

EMPLOYER BOUND BY FINDING OF EI UMPIRE
IN WRONGFUL DISMISSAL ACTION

Korenberg v. Global Wood Concepts Ltd., Ont. S.C.J., Dec. 9, 2005

By R. Lance Ceaser

In a recent decision of the Ontario Superior Court of Justice, the Court has reminded employers that they must exercise caution before becoming involved in proceedings under the *Employment Insurance Act*. Tactical mistakes before the EI Board of Referees or the Umpire may affect the employer's position in subsequent wrongful dismissal litigation.

In *Korenberg v. Global Wood Concepts Ltd.*, the plaintiff was a former night shift supervisor for the company. The plaintiff was terminated, with the employer alleging that his failure to prevent theft and permitting employees to leave work early constituted cause for dismissal. Shortly after his dismissal, the plaintiff applied for EI benefits, and was denied. However, the plaintiff subsequently appealed this decision to the Board of Referees. The company participated in his appeal by providing videotape to the Board which it asserted proved the misconduct for which the plaintiff was dismissed. The Board was not convinced that the plaintiff was dismissed due to misconduct on his part, and allowed the plaintiff's appeal. The company then appealed this decision to the Umpire, a retired judge. Before the Umpire, the company attempted to adduce further evidence of the plaintiff's employment history in support of the assertion that the plaintiff was dismissed due to his misconduct. The Umpire refused to receive the new evidence on the basis that the employer was fully aware of the issue at the time of the earlier hearing, had the evidence in its possession at that time, and had made no attempt to introduce the evidence before the Board of Referees. In the result, the Umpire rejected the employer's appeal.

Subsequently, the plaintiff commenced the wrongful dismissal action, and brought a motion for summary judgment. In essence, the plaintiff asserted that the employer was precluded from arguing that the termination was for cause on the basis of the doctrine of issue estoppel. Issue estoppel is a principle that allows a court or tribunal to refuse to hear a relitigation of issues that have been previously argued and conclusively decided by another adjudicative body. The Court found that all of the preconditions for the application of issue estoppel were present (i.e., was a final decision made regarding the same issue between the same parties in an earlier proceeding?). The Court then went on to determine that there was no basis for the Court to exercise its discretion to not apply issue estoppel in the circumstances. The fact that procedures before the Board and Umpire were not the same as in a civil court, and the refusal of the Umpire to permit the introduction of new evidence, did not warrant not applying the doctrine. Accordingly, the motion for summary judgment was granted, on the basis that the employer had no defence to the alleged wrongful dismissal.

While this decision does not break new ground, it stands as a warning to employers (and employer counsel) that careful consideration must be given before participating in an employee's claim for EI benefits. In most cases, such involvement will not be in the employer's best

interests, particularly given that involvement in the EI proceedings may bind the employer to findings made in that venue. If the employer believes that participation in EI proceedings is necessary, it is imperative that the employer put its best case forward, including all relevant evidence. Failure to do so at the earliest opportunity may result in not being able to make the case later or being bound by a decision which does not reflect all of the pertinent facts.