively determined that Minott had been fired for cause. The trial judge, Molloy J., dismissed the motion [reported (1997), 30 C.C.E.L. (2d) 123]. After a one-day trial she concluded that Minott had been wrongfully dismissed. She awarded him damages of $40,537.47, equivalent to 13 months' salary. O'Shanter appeals on three grounds:

(1) Minott's misconduct gave O'Shanter cause to fire him. Therefore the trial judge erred in concluding that Minott had been wrongfully dismissed.

(2) The trial judge should have applied this court's judgment in Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (C.A.) and dismissed Minott's claim on the basis of issue estoppel.

(3) The trial judge's award was excessive and was arrived at by applying incorrect principles.

I would not give effect to any of these arguments. I would therefore dismiss O'Shanter's appeal.

The First Issue: Did the Trial Judge Err in Concluding that Minott Had Been Wrongfully Dismissed?

To put the relevant facts in context, I will discuss this issue first, although the question of issue estoppel logically

precedes it. O'Shanter owns and manages apartment buildings. In 1990, it managed about 3,200 residential units. To maintain and repair the units, O'Shanter had its own maintenance department. Minott worked in that department doing repair work, which included masonry and plastering. He was hired in 1979 and fired on November 14, 1990, at age 43.

During his 11 years of employment, work was assigned to Minott daily by a maintenance co-ordinator, Ria Ramjatten. He was given a work order by Ramjatten, went to the work site and did the repairs, usually with little or no supervision. In July 1989, Bill Scott became the manager of O'Shanter's maintenance department and, therefore, Minott's supervisor. Scott claimed that he believed in progressive discipline, including counselling and oral and written warnings over an extended period of time. Dismissal was "a last resort". Regrettably, Scott abandoned these precepts in his treatment of Minott.

The dispute that led to Minott's dismissal began with the late delivery of some Canada Savings Bonds and ended with his inability to purchase a new car to get him to and from work. O'Shanter offered all of its employees the opportunity to buy Canada Savings Bonds through payroll deductions. Minott took advantage of this opportunity, and by the end of October 1990 he had accumulated $5,000 in bonds. He decided to use this money to buy a new car because his old car had broken down. He had arranged to pick up his new car on November 1, but, because of a problem at the bank, the bonds were not cashed until November 7.

Minott left work a little early on the 7th to get his money. He asked Ramjatten for the following day off so that he could pick up his new car and arrange for his insurance and a licence. Minott testified that Ramjatten told him taking the day off should not be a problem because nothing urgent needed to be done. Although she had no authority to give days off, Molloy J. held:

> It would have been completely out of character and absolutely inconsistent with this person's work record for over 11 years to have simply stayed home from work and blatantly lied about

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having had permission to do so. I accept as a fact that he believed, and believed on reasonable grounds, that he was entitled and authorized to take the day off.

Unfortunately, Minott did not receive the entire $5,000 from his Canada Savings Bonds. Earlier in the year he had been off work for two months because of eye surgery and, to get through this period, he had borrowed money from O'Shanter. The company deducted the amount owing on its loan from the $5,000. Thus Minott had less money than he had anticipated when he went to pick up his new car on November 8, and the dealer refused to go ahead with the sale. Minott was disappointed and, perhaps understandably, annoyed at his employer. He did not report for work on Friday, November 9 or on Monday, November 12. On the 12th, Scott suspended him for two days.

Scott and Minott differed over which two days Minott was suspended for. Scott claimed that he had suspended Minott for Monday, November 12 and Tuesday, November 13, expecting him to report to work on Wednesday, the 14th. Minott thought that he was suspended for the 13th and 14th. Molloy J. found Minott "to be an honest and straightforward witness", though confused about the details of what occurred between November 8 and November 14 because he was so upset. She held, "I think it reasonable that there was some confusion in Mr. Minott's mind as to whether he was suspended for Monday and Tuesday or for Tuesday and Wednesday."

Minott did call into work on November 14, which the trial judge found to be consistent with his understanding that he was suspended that day. When he called he spoke to Scott and the two had heated words. Minott refused to apologize for his behaviour and Scott fired him.

O'Shanter submits that Scott was justified in firing Minott. This submission has two branches: the trial judge's finding that Minott was confused about when his two days suspension started is not reasonably supported by the evidence; and a wilful refusal to report for work, even for a day, justifies dismissal for cause. On the first branch, Minott's evidence on cross-examination provides support for the trial judge's

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finding. Minott was asked, "and you are not sure which day you were suspended, perhaps, but, in any event, it was for the 12th," and he replied, "the two days following." Accepting this evidence, the trial judge characterized what occurred as a "gross misunderstanding". I am not persuaded that she erred in her characterization. On that ground alone O'Shanter's submission that Minott was dismissed for cause must fail.

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But even if Minott knew that he was expected to work on November 14, yet wilfully refused to do so -- and, admittedly, there is a good deal of evidence to support such a finding -- his refusal did not give O'Shanter cause to dismiss him. O'Shanter argues that its actions should be judged against Minott's conduct for the entire week between November 8 and November 14, and not just in the light of his conduct on the 14th alone. Minott, however, had received a two-day suspension for his conduct up to November 12. I do not accept that Minott's wilful refusal to report to work for one further day can elevate conduct that warranted a two-day suspension into just cause for dismissal.

Wilfully missing a day's work might in a rare case justify dismissal. But it does not justify dismissal in this case, where Minott otherwise had a long record of loyal service and was not given any warning that his job was in jeopardy. I agree with Molloy J.'s observation that "[t]he decision to terminate employment, particularly one of a long-standing employee, is not one which should be taken lightly." Even looking at Minott's misconduct over the entire week of November 8, this "aberrant episode", as the trial judge called it, did not warrant his dismissal. Minott was not blameless for what occurred -- a fact recognized by the trial judge -- but his misconduct was not serious enough to justify his dismissal for cause. I would not give effect to this ground of appeal.

Second Issue: Did the Trial Judge Err in Failing to Dismiss Minott's Claim on the Basis of Issue Estoppel?

O'Shanter relies on the principle of issue estoppel to bar Minott's action for wrongful dismissal. O'Shanter argues that whether Minott lost his job by reason of his own misconduct is

the same question as whether the company had just cause to fire him. Because the Board of Referees found that Minott did lose his job by reason of his own misconduct, O'Shanter argues that Minott ought to be prevented from relitigating the same question in civil proceedings. Just as this court in Rasanen v. Rosemount Instruments Ltd. held that proceedings under the Employment Standards Act, R.S.O. 1990, c. E.14, can give rise to issue estoppel, so too, submits O'Shanter, should these proceedings under the Employment Insurance Act. Molloy J. rejected this argument and so do I.

I will first discuss the general principles underlying issue estoppel and then apply them to this case. Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of res judica: see generally Holmested and Watson, Ontario Civil Procedure, loose-leaf, vol. II, at s. 21.17ff. Res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. No question of cause of action estoppel arises in this case. Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.

The overall goal of the doctrine of res judicata, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation" (Holmested and Watson, at s. 21 17[3]). The policy considerations underlying issues estoppel were discussed in the leading Canadian case on the subject, Angle v. M.N.R., [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, see the dissenting judgment of Laskin J. at p. 267 S.C.R., pp. 550-51 D.L.R.:

> The basis of issue estoppel as well as a cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see New Brunswick Railway Co. v. British and French Trust Corp.

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Ltd., [1939] A.C. 1, at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (Carl Zeiss case, [1967] 1 A.C. 853, per Lord Upjohn at p. 946, per Lord Guest at p. 933); that it is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and . . . the right of the individual to be protected from vexatious multiplication of suits and prosecutions . . ." (Spencer-Bower and Turner, Res Judicata, 2nd ed. (1969), p. 10).

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Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in Rasanen affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same. In Angle, Dickson J. set out three requirements, relying on English authority (at p. 254 S.C.R., p. 555 D.L.R.):

> Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:
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> > . . . (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.

These three requirements have consistently been applied by Canadian courts. With these three requirements in mind I turn to the facts of this case. After Minott was fired he applied in writing to the Canada Employment and Immigration Commission for unemployment insurance benefits. An insurance officer with the Commission decided that Minott was disqualified from receiving benefits for six weeks because he had lost his job "by reason of his own misconduct" under s. 28(1) of the previous statute,

the Unemployment Insurance Act, which stated,

28(1) 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. [See Note 2 at end of document.]

Minott appealed the Commission's decision under s. 79(1) [See Note 3 at end of document.] of the Act to a three-person Board of Referees. The Board held a hearing. Minott attended and gave evidence. O'Shanter was given notice of the hearing and the right to be present, but chose not to attend. The Board, however, had in its file a written statement from O'Shanter, which indicated that Minott had received written warnings about his attendance, and that he had been offered "suitable employment that could have been reached by public transportation" but did not seem interested.

The Board upheld the finding of the insurance officer that Minott had lost his job by reason of his own misconduct, but concluded that the period of disqualification was too severe. The Board, therefore, reduced the period of disqualification from six weeks to three weeks. Under s. 80 [See Note 4 at end of document.] of the Act an appeal lies from a Board of Referees to an umpire for errors of law or jurisdiction or for erroneous findings of fact made perversely or capriciously. Minott, however, chose not to exercise this right of appeal.

Against this factual background I consider the three requirements for issue estoppel. In summary I agree with Molloy J. that the finding of the Board of Referees does not give rise to issue estoppel because neither the first requirement -- that the issue be the same -- nor the third requirement -- that the parties be the same -- was met.

(i) Was the issue the same?

Issue estoppel first requires that the issue in the subsequent litigation be the same as the issue decided in the previous litigation and that "its determination must have been necessary to the result in the litigation" (Holmested and

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Watson, at s. 21 23[1]) In other words, issues estoppel covers fundamental issues determined in the first proceeding, issues that were essential to the decision. Issue estoppel applies to issues of fact or of law or of mixed fact and law.

The same issue requirement may apply at two levels in proceedings before the Board of Referees: the underlying or evidentiary findings on which the finding of misconduct was based, and the finding of misconduct itself. [See Note 5 at end of document.] However, neither the insurance officer nor the Board of Referees made any evidentiary findings. For example, neither the officer nor the Board made a finding on whether Minott was mistaken about the days he was suspended for or whether he deliberately refused to work on November 14. Had any evidentiary findings been made, the parties might have been precluded from relitigating those findings in the subsequent wrongful dismissal action, if the other requirements of issue estoppel had been satisfied. Those findings would not have disposed of the wrongful dismissal action, but they may have narrowed it.

In this case, however, we only have then the Board's finding of misconduct. That is a finding of mixed fact and law: see generally Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; and Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.). If the Board's finding answers the same question that has to be answered in the wrongful dismissal action, then O'Shanter has met the first requirement of issue estoppel. Is, then, the question whether Minott lost his job by reason of his own misconduct the same question as whether O'Shanter had just cause to fire him? Molloy J. said that it was not the same question. She reasoned:

> It is not every incident of misconduct which may constitute cause for dismissal. Other factors may be considered in determining whether a particular incident of misconduct warrants dismissal, e.g. the seriousness of the misconduct, the number of similar incidents, whether or not there have been warnings, and whether this was an isolated incident in

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an otherwise long and unblemished employment history. Thus, although behaviour by an employee which is sufficient to constitute cause for dismissal at common law will necessarily be "misconduct" within the meaning of the Act, the reverse is not necessarily the case. Cause of dismissal is a broader concept than "misconduct". There will undoubtedly be some fact situations in which the determination by the Board of Referees as to misconduct will answer precisely the same question as is before the court on wrongful dismissal (e.g. where there is no dispute as to seriousness of the alleged misconduct and the real issue is whether it in fact occurre whether it constituted cause for dismissal at common law. That is not the same question as was before the Board of Referees which looked only at whether there had been misconduct.

Her reasons emphasize the importance of focusing on the statutory standard of misconduct in the factual context in which it is to be applied. A finding of misconduct under the Act does not necessarily mean that an employer has just cause for dismissal. Conversely -- and here I disagree with the trial judge -- an employer may have just cause for dismissal even though no misconduct is found. The authorities on misconduct under the Act demonstrate these propositions. In the recent case of Fakhari v. Canada (Attorney General) (1996), 197 N.R. 300 at p. 302 (F.C.A.), Robertson J.A. noted that an employee's actions could be characterized as misconduct under the Act though an employer would not have just cause for dismissal:

An employer's subjective appreciation of the type of misconduct which warrants dismissal for just cause cannot be deemed binding on a Board of Referees. It is not difficult to envisage cases where an employee's actions could be properly characterized as misconduct, but the employer's decision to dismiss that employee will be rightly regarded as capricious, if not, unreasonable.

Conversely, an employee who is incompetent or persistently careless may be dismissed for cause though no misconduct is made out, because misconduct requires a wilful or reckless disregard of an employer's interest: see generally Canada

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(Attorney General) v. Tucker, [1986], 2 F.C. 329, 66 N.R. 1 (C.A.) per MacGuigan J.A.; Rudner, The 1998 Annotated Employment Insurance Statutes (1997), at p. 607; and Canada (Attorney General) v. Jewell (1994), 175 N.R. 350, 94 C.L.L.C. 14,046 (F.C.A.). In short, misconduct under the Act cannot automatically be equated with just cause for dismissal at common law.

Just cause for dismissal at common law demands a broader inquiry than the search for misconduct under the Act. To decide whether an employer had just cause for dismissal, a court may have to take into account a host of considerations: the seriousness of the employee's misconduct; whether the misconduct was an isolated incident; whether the employee received warnings; the employee's length of service; how other employees were disciplined for similar incidents; and any mitigating considerations. Misconduct under the Act seems to focus more narrowly on the employee's actions that led to the dismissal.

Admittedly, as Molloy J. points out, some conduct (for example, stealing from an employer) may justify both a finding of misconduct under the Act and a finding of just cause for dismissal. But that is not the case here. The Board in this case equated Minott's refusal to work in November 1990 with misconduct under the Act. He was dismissed after refusing to work on November 14 and therefore the Board held that he lost his job by reason of his own misconduct. The Board then reduced the period of disqualification because of Minott's 11 years of service and because of the problems he had in getting his money for his Canada Savings Bonds and in buying a new car. The Board viewed these considerations as relevant to the severity of the disqualification, not to the question of misconduct. As Molloy J. observed, in a wrongful dismissal action these considerations are relevant to the question of just cause. This analysis shows that misconduct under the Act and just cause for dismissal at common law do not necessarily raise the same question. On the facts of this case, the answer to the former does not determine the answer to the latter.

O'Shanter relies on this court's reasoning in Rasanen in

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support of its position. In Rasanen an employee claimed eight weeks' termination pay under the Employment Standards Act and also sued his employer for damages for wrongful dismissal. A referee under the statute found that the employee was not entitled to termination pay because he was "laid off after refusing an offer by his employer of reasonable alternative work". Later, in the wrongful dismissal action, the trial judge dismissed the employee's claim because of issue estoppel.

The trial judge's decision on issue estoppel was upheld by the majority of the panel in this court. Abella J.A. held that the question whether the employee was entitled to termination pay was the same question to be decided in the wrongful dismissal action. In his concurring reasons, Morden A.C.J.O. took a narrower view. He held that because the wrongful dismissal action was to be decided on the basis of constructive dismissal, "the decision of the referee that the appellant had refused 'an offer by his employer of reasonable alternative work' . . . is a decision on the same question which inevitably has to be decided in the action and is one that goes to the root of the action" (at p. 293).

But Morden A.C.J.O. also pointed out that if the wrongful dismissal action were viewed as a case of "straight unjust dismissal" then "the application of issue estoppel presents some difficulties" (at p. 294). Indeed, in that context, he was not persuaded that the question would be the same because if the issue was just cause the effect of refusing an offer of reasonable alternative work could not be looked at in isolation. "[O]ther considerations such as the length of time the employee had to consider the offer" would have to be taken into account (at p. 294). Therefore, I do not read the ratio of Rasanen as standing for the broad proposition that termination under the Employment Standards Act always raises the same question as just cause at common law. Whether the same issue requirement is met depends on the factual context in which the statutory standard is applied. In this sense, Rasanen is no different from the present case. Considering the factual context in which the Boar d of Referees found Minott had lost his job by reason of his own misconduct, I am not persuaded that the same issue requirement of issue estoppel has been met.

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(ii) Was the decision of the Board of Referees a final judicial decision?

This requirement has two components: the Board's decision must be a final decision and it must be a judicial decision. The Board's decision meets the finality component of issue estoppel, even though Minott could have appealed the decision to an umpire. Spencer-Bower, Turner and Handley, The Doctrine of Res Judicata, 3rd ed. (1996), at p. 76, sets out the governing principle:

> A judicial decision, otherwise final, is not the less so because it is appealable. If it is incapable of revision by the court which pronounced it, it is final in that court, which is all that is required to be shown, and it is immaterial that it is capable of being rescinded or varied by an appellate court.

The Board of Referees under the Employment Insurance Act, as under the previous Act, does not have the power to revise or rescind its decision. Thus, the Board's finding of misconduct conclusively decided Minott's right to unemployment insurance benefits subject to appeal. The Board's decision, therefore, was final.

In my opinion, the Board's decision was also a judicial decision. The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel though the tribunal's procedures do not conform to the procedures in a civil trial. Provided the tribunal's procedures meet fairness requirements and provided the tribunal is carrying out a judicial function, its decision will be a judicial decision. The words of L'Heureux-Dub J. in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 at p. 685, 69 D.L.R. (4th) 489 at p. 512, bear stating:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the

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> requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action, 4th ed. (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case a bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word.

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Fairness requirements were satisfied because Minott knew the case he had to meet, he was given a reasonable opportunity to meet it and he was given an opportunity to state his own case. Procedural differences between a hearing before a Board of Referees and a civil trial do not make the Board's decision any less "judicial". But these differences may trigger the exercise of the court's discretion to refuse to apply issue estoppel in appropriate cases, as I will discuss. In my view, however, the Board's procedures were sufficient to satisfy the judicial component of the second requirement of issue estoppel.

Moreover, the Board was carrying out a judicial function. In a different context the Supreme Court of Canada has already held that an officer of the Commission, the first level decision maker, is engaged in a judicial exercise or is carrying out a judicial function. In MacDonald Tobacco Inc. v. Canada (Employment and Immigration Commission), [1981] 1 S.C.R. 401 at pp. 407-08, 121 D.L.R. (3d) 546 at p. 551, Laskin C.J.C. wrote:

> Again, the concession so made carries with it that the officer and the Commission, in dealing with an application for reduction of premium, were engaged in a judicial exercise. That was, in any event, the view of the Federal Court of Appeal. Pratte J., speaking for that Court, was plainly right in stating that the officer of the Commission, charged, in the words of s. 24(2) of the Regulations, to

decide whether a reduction shall be made, was obliged to make the decision in accordance with the Regulations enacted pursuant to s. 64 of the Act and thus under prescribed standards. The judicial character of this power of decision is underlined by the provisions for review. There are no policy considerations involved in the exercise of an authority which comes from the Regulations and not by delegation from the Commission. Employers' rights are involved in an application invoking the authority of an officer and made pursuant to the criteria set out in the Regulations, criteria which the officer is obliged to apply. They are not mere guides for a wide discretion.

In saying that the officer is carrying out a judicial function, I am not to be taken as saying also that he must give an oral hearing. The Regulations provide for the form and contents of an application for reduction of premium. This satisfies, in the circumstances, any requirement of fairness because it is left to an employer to invoke the Regulations which, in pursuance of the Act, set out the conditions to be met for a reduction of premium. The officer's duty is to see if the facts set out in the application meet the requirements prescribed for a reduction of premium. If the employer is not satisfied with the officer's decision, the Regulations provide for two levels of review at his instigation alone.

If an officer of the Commission is engaged in a judicial exercise, then so too is the Board of Referees, sitting on an appeal of the officer's decision. I therefore conclude that the Board's decision was a final judicial decision and that the second requirement of issue estoppel was satisfied in this case.

(iii) Were the parties the same?

To apply issue estoppel, the parties to the first proceeding must be the same as the parties to the second proceeding. Deciding whether this requirement has been met causes difficulty when one of the parties to the second proceeding is entitled to participate actively in the first proceeding and to exercise fully the rights of a party in that proceeding, but

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chooses not to do so. That is the case here. Although O'Shanter could have taken part in the oral hearing before the Board of Referees, it declined to do so. In such cases, whether a person is a party for the purpose of issue estoppel depends on its degree of participation. Because O'Shanter did not actively participate in the hearing before the Board of Referees, I conclude that it was not a party for the purpose of issue estoppel.

The provisions of the Employment Insurance Act and the regulations passed under it, the Employment Insurance Regulations, SOR/96-322, especially ss. 78-80, give the employer the right to participate at the various stages of the proceedings before the Commission, the Board of Referees and the umpire. The employer is entitled to notice, has the right to make representations at the hearings, is notified of the outcome and has a right to appeal a decision of the Commission or of the Board of Referees. [See Note 6 at end of document.] For example, s. 83(1) of the regulations, which contemplates that an employer is a party, states: "A board of referees shall give each of the parties interested in an appeal a reasonable opportunity to make representations concerning any matter before the board."

O'Shanter took no part in the proceedings before the Board of Referees, although it received notice of Minott's appeal. O'Shanter did not appear before the Board; it did not seek to introduce any evidence; and it made no written representations. It did, however, file with a Commission a written statement in response to Minott's application for benefits. This statement, to which I referred earlier, was given at the invitation of the Commission under s. 42 of the Unemployment Insurance Act, which provided:

> 42. Where, in considering a claim for benefit, the Commission finds an indication from the documents relating to the claim that the loss of employment resulted from the claimant's own misconduct or that the claimant voluntarily left employment, the Commission shall
>
> (a) provide an opportunity to the claimant and the employer to provide information as to the reasons

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for the loss of employment; and

(b) where any such information is provided, take it into account in determining the claim. [See Note 7 at end of document.]

This statement, which said that Minott had received written warnings and had been offered a job he could reach by public transportation, was in the Board's file on appeal and was apparently relied on by the Board in reaching its decision. The giving of this statement, however, was the only way that O'Shanter participated in the proceedings before the Commission and the Board. In my view, that limited participation was not sufficient to make O'Shanter a party for the purpose of issue estoppel.

Recent case law in this province suggests that a person must actively participate in administrative proceedings to meet the "same parties" requirement of issue estoppel. In both Schweneke v. Ontario (1996), 1 C.P.C. (4th) 35 (Ont. Gen. Div.), and Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19, 1 C.P.C. (4th) 49 (Ont. Gen. Div.), also cases concerning proceedings under the Unemployment Insurance Act, the employer actively participated in the hearing before the umpire or the Board of Referees and was therefore held to be a party. Similarly, in Rasanen, Abella J.A. held that the appellant, the employee, if not a party to the proceedings under the Employment Standards Act, was at least a privy. She wrote (at p. 283):

> The appellant clearly called the witnesses he wanted, introduced the relevant evidence he needed, and had the chance to respond to the evidence and arguments against him. . . . He had a meaningful voice, through his own evidence and through the assistance of the ministry, in a proceeding which decided the very issue he sought to raise in his subsequent action.

In contrast, in the recent case of Wood v. Nor-Sham (Markham) Hotels Inc. (1998), 35 C.C.E.L. (2d) 206 (Ont. Gen. Div.), Sharpe J. held that an employer who chose not to contest an

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employee's appeal before a Board of Referees under the Act was not bound by the Board's decision in the subsequent wrongful dismissal action. As in the case before us, in Wood the employer had provided information about the employee's dismissal to the unemployment insurance officer adjudicating the claim for benefits. The employer, however, did not attend the hearing before the Board of Referees and instead wrote the Chairman of the Board saying it would not attend. Sharpe J. held that "the letter, together with the other conduct of the employer taken as a whole, do not constitute participation in the process sufficient to render the employer bound by the Board of Referees' decision" (at p. 208).

In their article, "Ties that Bind at Common Law: Issue Estoppel, Employment Standards and Unemployment Insurance Adjudication" (1997), 24 C.C.E.L. (2d) 291 at p. 310, Jeffrey Goodman and Jeff Murray accurately summarize the case law:

> The caselaw to date suggests that employers can avoid creating an estoppel either by not appealing a decision favourable to an employee or not attending an employee's appeal. The cases have held that by appealing or attending at an employee's appeal the employer becomes a party to that appeal.

The recent Australian High Court case, Australian Securities Commission v. Marlborough Gold Mines Limited (1997), 177 C.L.R. 485 (Aust. H.C.), also lends support to the need for active participation to become a party for the purpose of issue estoppel. A company had applied to the trial court for an order to summons a meeting of its members to consider a scheme to convert the company from one of limited liability to one of no liability. The Australian Securities Commission appeared and told the court that it neither consented to nor opposed the application. The order was made and a meeting was held to approve the scheme. The Commission then learned of a recent judgment suggesting that the scheme was illegal. The trial court approved the scheme and the Commission filed a notice to intervene, opposing the approval and then appealing against the approval. The Australian High Court had to consider whether issue estoppel arose in this context, estopping the Commission

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from its opposition. The High Cou rt held that the Commission's appearance before the court on the application for leave to summons a meeting was not sufficient to make it a party for the purpose of issue estoppel. The High Court wrote (at p. 505):

> The fact that the Law requires that notice be given to the Commission does not make the Commission a party. Nor, in our view, does the fact that the Commission appeared to announce its attitude make it a party. That, if anything, was something done by way of making information available to the Court.

A person can be a party for one purpose and not for another. In the present case, O'Shanter provided information to the Commission. By doing so it did not become a party for the purpose of issue estoppel. In addition to the case law, I think that policy considerations justify focusing on the degree of participation to determine whether an employer in O'Shanter's position is a party for the purpose of issue estoppel. Holding that an employer who merely provides information to an insurance officer becomes a party and thus bound by the Commission's or the Board's findings could turn a right to participate into a practical obligation to do so. Ordinarily, employers do not appear on applications for unemployment insurance benefits or even on appeals because the stakes are small and they do not have a direct financial interest in the outcome, although they may be liable under s. 46(1) of the Act to repay any benefits received by an employee who subsequently succeeds in a wrongful dismissal action. Thus, to give employers in O'Shanter's position party status for the purpose of issue estoppel would provide a perverse incentive for employers to participate actively in hearings before the Board of Referees or before an umpire.

Implicit in this discussion is my rejection of any notion of non-mutual issue estoppel. The doctrine of non-mutual issue estoppel, which was not argued before us, has roots in American jurisprudence: see Holmested and Watson, at s. 21 24. It permits a judgment to operate in favour of a non-party. Applied here, it might permit an employer to refrain from participating in a hearing before a Board of Referees yet rely on a

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favourable Board decision in a subsequent wrongful dismissal action. By adopting a "wait and see" approach to the Board's decision, an employer could rely on issue estoppel if the employee lost, but be no worse off if the employee won, because issue estoppel could not be applied against an employer who had not had its day in court. Applying non-mutual issue estoppel would allow the employer to "have it both ways". In my view, in these cases issue estoppel should be mutual: see generally Spencer-Bower, supra, pp. 110-11. An employer should only be able to invoke issue estoppel for a favourable decision if issue estoppel could also be invoked against it for an unfavourable decision. I do not consider O'Shanter bound by the Board's decision any more than I consider it would have been bound in the wrongful dismissal action had Minott succeeded in his appeal before the Board of Referees. O'Shanter was not a party for the purpose of issue estoppel and the third requirement is therefore not satisfied.

I have concluded that the Board's finding of misconduct under the Act does not satisfy the first and third requirements of issue estoppel. Therefore the Board's finding did not prevent Minott from maintaining his action for wrongful dismissal. Even had the three requirements been met, however, in my view the court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice. As Lord Upjohn observed in Carl Zeiss Stiftung v. Rayner Keeler Ltd., [1967] 1 A.C. 853 at p. 947, [1966] 2 All E.R. 536, "[a]ll estoppels are not odious but must be applied so as to work justice and not injustice, and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an

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unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings. It would be unfair to do otherwise. In Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41 at p. 50 (H.L.), Lord Keith wrote:

> . . . there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . .

Applying issue estoppel to the findings of an administrative tribunal to foreclose a subsequent civil proceeding may also be unfair or work an injustice. Its application to findings made in proceedings under the Employment Insurance Act is a good example. Looking at legislative intent, nothing either in the scheme of the Act or in its individual provisions suggests, for example, that the finding of misconduct by a Board of Referees or by an umpire is binding in a civil action for wrongful dismissal. Issue estoppel is a common law rule and therefore the courts must consider the appropriateness of applying it to the findings of a tribunal under the Act to prevent those findings from being relitigated in a subsequent action for wrongful dismissal.

In my opinion, invoking issue estoppel for the findings of a Board of Referees or of an umpire raises several concerns. Some

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of these concerns are alleviated by holding that the "same parties" requirement turns on the employer's degree of participation. But issue estoppel affects employees as well as employers and thus other concerns remain, which I will discuss briefly.

First, the scheme of the Act contemplates that claims for unemployment insurance benefits be adjudicated quickly, inexpensively and summarily. To inject issue estoppel into these claims adjudications would undermine the aim of the legislative scheme: see also N. Grosman, "No Estoppel", 7 E.M.P. Bul. 2 (April 1997). Employers and employees may overlitigate these adjudications, hire lawyers unnecessarily or pursue appeals they might not otherwise take out of fear of the consequences in later civil litigation. As Molloy J. sensibly observed:

> If the decisions of Boards of Referees as to misconduct are held to always be determinative of whether there has been cause for dismissal at common law, it will be necessary for employees to retain counsel and litigate before the Board in the same manner as before a court in a wrongful dismissal action. This would not be a desirable result for any of the parties involved, including the administrative board itself which would soon find its expeditious summary process clogged with parties litigating their civil causes of action.

Second, employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them: see Restatement of the Law (Second), Judgment 2d (1982), s. 83(2)(e). Applying issue estoppel may therefore cause real injustice to an aggrieved employee. As Langdon J. noted in Hough v. Brunswick Centres (at p. 54), "[t]o become unemployed is a fairly universal experience in modern days. It is an almost automatic reaction for anyone who is terminated or laid off to file for benefits. One does not do so with the thought in mind that if one loses one's claim, one is at risk of having all legal remedies foreclosed."

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Third, the financial stakes in an application for unemployment insurance benefits are typically insignificant compared to the financial stakes in an action for wrongful dismissal (Restatement, p. 279). Here, before the Board of Referees, only a few weeks of benefits were at stake, but in the wrongful dismissal action $40,000 was at stake. As Sharpe J. observed in Randhawa (at p. 25), "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." To apply issue estoppel in such a case may be as unfair to the employer as to the employee.

Fourth, the procedural differences between a hearing under the Act and a civil action for wrongful dismissal may cause a court to exercise its discretion against applying issue estoppel. The Restatement (Second) of Judgments sets out several exceptions to the application of issue estoppel (see Restatement, para. 28 "Exceptions to the General Rule of Issue Preclusion"). One exception recognizes that procedural differences in the two proceedings may be a sufficient reason not to apply issue estoppel. Section 28(3) of the Restatement states that "a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts". Morden A.C.J.O. expressed a similar view in his concurring judgment in Rasanen when he said (at p. 295), "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel" In Rasanen itself, Morden A.C.J.O. held that the tribunal procedures were sufficient to apply issue estoppel. Carthy J.A., dissenting on this point, held that they were insufficient.

Procedural differences should be looked at in practical terms. In the present case, Minott did not have a prehearing discovery. Although he had limited formal education, he appeared before the Board of Referees unrepresented, led no evidence, called no witnesses and had no opportunity to build

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his case through cross-examination. His claim failed because the Board had in its file, and apparently acted on, information from O'Shanter later proved incorrect in the wrongful dismissal action. I do not say that the procedures before the Board of Referees were deficient. They may have been appropriate for the purpose of the Act and for the summary determination of the disqualification period to be made by the Board, but entirely inappropriate for the determination in the wrongful dismissal action of Minott's claim for damages and of O'Shanter's defence of just cause.

Finally, the expertise of the Board of Referees is quite different from the expertise needed to decide a wrongful dismissal action. The Board of Referees must consider misconduct in the context of a claim for unemployment insurance not in the context of a dispute between an employer and an employee over just cause: see Toronto Police Services Board v. Toronto Police Assn. (1998), 71 L.A.C. (4th) 289 at pp. 306-07.

Because I take the view that O'Shanter has not met all of the three basic requirements of issue estoppel, I need not invoke discretion to hold that the Board's finding. of misconduct does not prevent Minott from maintaining his action for wrongful dismissal. Had I concluded otherwise, however, I would have been prompted by the concerns that I have listed to exercise my discretion to refuse to apply issue estoppel to the finding of misconduct made by the Board of Referees. I do not intend by anything I have said to undermine the role of the tribunals under the Employment Insurance Act. They play a vital role because they decide entitlement to benefits that are of great importance to many workers. But because of the very different characteristics of decision making under the Act, the findings of these tribunals should not automatically be imported into a subsequent civil action. I would not give effect to this ground of appeal.

Third Issue: Did the Trial Judge Err in Awarding Minott Damages Equal to 13 Months' Salary?

Lacking just cause, O'Shanter was required to give Minott reasonable notice of his dismissal or pay him his salary for

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the notice period. Molloy J. assessed the reasonable notice to which Minott was entitled at 13 months. She therefore awarded him, as damages for wrongful dismissal, his salary for the 13-month period. O'Shanter submits that the award is excessive and was arrived at by applying incorrect principles.

This submission must be judged against the standard of appellate review of wrongful dismissal awards. Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact: see Isaacs v. M.H.G. International Ltd. (1984), 45 O.R. (2d) 693, 7 D.L.R. (4th) 570 (C.A.). If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.

O'Shanter submits that in awarding 13 months, the trial judge made two errors in principle: first, she relied on the trial decision in Cronk v. Canadian General Insurance Co. (1994), 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15 (Gen. Div.), which was subsequently overturned by this court (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147 (C.A.); and, second, she determined the period of reasonable notice by using as a starting point the rule of thumb that one year's service equals one month's notice. O'Shanter also submits that even apart from these errors in principle, 13 months' notice is excessive and beyond the upper limit of 12 months for clerical employees referred to by this court in Cronk. O'Shanter submits that a reasonable period of notice was in the range of six months.

I agree that the trial judge's reasons reflect the two errors in principle alleged by O'Shanter. I do not agree, however,

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that this court's decision in Cronk establishes an upper limit of 12 months' notice for a manual worker such as Minott. And I do not agree that an award of damages equivalent to 13 months' notice is unreasonable. Although perhaps at the very high end, 13 months' notice for Minott is within an acceptable range. Therefore, I would not interfere with the trial judge's award.

In Bardal v. The Globe and Mail Ltd. (1960), 24 D.L.R. (2d) 140 at p. 145 (Ont. H.C.J.), in a frequently cited passage, McRuer C.J.H.C. discussed the factors a court should consider in determining reasonable notice.

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

The Supreme Court of Canada has endorsed this passage although it has also said that the Bardal factors are not exclusive and that, depending on the case, others may have to be considered: see Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491; and Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1.

In Cronk, in granting summary judgment for the plaintiff, the trial judge MacPherson J. focused on "the character of employment" factor. He rejected the notion that managerial or senior employees within an organization are entitled to longer notice periods than clerical employees. In the present case, Molloy J. relied on MacPherson J.'s reasoning to "find no basis in fact or in law to decrease this award given to Mr. Minott because he is a plasterer rather than an executive".

After the trial decision in this case, however, this court reversed the trial decision in Cronk. The majority concluded the trial judge in Cronk had erred by collapsing the "character of employment" factor into the "availability of similar

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employment" factor and therefore he had erred by departing from "the widely accepted principle" that clerical workers are generally entitled to less notice than senior managers or specialized employees holding a high rank in an organization. In view of this court's decision in Cronk, Molloy J. similarly erred in the present case.

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In my view, she also erred by using as a starting point for determining the period of reasonable notice, the "rule of thumb" that an employee is entitled to one month's notice for every year worked. She explained her "rule of thumb" approach in the following passage in her reasons.

> Although case authorities seldom refer to it, there has been a long-standing rule of thumb applied by specialists in employment law within the legal profession. According to this rule of thumb, one should allow one month of notice for every one year of service. That is the general rule. After that, there are adjustments up or down for extraordinary circumstances usually taking into account the list of factors set out in Bardal, those being length of service, age and availability of similar employment. [See Note 8 at end of document.]

Thus, to determine the period of reasonable notice to which Minott was entitled, Molloy J. started with "a little over 11 months of notice" because he had worked for O'Shanter for just over 11 years. She increased this figure to 13 months because of his age, 43, at the time of dismissal and because of the unlikely availability of other employment in the construction industry at the time. As I have said, she refused to reduce the period of reasonable notice because Minott was not a managerial employee.

Those who support the rule of thumb approach to calculating the period of reasonable notice argue that it accords with popular perception, that it is reflected in corporate severance policies, and, most important, that it provides "some predictability and certainty to the calculation . . . while at the same time allowing for flexibility by adjusting for various factors (Bullen, at p. 43).

Predictability, consistency and reasonable certainty are obviously desirable goals in employment law -- both for employers and for those advising employees who have been or are about to be dismissed -- a point emphasized by Lacourcire J.A. in his majority reasons in Cronk. These goals, however, are best achieved by a careful weighing and blending of the Bardal and other factors relevant to the calculation of reasonable notice, by establishing reasonable ranges for similar cases, recognizing that no two cases are the same, and even by establishing upper limits for particular classes of cases where appropriate.

The rule of thumb approach suffers from two deficiencies: it risks overemphasizing one of the Bardal factors, "length of service", at the expense of the others; and it risks undermining the flexibility that is the virtue of the Bardal test. The rule of thumb approach seeks to achieve this flexibility by using the other factors to increase or decrease the period of reasonable notice from the starting point measured by length of service. But to be meaningful at all, this approach must still give unnecessary prominence to length of service. Thus, in my opinion, the rule of thumb approach is not warranted in principle, nor is it supported by authority: see Levitt, The Law of Dismissal in Canada, 2nd ed. (1992), at 808.11 and Harris, Wrongful Dismissal, loose-leaf, at s. 4.36(g).

Moreover, it is not reflected in the wrongful dismissal awards made daily by trial judges. In a recent paper, "Measuring the Rule of Thumb in Wrongful Dismissal Cases" (1998), 31 C.C.E.L. (2d) 311, Barry Fisher used his wrongful dismissal data base (nearly 1,600 cases at the time) to show that the rule of thumb had little or no validity as a predictor of reasonable notice for short term or long term employees, though it had "some validity for cases in the mid-seniority range" (at p. 317). Mr. Fisher concluded that the rule of thumb was not an "all embracing formula" (at p. 317). Indeed, Cronk itself implicitly rejects the rule of thumb approach. Ms. Cronk, a 30-year employee, was awarded 20 months' notice at trial, reduced to 12 months on appeal.

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Still, as Molloy J. recognized in her judgment in McKay v. Eaton Yale, (at p. 227) what ultimately matters is whether the notice period falls within an acceptable range.

> One could, of course, carry out the calculation process without such a structure by simply considering all of the factors as a whole and arriving at a number. Some may prefer this approach. I prefer to start from a base and then adjust. I doubt that it matters provided that the result arrived at falls within the appropriate range given the circumstances of the case.

Although I have concluded that the trial judge erred in principle in calculating the period of reasonable notice, I would not interfere with her award of 13 months' notice because I do not think it is unreasonable. O'Shanter submits that her award is excessive, beyond the maximum of 12 months referred to by this court in Cronk and that a reasonable figure is six months. In Cronk, Lacourcire J.A. held that the character of the plaintiff's employment -- she was a clerical employee -- did not entitle her to a lengthy period of notice. He concluded that because of the other Bardal factors, she qualified for the maximum notice in her category, which he fixed at 12 months. In concurring reasons, Morden A.C.J.O. agreed with the figure of 12 months for Ms. Cronk, without suggesting that it represented an upper limit for clerical employees. The third judge on the panel, Weiler J.A., dissented and would have ordered a trial on the issue of reasonable notice. But she observed t hat the Bardal factors did not necessarily require a clerical employee to be given less notice than a managerial employee. Therefore, I do not regard this court's decision in Cronk as establishing an upper limit of 12 months' notice for all non-managerial or non-supervisory employees. At most it deals with one occupational category, clerical employees. Moreover, the imposition of an arbitrary 12-month ceiling for all non-managerial employees detracts from the flexibility of the Bardal test and restricts the ability of courts to take account of all factors relevant to each case and of changing social and economic conditions: see England, Christie and Christie, Employment Law in Canada, 3rd ed.

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(1998), at p. 14.93.

I acknowledge that 13 months' notice for Minott, even on a generous view, is at the very high end of an acceptable range. Thirteen months, however, is justified by the following considerations: Minott was 43 when he was fired; he has little formal education and limited skills; and, although he is experienced in the construction industry, because of a recession few jobs were available in that industry at the time of his dismissal. Even if 13 months was slightly outside of the high end of an acceptable range, to reduce it would amount to unwarranted tinkering. Therefore, I would not interfere with the damages award.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Notes

Note 1: This case was decided under the previous legislation, the Unemployment Insurance Act, R.S.C. 1985, c. U-1. The provisions of the Unemployment Insurance Act dealt with in these reasons remain virtually unchanged in the Employment Insurance Act. Since this case was decided under the previous legislation, all references to provisions that were pertinent at trial will refer to that Act. All other references to provisions in the Act refer to the current legislation.

Note 2: This provision is virtually identical to s. 30(1) of the current Employment Insurance Act.

Note 3: Now s. 114(1) of the Employment Insurance Act.

Note 4: Now s. 115 of the Employment Insurance Act.

Note 5: Langdon J. discusses this distinction in Hough v. Brunswick Centres (1997), 28 C.C.E.L. (2d) 36, 9 C.P.C. (4th) 111 (Ont. Gen. Div.).

Note 6: The rights of appeal are in s. 114(1) and s. 115(1)(c)

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of the current Act.

Note 7: Section 51 of the current Act.

Note 8: Molloy J. used the same "rule of thumb" approach in two later decisions: Bullen v. Procter & Redfern Ltd. (1996), 20 C.C.E.L. (2d) 36, 47 C.P.C. (3d) 280 (Ont. Gen. Div.); and McKay v. Eaton Yale (1996), 31 O.R. (3d) 216, 31 C.C.E.L. (2d) 295 (Gen. Div.).

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