

Ontario v. O.P.S.E.U.

Ontario Public Service Employees Union *Appellant*

v.

Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services, Her Majesty the Queen in Right of Ontario as represented by the Ministry of Correctional Services and Ontario Crown Employees Grievance Settlement Board *Respondents***Indexed as: Ontario v. O.P.S.E.U.****Neutral citation: 2003 SCC 64.**

File No.: 28849.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour law -- Arbitration -- Dismissal without just cause -- Evidence -- Government employees dismissed after being convicted of sexual assault -- Convictions upheld on appeal -- Grievance settlement board ruling that convictions not conclusive evidence of guilt -- Whether union entitled to relitigate issue decided against grievors in criminal proceedings -- Whether issue estoppel applicable -- Evidence Act, R.S.O. 1990, c. E.23, s. 22.1.

W and S were each convicted of sexually assaulting people under their care. Their appeals failed, and as a result, they were terminated from their respective employment positions on the basis of their convictions. The appellant union grieved their dismissal on their behalf to the Ontario Crown Employees Grievance Settlement Board. The Board ruled that the criminal convictions were admissible as *prima facie*, but not conclusive, evidence and that rebuttal evidence could be tendered. No evidence suggesting fraud in the original trial, nor any fresh evidence, was tendered in either of the cases. The Board held that the presumption raised by W's criminal convictions had been rebutted and that he had been wrongfully dismissed. The Board held that S's convictions were inconclusive *prima facie* evidence. The Divisional Court quashed the Board's rulings. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and **Arbour** JJ.: For the reasons given in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, the doctrine of abuse of process bars the relitigation of the grievors' guilt for the offences for which they were convicted.

The common law doctrine of issue estoppel is not applicable in this case because the requirement of mutuality has not been fulfilled. The original criminal trial involved the individual grievors W and S and the Crown acting as prosecutor. The parties to the arbitrations in this case were the appellant union and the Crown acting as employer. Despite their legal personality, and their designation for the purpose of judicial proceedings, the ministries in question here as employers share no relevant relationship to the Crown as prosecutor.

Section 22.1 of the Ontario *Evidence Act* does not allow rebuttal evidence to be led in any and all circumstances. A recent amendment to the *Crown Employees Collective Bargaining Act* renders a prior criminal conviction of a Crown employee conclusive evidence that the employee committed the crime, even when no common law doctrine could successfully be invoked to bar relitigation of that issue. This amendment goes much farther than s. 22.1 of the *Evidence Act* and has no effect on its proper interpretation.

Per LeBel and Deschamps JJ.: Subject to the comments made in *Toronto (City) v. C.U.P.E., Local 79*, there was agreement with the majority's disposition of the appeal.

Cases Cited

By Arbour J.

Applied: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63; **referred to:** *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44.

By LeBel J.

Referred to: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

Statutes and Regulations Cited

Crown Employees Collective Bargaining Act, 1993, S.O. 1993, c. 38, s. 48.1(1) [ad. 2001, c. 7, s. 18].

Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 [ad. 1995, c. 6, s. 6(3)].

Public Service Statute Law Amendment Act, 2001, S.O. 2001, c. 7, s. 18.

APPEAL from a judgment of the Ontario Court of Appeal, [2001] O.J. No. 3238 (QL) (*sub nom. Ontario (Ministry of Community and Social Services) v. Ontario (Crown Employees Grievance Settlement Board)*), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC ¶ 220-038, [2000] O.J. No. 1570 (QL) (*sub nom. Toronto (City) v. C.U.P.E., Local 79*). Appeal dismissed.

Craig Flood, for the appellant.

Mary Gersht, Sean Kearney and Meredith Brown, for the respondent Her Majesty the Queen in Right of Ontario et al.

No one appeared for the respondent Ontario Crown Employees Grievance

Settlement Board.

Solicitors for the appellant: Koskie Minsky, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of Ontario: Attorney General of Ontario, Toronto.

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Ontario v. O.P.S.E.U.*, 2003 SCC 64. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Ontario v. O.P.S.E.U.*, [2003] x S.C.R. x, 2003 SCC 64.

ARBOUR J. --

I. Introduction

1 This appeal was heard at the same time as the appeal in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. Essentially, for the reasons provided in *C.U.P.E.*, I would dismiss the appeal. There are, however, issues particular to this appeal that were not raised in *C.U.P.E.* I will consider these issues briefly after outlining the salient facts.

II. Facts

2 This appeal consolidates the individual arbitrations of Jack R. White and Mohan Samaroo. White and Samaroo were each convicted of sexually assaulting people who were under their care. Their appeals failed, and as a result, they were terminated from their respective employment positions on the basis of their convictions. Their union, the Ontario Public Service Employees Union (OPSEU), grieved their dismissal on their behalf to the Ontario Crown Employees Grievance Settlement Board. The Board ruled that the criminal convictions were admissible as *prima facie*, but not conclusive, evidence and that rebuttal evidence could be tendered. No evidence suggesting fraud in the original trial, nor any fresh evidence unavailable at trial, was tendered in either of the cases. In *White*, upon hearing all the evidence, the Board held that the presumption raised by the criminal convictions had been rebutted, and that the employee had been wrongfully dismissed. In *Samaroo*, the employer appealed after the Board held the convictions to be inconclusive *prima facie* evidence.

A. Jack R. White

3 Mr. White was a residential counsellor employed by the (then) Ontario Ministry of Community and Social Services at the Ministry's Huronia Regional Centre which provides residence and care for adults with developmental disabilities. White had responsibility over the direct care and supervision of residents of the Centre, which included bathing, dressing, clothing and feeding them. White was accused by another counsellor of sexually assaulting a female resident, a severely disabled woman who could not speak. At his criminal trial before a judge and jury, White pleaded not guilty. He did not testify nor did he call any evidence. He was found guilty and his appeal failed.

4 Shortly after his conviction, White's employment was terminated. His union grieved his dismissal to the Ontario Crown Employees Grievance Settlement Board. The Board, following the instructions of the Divisional Court, admitted White's conviction as *prima facie* evidence. At the arbitration, White testified and maintained his innocence. The Board reinstated him to his job, awarded him lost wages, and ordered all reference to the sexual assault removed from his file.

B. Mohan Samaroo

5 Mr. Samaroo was employed by the Ministry of Correctional Services as a correctional officer at a jail in Whitby, Ontario. Several female inmates complained that Samaroo had sexually assaulted them. An internal investigation was launched that indicated that Samaroo had, in fact, sexually assaulted five inmates. The Ministry of Correctional Services terminated Samaroo's employment and his union immediately filed a grievance on his behalf. Shortly afterwards, the matter proceeded to a criminal trial and Samaroo was found guilty of two counts of sexual assault and one count of assault. His appeal was dismissed.

6 The Crown Employees Grievance Settlement Board held that the convictions were admissible as *prima facie*, but not conclusive, evidence of his guilt and adjourned the hearing with respect to the rebuttal evidence and the merits of the grievance, on consent, pending an appeal to the Divisional Court.

C. Procedural History

7 At Divisional Court, the applications for judicial review were granted and the decisions of the arbitrators were quashed: (2000), 187 D.L.R. (4th) 323. The Divisional Court heard this case and *C.U.P.E.* at the same time. For a description of the Divisional Court reasons, see para. 6 of

C.U.P.E. (Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, being released concurrently by this Court). The Court of Appeal for Ontario dismissed the appeals brought by the appellant OPSEU in an endorsement ([2001] O.J. No. 3238 (QL)) for the reasons provided in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541. For a more detailed judicial history of the Court of Appeal's reasons see paras. 7-10 of *C.U.P.E.*

III. Issues

8 The facts and issues in this combined appeal are substantially similar to the facts and issues in *C.U.P.E.* For the reasons given in that case, I am of the view that the doctrine of abuse of process bars the relitigation of the grievors' guilt for the offences for which they were convicted. However, I would like to address two issues particular to this appeal: (1) whether issue estoppel is applicable in this case, and (2) the meaning of s. 22.1 of Ontario's *Evidence Act*, R.S.C. 1990, c. E.23, in light of s. 48.1(1) of the *Crown Employees Collective Bargaining Act*, 1993, S.O. 1993, c. 38 (as amended by the *Public Service Statute Law Amendment Act*, 2001, S.O. 2001, c. 7, s. 18).

IV. Analysis

A. *Issue Estoppel*

9 I have come to the conclusion that, as in *C.U.P.E.*, the common law doctrine of issue estoppel is not applicable in this case. The first two requirements of that doctrine, that the issue be the same as the one decided in the prior decision and that the prior judicial decision be final (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25 (*per* Binnie J.)), have been met here as in *C.U.P.E.*, but the final requirement of mutuality has not been fulfilled. The mutuality criterion requires that the parties be the same for both proceedings, or that they at least be the privies to the original parties.

10 As in *C.U.P.E.*, the original criminal trials involved the individual grievors personally (White and Samaroo respectively) and Her Majesty the Queen. The parties to the arbitrations in this case were OPSEU and Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services in one case, and by Her Majesty the Queen in Right of Ontario as represented by the Ministry of Correctional Services in the other.

11 In *Danyluk*, *supra*, at para. 60, Binnie J. stated that the concept of privity is somewhat elastic and that determinations as to the degree of interest that will create privity must be made on a case-by-case basis. Applying this approach to the privity requirements, it could be argued that there is sufficient mutuality to permit the application of the doctrine of issue estoppel in this case. I am not persuaded however, that even under a somewhat relaxed approach to privity these parties can be said to be the same or the privies to the original parties. Even if privity could be found between the grievors and their union, in my view, the Crown, acting as prosecutor in the criminal case, is not privy to the Crown acting as employer. The employer ministries played no role in the criminal proceedings nor could they have participated as parties to these proceedings. The Attorney General, under whose authority criminal prosecutions are conducted, does not represent the interest of any particular party, but represents the public interest. Despite their legal personality, and their designation for the purpose of judicial proceedings, the ministries in question here as employers share no relevant relationship to the Crown as prosecutor.

12 In any event, for the reasons given in *C.U.P.E.*, I am of the view that abuse of process is the most appropriate doctrine to resolve these cases. The main concern in this appeal does not relate to the technical requirements of mutuality, but to the broader question of the integrity of the judicial adjudicative function. Although both doctrines promote the better administration of justice, issue estoppel is a more appropriate doctrine to use when the focus is primarily on the interests of litigants. Abuse of process, on the other hand, transcends the interests of litigants and focuses on the integrity of the entire system. When an attempt is made to relitigate a criminal conviction, the doctrine of abuse of process provides the better line of inquiry.

B. *Meaning of Section 22.1 in Light of Public Service Statute Law Amendment Act*

13 In its factum, the appellant (at para. 57) refers to the new s. 48.1(1) of the *Crown Employees Collective Bargaining Act* (enacted by s. 18 of the *Public Service Statute Law Amendment Act, 2001*), that renders a prior criminal conviction of a Crown employee conclusive evidence that the employee committed the act for which he or she was convicted. The appellant argues that had the legislature intended to restrict the scope of the rebuttal evidence under s. 22.1 of the *Evidence Act*, it had the opportunity to do so, and presumably it would have been explicit about it.

14 For the reasons given in *C.U.P.E.*, I cannot agree that s. 22.1 reveals an unambiguous legislative intent to allow rebuttal evidence to be led in any and all circumstances. The recent amendment regarding the effects of the criminal conviction of a Crown employee goes much further than s. 22.1 of the *Evidence Act*. It renders the conviction conclusive of the fact that the employee committed the crime, even when no common law doctrine could successfully be invoked to bar relitigation of that issue. In my view, the existence of that amendment has no effect on the proper interpretation of s. 22.1.

V. Disposition

15 For the foregoing reasons and for the reasons in *C.U.P.E.*, released concurrently, I would dismiss the appeal with costs.

LEBEL J. --

16 Subject to my comments in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, released concurrently, I concur with Arbour J.'s disposition of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Koskie Minsky, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of Ontario: Attorney General of Ontario, Toronto.

The official versions of decisions and reasons for decision by the Supreme Court of Canada are published in the Supreme Court Reports (S.C.R.). This site is prepared and published by LexUM in partnership with Supreme Court of Canada.