IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kurik v. CAS Ventures Ltd.,*
2023 BCSC 488

Date: 20230329
Docket: 18609
Registry: Smithers

Between:

Duane George Kurik

Plaintiff

And:

CAS Ventures Ltd.

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(Hearing proceeded via MS Teams)

Counsel for the Plaintiff:	A.D. Mardiros
Counsel for the Defendant:	D.W. Draht
Place and Date of Trial/Hearing:	Smithers, B.C. February 16, 2023
Place and Date of Judgment:	Smithers, B.C. March 29, 2023

Introduction

[1] In this wrongful dismissal action, the plaintiff seeks damages for breach of contract, aggravated damages, bad faith damages and special damages. He had previously filed a complaint to the Employment Standards Branch seeking compensation for what he identified as "regular wages" totalling $93,000 based on his expected length of service of 10 months. The claim for length of service was dismissed.

[2] The defendant applies to have the plaintiff's claim struck or dismissed on the basis it is barred by the doctrine of *res judicata* and that there has already been a finding of frustration of contract.

[3] The trial is set for three days commencing March 27, 2023. Given the approaching trial date counsel were advised by memorandum the application of CAS Ventures Ltd. ("CAS") filed January 9, 2023 was dismissed with costs to the plaintiff. Written reasons were to follow. These are those reasons.

Background

[4] The plaintiff is a labourer who in or around January 2019 entered into an oral contract of employment with the defendant CAS Ventures Ltd., with such employment to begin in January 2019. He was hired to work as a faller on the Coastal GasLink pipeline project in northern British Columbia. The Coastal GasLink project involves contracts with many companies and organizations including Macro-Spiecapag Joint Venture ("MSJV"). MSJV has sub-contracts with the defendant and the company Kyah Resources Ltd. ("Kyah") involving a worksite near Houston, British Columbia.

[5] The plaintiff alleges his employment was to continue until the contract of the defendant CAS was completed for the season, expected to be some time in November 2019.

[6] He relocated from Terrace, British Columbia to Houston, British Columbia to take the job. In January 2019 he completed coursework to qualify for the employment. After completing the coursework, on or about February 14, 2019 he

began working for the defendant as a faller. He worked as a faller from February 14, 2019 until March 18, 2019 when he was promoted to site supervisor. He remained in that position until his employment ended on May 15, 2019.

[7] The defendant supplies contract labour. It was engaged by Kyah to supply a crew to assist with Kyah's own contract to clear and prepare land for the Coastal GasLink pipeline project. The defendant states the plaintiff was required to take directions from Kyah employees with respect to the scheduling and instructing of the defendant's workers, recording and submitting the defendant's workers' time records and attending to various miscellaneous administrative matters.

[8] The defendant alleges the plaintiff was incompetent in his performance of the duties of a supervisor and failed to act in accordance with Kyah's directions, amongst other allegations, and was therefore dismissed for cause.

[9] The plaintiff alleges his work as site supervisor was continually interfered with by Kyah's site supervisor and its other employees. That interference was reported to the defendant CAS. On May 15, 2019, the plaintiff was excluded from the worksite allegedly on instructions from Kyah.

[10] The plaintiff asserts the defendant failed to protect him from bullying and harassment by Kyah employees and failed to return him to the worksite so he could perform his duties under his employment with the defendant. He elected to treat the conduct of the defendant, in failing to intervene to prevent Kyah employees from interfering with the performance of his duties and allowing his exclusion from the worksite, as a repudiation of the contract of employment and to treat the contract of employment as having been terminated by the defendant. He alleges the termination was without just cause and with no notice, and constituted an arbitrary and willful breach of the contract of employment.

Employment Standards Branch Complaint

[11] On November 15, 2019, the plaintiff filed a claim for termination pay before the Employment Standards Branch pursuant to s. 74 of the *Employment Standards*

Act, R.S.B.C. 1996, c. 113 [*Act*]. He claimed he was entitled to pay of $650 per day and believed he was entitled to $93,000, based on the expected length of his employment contract had he not been terminated.

[12] He attached to his complaint a six-page summary of the events leading to his complaint along with two emails. There was an email from Butch Dennis of CAS dated May 13, 2019 addressed to Mike Bayley of Kyah raising concerns about Kyah's conduct. His email ended with the comment that he did not "like some one trying to set up [his] superviser [sic] for failure". The next email was dated May 16, 2019 also from Butch Dennis addressed to Joan Goldhawk of MSJV entitled "job site wrongful fireing [sic]" complaining about actions of Kyah including its refusal to have the plaintiff on the worksite.

[13] After largely unsuccessfully seeking further information from the plaintiff and exchanges described as "not respectful or constructive", the delegate issued a preliminary assessment letter on July 16, 2020 to the plaintiff regarding his wage complaint based on payroll records, information from the defendant employer and information on the complaint form. The preliminary assessment indicated the plaintiff was entitled to $2,965.66 in wages and no compensation for length of service. The plaintiff was given until July 23, 2020 to provide a written response but did not do so.

[14] On September 4, 2020, the delegate of the Director of Employment Standards issued their determination. They noted:

> Numerous attempts were made to include Mr. Kurik in the complaint resolution process, however, Mr. Kurik did not participate in a meaningful way. One of the purposes of the Act is to provide a fair and efficient procedures [sic] for resolving disputes over the application and interpretation of the act. Therefore, in the absence of any supporting evidence from Mr. Kurik, I am issuing this Determination based on the information contained in the file and on the information provided by the Employer.

[15] The delegate summarized the information provided by the two parties:

> Information Provided by The Complainant
>
> Mr. Kurik's complaint form indicates his rate of pay was $650.00 per day and that he is seeking $93,000.00 in regular wages. He does not indicate what time period he is seeking these wages for. In his email response on June 7,

> 2020 Mr. Kurik stated he is seeking lost wages for 10 months and that he was neither laid off or terminated.
>
> No further information regarding the wage complaint was provided by Mr. Kurik.
>
> Information Provided by The Employer
>
> Mr. Dennis stated that Mr. Kurik started employment as a tree faller and assisted in clearing land at the job site. As a tree faller his rate of pay was $500.00 per day for 12 hours of work. Due to the physical nature of the job, Mr. Kurik was unable to perform the duties of a tree faller and as such he became a supervisor on the same job site.
>
> As a supervisor, Mr. Kurik was responsible for a crew of approximately 10 employees who performed flagging and general labour work. His rate of pay was $35,00 per hour.
>
> Mr. Kurik also had a travel and training rate of $20.00 per hour.
>
> Mr. Dennis stated that Kyah decided not to allow Mr. Kurik on the job site and did not explain why. Mr. Dennis stated he continually asked for a reason but that Kyah did not provide one.
>
> The only contract CAS had during the time of Mr. Kurik's employment was with Kyah. CAS was therefore unable to provide other work for Mr. Kurik at another job site. Mr. Dennis stated he faced losing CAS's subcontract with Kyah if he continued to employ Mr. Kurik at the job site. Accordingly. Mr. Dennis ceased allowing Mr. Kurik on the worksite from May 15, 2019.
>
> Mr. Dennis provided payroll records indicating that Mr. Kurik was paid every two weeks. Mr. Dennis also supplied a record of the daily hours worked by Mr. Kurik. The records submitted include a breakdown of the wages Mr. Kurik earned as a tree faller, as a supervisor and at the travel/training rates. They also show the amount of vacation pay earned, vacation pay paid, the total gross amount earned and the source deductions for each pay period.

[16] The delegate then addressed two issues:

a) Was the plaintiff owed compensation for length of service? If so, how much?

b) Was the plaintiff owed any wages, and if so, in what amount?

[17] Regarding the second issue the delegate found that the plaintiff was owed gross wages of $2,965.66. The defendant voluntarily paid the plaintiff that amount. The sole remaining issue was the first issue which relates to the application before the Court.

[18] The delegate made these findings and provided their analysis:

> Findings and Analysis
>
> 1. Is Mr. Kurik owed compensation for length of service? If so, how much?
>
> Section 63 of the Act states after three consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> One of the ways in which this liability is discharged is under section 65(1)(d) of the Act which states that section 63 does not apply to an employee employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstances other than receivership or a proceeding under an insolvency [a]ct.
>
> Mr. Kurik was employed for three months, and as such, if owed, his entitlement to compensation for length of service would be in the amount of one week's wages.
>
> Mr. Kurik stated that he was not laid off or terminated. Mr. Dennis stated that Mr. Kurik was unable to perform work due to a decision made by Kyah, namely to prevent Mr. Kurik from attending the job site.
>
> Kyah's decision to prohibit Mr. Kurik from attending the job site was beyond Mr. Dennis's control, and he did not anticipate that Kyah would prevent Mr. Kurik from attending the job site. Mr. Dennis stated that he asked Kyah to provide the reason Mr. Kurik was not allowed on the job site but that Kyah did not provide a reason.
>
> At the time of Mr. Kurik's employment, Mr. Dennis states CAS had a contract for work with Kyah at only one job site. As there is no information to the contrary, I accept CAS could only keep Mr. Kurik employed if he could work at the site because there was no other alternative. I find that Kyah's decision impeded Mr. Kurik's ability to perform his contractual duties with CAS and that CAS was incapable of anticipating Kyah's decision.
>
> I find that Kyah's unilateral and unexplained decision to prohibit Mr. Kurik from attending the job site was an unforeseeable event which made Mr. Kurik's employment contract impossible to perform.
>
> Accordingly, I find section 65(1)(d) applies and CAS is discharged of its liability to pay Mr. Kurik compensation for length of service in accordance with section 63 of the Act.

Issues

[19] The central issue before the Court is whether the plaintiff's wrongful dismissal claim is barred by the doctrine of *res judicata* because of the determination of the Director of Employment Standards and therefore issue estoppel prevents this action from proceeding.

Position of the Defendant

[20] The defendant submits the legal test for estoppel is met given the same question has been decided, the decision was final and not appealed and the parties to the decision are the same as the parties to this proceeding.

Position of the Plaintiff

[21] The plaintiff submits the determination of the delegate that the contract was frustrated was fundamentally flawed and did not meet the test of impossibility under s. 65(1) of the *Act* nor frustration at common law. He submits that an application of the legal test for issue estoppel should lead the Court to exercise its discretion to not apply the doctrine.

Law

[22] The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 addressed the rationale for finality in litigation:

> 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. The appellant chose the ESA as her forum. She lost. 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.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per *rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or

> material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.
>
> 21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.
>
> [Emphasis added.]

[23] In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, the Supreme Court of Canada addressed the doctrine of *res judicata* and its discretionary nature:

> 30 The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.
>
> 31 Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

[24] In *Danyluk*, non-exhaustive factors guiding a Court's exercise of discretion were described at paras. 67–81:

a) The wording of the statute from which the power to issue the administrative order derives;

b) The purpose of the legislation;

c) The availability of an appeal;

d) The safeguards available to the parties in the administrative procedure;

e) The expertise of the administrative decision maker;

f) The circumstances giving rise to the prior administrative proceedings; and

g) The potential injustice.

[25] The Supreme Court of Canada in *Penner* further addressed that list of factors:

> 37 This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co*. (1999), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.
>
> 38 The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.
>
> 39 Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

Analysis

[26] It is not disputed that the legal test for estoppel is met given the same question has been decided, the decision was final, the appeal did not proceed and the parties to the decision are the same as the parties to this proceeding: *Danyluk* at para. 25.

[27] The issue then is whether it would be fair to apply the doctrine of issue estoppel to prevent the plaintiff from litigating his wrongful dismissal claim.

[28] I turn to the non-exhaustive *Danyluk* factors in resolving the issue.

Legislative Scheme

[29] Section 118 of the *Act* states that “nothing in this Act or the regulations affects a person’s right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain”.

[30] In *Read v. Rimex Supply Ltd*., 2021 BCSC 2157, Justice Lamb stated:

> 51 Section 118 "does not create an exclusive forum": *Fuggle* at para. 30, see also *Goodkey* at paras. 31-32. It does not appear from this section that the legislature intended to give the ESB exclusive jurisdiction over all employment-related claims nor the exclusive jurisdiction to decide whether an employer had just cause to terminate an employee.
>
> 52 The non-exclusivity of the ESB is relevant to the parties' reasonable expectations. In *Danyluk*, *Fuggle* and *Goodkey*, the non-exclusivity of the employment standards process meant that the employer who succeeded in that forum could not expect the decision would necessarily lead to finality in the employment dispute. By the same logic, the plaintiff in this case could not reasonably expect that the Delegate's finding on just cause was necessarily the final word on that issue.
>
> 53 On balance, the lack of exclusive jurisdiction for the ESB weighs against applying issue estoppel to the ESB decision.

[31] The defendant acknowledges this factor weighs against applying issue estoppel. However, it submits given the substantial size of the claim the plaintiff chose to advance this factor should be neutral.

[32] The plaintiff submits the civil claim is a wrongful dismissal claim seeking several remedies including various claims for damages. The plaintiff submits the interrelationship of the defendant and its reliance on information received from Kyah raises factual and legal complexities not easily accounted for in the rough and ready approach the legislation anticipates when a complaint is addressed under the *Act*. In addition, the alleged failures and defects in the delegate’s approach, factual findings

and conclusions illustrate the inappropriateness of resolution under the *Act.* Specifically, the plaintiff submits the delegate erred as:

a) the delegate relied on a statement of the defendant that it might lose the contract if it continued to employ the plaintiff unsupported by any documents from Kyah stating the defendant's contract was at risk. At best, the statement was what the defendant believed, but the factual basis for such a belief was not properly in evidence;

b) the delegate, in finding the employment contract was impossible to perform, provided no analysis nor consideration of previous Employment Standards Tribunal decisions; nor does the finding comply with the doctrine of frustration at common law;

c) Consequently, the reasons fail to provide an analysis but rather simply set out conclusions; and

d) Not all relevant information was before the delegate.

[33] The plaintiff submits as a result the process was fundamentally flawed and a trial is required to properly address the matters in issue.

[34] In my view, the lack of exclusive jurisdiction weighs against applying issue estoppel particularly where the decision in issue lacked an evidentiary basis: *Desmarais* at para. 39; see also *Danyluk* at para. 69. This factor weighs in favour of not applying issue estoppel.

Purpose of the Legislation

[35] Section 2 of the *Act* provides:

> The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;

> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.

[36] As noted at para. 40 of *Desmarais*, "[o]ne purpose of the legislation is to ensure that employees receive at least basic standards of compensation for length of service when an employer dismisses an employee without notice unless the dismissal is for cause. The employer's maximum liability for the length of service is the equivalent of eight weeks wages. When the employer's financial exposure is so limited, the streamlined procedural process is reasonable".

[37] Given the civil claim of the plaintiff the defendant's potential exposure is significantly greater. If issue estoppel applies the *Act*'s purpose of providing basic standards may be defeated by employees litigating claims intended to be efficiently resolved: *Danyluk* at para. 73; *Read* at para. 58; *Desmarais* at para. 41.

[38] This factor weighs against applying issue estoppel.

Availability of an Appeal

[39] Under s. 112 of the *Act*, a party can appeal a delegate's determination to the Employment Standards Tribunal (the "Tribunal") and under s. 116 a party can apply to the Tribunal for reconsideration of its decision.

[40] In this instance, the plaintiff filed an appeal under s. 112 of the *Act* on October 13, 2020 and sought an extension of the statutory appeal period as he was out of time. On October 13, 2020, the Tribunal sent the plaintiff an email asking that he provide a complete copy of the determination in issue and the written reasons for the determination by 4:00 p.m. that day. The email also included copies of information regarding the appeal process. The requested information was provided by the plaintiff on October 14, 2020, a day after the expiry of the statutory deadline.

[41] On October 19, 2020, the Tribunal by letter of that date informed the plaintiff he was to provide to the Tribunal his complete submissions for the appeal no later than 4:30 p.m. on November 13, 2020.

[42] On November 16, 2020, the Tribunal wrote to the plaintiff advising it had not received the requested documents for the appeal and that if they were not provided by 4:30 p.m. on November 23, 2020, the Tribunal would close its file without further notice. On November 22, 2020, the plaintiff emailed the Tribunal stating: “thanks but you be of no help to me at all I have contacted another lawyer and i will see where that goes”.

[43] On November 24, 2020, the Tribunal emailed the plaintiff and the defendant advising the Tribunal had closed its file.

[44] The defendant submits the decision of the plaintiff to withdraw from the available appeal process weighs against the plaintiff.

[45] There are references by the plaintiff to speaking to more than one legal counsel, however there is no evidence he retained counsel nor acted in accordance with legal advice nor if any advice was provided.

[46] The plaintiff’s failure to take advantage of the appeal process weighs against him. However, the plaintiff submits that failure must be considered in context. The actual claim of the plaintiff for compensation of $93,000 noted in his complaint was outside the jurisdiction of the delegate, hence the application was misconceived by the plaintiff. In addition, the plaintiff’s counsel submits that as an unrepresented party at the time, providing the requested submissions and evidence was beyond the plaintiff’s abilities, so he gave up.

[47] It is clear from the material filed that the plaintiff was upset by his dismissal. His various emails reveal his frustration and his resulting lack of cooperation with the delegate despite the plaintiff having initiated the procedure under the *Act*.

[48] The plaintiff submits that a lack of participation is not a decisive factor and refers to *Penner*, where the majority stated:

> 45 Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

[49] Because of these factors, which only partially explain why he did not pursue the appeal, this factor weighs only to a limited extent against the plaintiff.

Procedural Safeguards Available in the Administrative Procedure

[50] The procedures under the *Act* are designed to provide quick and expeditious means to meet the objectives of the *Act*. As such, they may fail to be adequate to address complex issues of fact or law: *Danyluk* at paras. 75–76.

[51] The defendant submits that the Court should consider how the delegate conducted the case. In *Desmarais*, Justice Thomas noted:

> 47 In this case the delegate:
>
> a) compelled production of documents from the plaintiff, other relevant parties and the defendant;
>
> b) obtained a detailed statement from the plaintiff and other relevant parties setting out the position as to why they felt they had been wrongfully terminated;
>
> c) Obtained a detailed statement from the defendant as to why the plaintiff had been terminated for cause;
>
> d) Conducted a telephone interview of both the plaintiff, other relevant parties and the defendant;
>
> e) Provided the information obtained by the delegate to the parties and invited them to respond to the information provided by the other side; and
>
> f) Provided the defendant with a preliminary determination in which he was invited to address the delegate's concerns and provide additional information.

[52] The defendant says this case is similar to *Desmarais* in many respects given the delegate attempted numerous times to contact the plaintiff, and the plaintiff was

unresponsive, failed to respond to information provided, engaged in harassing behavior and then failed to respond to the preliminary decision provided by the delegate. As a result, the delegate was left relying on information from the defendant. As in *Desmarais*, the defendant submits this factor is neutral.

[53] The plaintiff however disputes the similarity to the *Desmarais* factors suggested by the defendant. The plaintiff submits that unlike in *Desmarais*:

a) The delegate did not compel production of documents from the defendant such as confirmation from Kyah that the defendant's contract was at risk;

b) The delegate did not have a complete record;

c) The delegate did not have details of why the plaintiff was dismissed for cause; and

d) The delegate, from the material filed with the complaint, would have been aware the defendant's employee disputed the basis for Kyah banning the plaintiff from the worksite yet did not seek further information regarding the matter when it was clear such information was not available to the plaintiff.

[54] The plaintiff submits such distinguish this matter from *Desmarais* and the conclusion there that issue estoppel applied.

[55] Such lack of information and factual evidence weigh against the application of issue estoppel.

Expertise of the Decision Maker

[56] As noted in *Danyluk*, if the decision maker is a non-legally trained individual, they may not have the expertise required in a complex case: para. 77. In this instance there is no evidence regarding the expertise of the decision maker. The parties agree this is a neutral factor.

Circumstances Giving Rise to the Prior Decision

[57] The plaintiff submits as noted that he was upset and frustrated. As he was acting on his own behalf without counsel, a review of his emails reveals concerns regarding his ability to properly pursue the matter: see *Danyluk* at para. 78 and *Goodkey v. Dynamic Concrete Pumping Inc.*, 2003 BCSC 546 at paras. 40–41. The plaintiff did not understand why he was dismissed and the defendant likewise lacked details and specifics of Kyah's concerns.

[58] As noted earlier, given the nature of his claim, proceeding in the civil court system would have been advisable and avoided the issue before this Court. The nature of the relief he was seeking and the factual complexity of his dismissal did not lend themselves to resolution under the Employment Standards Branch process. While the plaintiff bears some responsibility for engaging the process, in context this factor is neutral.

Potential Injustice

[59] In *Danyluk* the Supreme Court of Canada stated a court has the discretion to refuse to apply estoppel: para. 62. The Court referred to *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc*. 50 B.C.L.R. (3d) 1 at para. 32, 1998 CanLII 6467 (C.A.) where Justice Finch (as he then was) noted that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case".

[60] The Supreme Court of Canada then stated:

> Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke, supra*, at paras. 38 and 43:
>
> > The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist....The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in

> the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> …
>
> ...The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

[61] In *Desmarais* the Court found no specific issue was raised that would lead the Court to conclude a potential injustice could arise if issue estoppel applied. This factor in the circumstances of *Desmarais* was found to be neutral: paras. 61–63.

[62] In *Read*, Lamb J. addressed this factor:

> 80 A final and important factor in the analysis asks whether applying the doctrine in the circumstances of the case would work an injustice. As the majority in *Penner* described, the "list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel": *Penner* at para. 38. The majority in *Penner* said unfairness could arise in two ways, either because the proceeding itself was unfair, or because using the results of a prior proceeding to preclude a subsequent proceeding generates unfairness. Regarding the second type of unfairness, Justices Cromwell and Karakatsanis wrote for the majority that this unfairness can arise where there is a significant difference in the purposes, processes and stakes involved in two proceedings (at para. 42):
>
> > The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. <u>This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings…</u>
> >
> > [Emphasis added.]
>
> 81 The majority went on to emphasize that the differences in purpose, process and stakes between the proceedings "must be significant" to avoid undermining both litigation finality and the authority of administrative tribunals: *Penner* at para. 42.

[63] The plaintiff submits it would be unjust to prevent the plaintiff from pursuing his wrongful dismissal claim. The nature of relief sought includes substantial damages, and the facts surrounding his dismissal raise issues that the Employment Standards Branch could not address and issues of credibility that the Employment Standards branch could not assess.

[64] There are significant differences between the Employment Standards Branch proceeding and this action. The purpose of the Employment Standards Branch was limited. The issues here require a trial. To apply issue estoppel would prevent the plaintiff from pursuing his claim—a claim involving significantly more in damages than he could receive in the Employment Standards process.

Conclusion

[65] I conclude that in the circumstances described it would be unjust to apply the doctrine of issue estoppel. Justice requires that the plaintiff be entitled to pursue his claim for wrongful dismissal in court.

[66] The application of the defendant is dismissed.

Costs

[67] The plaintiff is entitled to his costs of this application.

"The Honourable Mr. Justice Punnett"