



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *Burke v. Newfoundland and Labrador Association  
of Public and Private Employees*, 2020 NLCA 38

**Date:** November 6, 2020

**Docket Number:** 201901H0080

**BETWEEN:**

KEVIN BURKE

APPELLANT

**AND:**

NEWFOUNDLAND AND LABRADOR ASSOCIATION  
OF PUBLIC AND PRIVATE EMPLOYEES

FIRST RESPONDENT

**AND:**

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

SECOND RESPONDENT

**Coram:** Welsh, O'Brien and Butler JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador,  
General Division  
(2019 NLSC 97)

**Appeal Heard:** October 21, 2020

**Judgment Rendered:** November 6, 2020

**Reasons for Judgment by:** Welsh J.A.

**Concurred in by:** O'Brien and Butler JJ.A.

**Counsel for the Appellant:** Self-Represented

**Counsel for the First Respondent:** Paula M. Schumph

**Counsel for the Second Respondent:** Christopher E. King

**Welsh J.A.:**

[1] Kevin Burke's employment with Memorial University of Newfoundland was terminated in 2005. Since that time, he has engaged in a lengthy dispute with the University and the Newfoundland and Labrador Association of Public and Private Employees (the "Union"). The matter has been considered on several occasions by arbitration, by the Labour Relations Board, and by the courts, including this Court.

[2] In an oral decision on March 8, 2019, subsequently provided in writing, the applications judge in the Supreme Court, General Division, dismissed Mr. Burke's application for enforcement and clarification of the arbitration award of Dennis M. Browne, dated November 24, 2006, and of the Labour Relations Board Order, dated March 9, 2012 (2019 NLSC 97). The judge dismissed the application on the basis that the matters raised were previously dealt with by full and final decisions. Mr. Burke appeals that decision.

**BACKGROUND**

[3] Mr. Burke began employment with the University (the "Employer") in 1997, and was a member of the Union. In April 2003, he received a letter from the Employer regarding his use of sick leave. In response, the Union filed a grievance which was resolved when a Last Chance Agreement, dated September 16, 2004, was negotiated. However, the Employer continued to have concerns regarding Mr. Burke's use of sick leave, and, on May 19, 2005, terminated Mr. Burke's employment. The Union filed a grievance which resulted in Mr. Burke's reinstatement, subject to conditions (decision of Arbitrator Browne, dated November 24, 2006). At page 23 of his decision, Arbitrator Browne set out the conditions for reinstatement:

... The Grievor is to provide the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian 1. A new Last Chance Agreement containing the usual terms and conditions shall be executed. Over the life of the New Last Chance Agreement no existing grievances are to be pursued by the Union pertaining to this particular Grievor. This will enable the Grievor to focus solely on his work related duties. The above are the conditions under which the Grievor is to be reinstated in his employment as Custodian 1.

(Emphasis added.)

The terms of the Last Chance Agreement were not specified, other than with the reference to "the usual terms and conditions".

[4] Mr. Burke refused to sign the Last Chance Agreement. Rather, by application to the Labour Relations Board, dated January 22, 2007, he complained that the Union did not provide the support he felt was appropriate in dealing with the grievances of April 3, 2003 and May 25, 2005. By order dated March 30, 2007, the Board dismissed Mr. Burke's application, concluding that the Union had not acted in an arbitrary or discriminatory manner, or in bad faith in dealing with the grievances.

[5] Mr. Burke sought judicial review of the Board's order by application dated May 2, 2007. Before that application was heard, a second arbitration was conducted for the purpose of determining "the usual terms and conditions" ordered to be included in the Last Chance Agreement as referenced in the November 24, 2006 Browne arbitration. In his October 14, 2007 decision, Arbitrator Clarke addressed his mandate, at pages 12 and 13:

As noted above, the sole purpose of the appointment of the undersigned was to determine the "usual terms and conditions" for the Last Chance Agreement. However, during the course of the hearing, the parties argued over whether or not the Grievor should be paid for the period of time that has elapsed since his dismissal. The union argues that the reason the Grievor was not reinstated immediately is because of delays caused by the actions of the employer in the drafting of the Agreement. The employer states that the reasons for the Grievor not being immediately reinstated are to do with the Grievor having launched various judicial proceedings [with] the effect of slowing down the process. The employer as well blamed the Grievor and the union for not having properly negotiated the terms for the Last Chance Agreement.

Notwithstanding that the written terms of my appointment are as set forth above, the parties asked for my views on the issue of compensation. These views are as set forth following.

In my view, the issue of compensation up to the date of Arbitrator Browne's decision is a matter which clearly falls within his jurisdiction as Arbitrator. If, having reinstated the Grievor and set forth the terms for his reinstatement, he had felt that compensation at that point was appropriate, he would have ordered same. ...

[6] The Last Chance Agreement specified by Arbitrator Clarke, to be signed by Mr. Burke, and on behalf of the Employer and the Union, stipulated:

**Whereas** Mr. Burke was terminated for excessive absenteeism and his failure to live up to the terms of a previous Last Chance Agreement; and

**Whereas** an Arbitration Award reinstated Mr. Burke under the usual terms and conditions of a new Last Chance Agreement; and

**Whereas** Mr. Burke, in accordance with the Arbitration Award has provided the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian 1.

Therefore, the parties hereby agree as follows:

1. The Last Chance Agreement shall be in effect from the date of Mr. Burke's return to active employment, [date of return] and shall remain in effect for one (1) year from that date until [a date one year from the date of return to active employment].
2. During this period Mr. Burke will attend work regularly. Should Mr. Burke exceed fifty-six (56) hours sick leave during the above referenced year, it shall be grounds for immediate dismissal.
3. This Last Chance Agreement will remain in Mr. Burke's file for eighteen (18) months following the execution of same and will be used by the Employer in any grievance or arbitration action. This agreement will be removed from Mr. Burke's file if he maintains a clear record through this eighteen (18) month period.
4. Following the one year of this Last Chance Agreement, Mr. Burke will continue to be monitored in accordance with the University's sick leave policy and use of sick leave in excess of the Custodial average will result in consequences for Mr. Burke.

Mr. Burke did not sign this Last Chance Agreement.

[7] Subsequently, on October 30, 2007, the application for judicial review of Arbitrator Browne's 2006 decision, previously filed by Mr. Burke, was dismissed.

[8] In December 2007, Mr. Burke filed another complaint with the Labour Relations Board alleging that the Union had not dealt appropriately with his grievance. The Board dismissed the complaint, and judicial review of that decision, also sought by Mr. Burke, was dismissed. However, the judicial review decision was successfully appealed by Mr. Burke. By decision dated February 18, 2010, this Court remitted Mr. Burke's complaint for reconsideration by the Board because (2010 NLCA 12, 294 Nfld. & P.E.I.R. 230):

[88] ... the failure of the Board to consider Mr. Burke's specific allegations in the context of the actions of the union in the period leading up to and during the Clarke arbitration was an unreasonable decision.

[9] On reconsideration, by decision dated March 6, 2012, the Labour Relations Board determined that the Union had acted in a manner that was

arbitrary in dealing with Mr. Burke's complaint. By way of remedy, the Board concluded and ordered:

[486] The Board does not have jurisdiction to make monetary awards nor to order the Employer to take any action in relation to this matter. The Board's jurisdiction is as set out in section 130(5) above. The Board therefore orders that the Union pursue a meeting with the Director or Associate Director of Employee Relations at [Memorial University of Newfoundland] in an attempt to resolve all issues pertaining to Mr. Burke's grievance.

[487] Should such a meeting not resolve this matter, the Board orders that any outstanding matters pertaining to this agreement be referred to Arbitration.

[10] After a meeting on March 28, 2012 failed to resolve the outstanding issues, in accordance with the Board's order, the matter was referred to arbitration. Based on the Board's decision that the Union had failed to meet its duty of fair representation for Mr. Burke, the Union hired external legal counsel to make submissions at the arbitration. In his decision, dated May 24, 2013, at pages 25 and 26, Arbitrator Browne addressed the requirement for a medical clearance from Mr. Burke:

The Employer should be assured that the Grievor is fit to return to work. The Grievor needs to know if he is capable of assuming his duties as a Custodian 1 in the workplace. A complete medical examination is required to make these determinations. Before the Grievor can return to work a medical certificate is to be provided to the Employer clearly stating that the Grievor is fit to return to work. [Emphasis in original.]

...

... After the Employer receives this medical certificate which needs only to state that the Grievor is fit to return to work as a Custodian 1, the Grievor can return to work to assume his duties as a Custodian. However, the terms of the Last Chance Agreement, which follow, apply.

[11] Regarding the Last Chance Agreement, Arbitrator Browne concluded, at page 27:

I find that the issues pertaining to the Last Chance Agreement were dealt with by Arbitrator Clarke. There is no ambiguity in Arbitrator Clarke's decision. The terms of the Last Chance Agreement have been decided. The Grievor and the parties were directed to sign the Last Chance Agreement by Arbitrator Clarke. The failure of the Grievor and the parties to execute that Last Chance Agreement does not provide another opportunity in this case for either party to resubmit issues which had been previously dealt with in arbitration. Simply put, the parties are bound by the terms of

the Last Chance Agreement in Arbitrator Clarke's decision. Furthermore, I am satisfied that Arbitrator Clarke's Last Chance Agreement contains reasonable terms and conditions and fairly reflects the circumstances of this case.

(Emphasis added.)

[12] In the result, Arbitrator Browne ordered Mr. Burke to be reinstated within thirty days after receipt of the medical certificate by the Employer, provided the Last Chance Agreement was executed. Mr. Burke provided the medical certificate by July 17, 2013. The Employer and the Union signed the Last Chance Agreement in December 2014. Mr. Burke has not signed the Agreement.

[13] In the meantime, the Employer applied for judicial review of Arbitrator Browne's 2013 decision. In a decision dated October 22, 2014, the applications judge dismissed the application for judicial review having found that the Arbitrator's "articulation of the outstanding issues with respect to Mr. Burke's grievance was reasonable and his disposition a reasonable outcome (2014 NLTD(G) 128, 356 Nfld. & P.E.I.R. 135, at paragraph 77). That decision was not appealed by the Employer or the Union.

[14] However, Mr. Burke, on his own motion, filed a notice of appeal. In response, the Union applied to have the notice of appeal struck on the basis that Mr. Burke had no standing to bring the appeal. That application, heard by a panel of three, was granted and the notice of appeal struck out (2015 NLCA 4; 361 Nfld. & P.E.I.R. 134). That decision is central to Mr. Burke's appeal which, on the submissions of the parties, is based on the doctrine of *res judicata*.

## ISSUES

[15] At issue in this appeal is whether the applications judge in the court appealed from erred in dismissing Mr. Burke's application for enforcement and clarification of Arbitrator Browne's 2006 decision and the Labour Relations Board's 2012 Order on the basis that the matters raised by Mr. Burke have been dealt with by means of full and final decisions.

## ANALYSIS

### The Law

[16] The doctrine of *res judicata*, with its two branches, cause of action estoppel and issue estoppel, is discussed in *Furlong v. Avalon Bookkeeping*

*Services Ltd.*, 2004 NLCA 46, 239 Nfld. & P.E.I.R. 197. Roberts J.A., for the Court, explained:

[15] Green, J.A., for this court (now Green, C.J.T.D.) considered the distinction between the two branches of *res judicata* in *Quinlan v. Newfoundland (Minister of Natural Resources)* (2000), 192 Nfld. & P.E.I.R. 144; 580 A.P.R. 144 (Nfld. C.A.), at paras. 6 and 7:

“... The principles underlying the *res judicata* doctrine are the promotion of finality of litigation and the prevention of a multiplicity or fragmentation of proceedings. Subject to the restrictive rules respecting reopening a case on the grounds of mistake or fraud or to allow for the reception of new evidence, a litigant ought not to be able to retry a cause of action, or to claim any relief flowing therefrom, that has already been litigated between the same parties or their privies (often referred to as ‘cause of action estoppel’ or ‘merger’ of the cause of action in the original judgment).

“The doctrine also applies (sometimes referred to as ‘issue estoppel’) to prevent a litigant from relitigating an issue that was fundamental to, and was decided in, previous litigation between the same parties or their privies even though the causes of action in the two proceedings were not identical. ...” (Emphasis added [in the original]).

[17] In the appeal now before this Court, it is the issue estoppel branch of *res judicata* that falls to be considered. The analytical approach to issue estoppel is discussed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. Binnie J., for the Court, explained:

[25] The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle [v. Minister of National Revenue]*, [1975] 2 S.C.R. 248], at p. 254:

- (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.

...

[33] The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still

determine whether, as a matter of discretion, issue estoppel *ought* to be applied [italics in the original] ... .

### Application of the Law

[18] A review of the facts set out above leads to the conclusion that, by means of his application in the court appealed from, Mr. Burke was attempting to raise again the question regarding the terms on which he would be reinstated as a Custodian 1. I note that the application was made by Mr. Burke, with the Union and the Employer being respondents. (For a comprehensive review of the proceedings and a discussion of the issue of standing by Mr. Burke as an individual before the Court, see the 2015 decision of this Court, 2015 NLCA 4.)

[19] The underpinning of Mr. Burke's application in this case is set out in the preamble to the applications judge's order:

**Whereas:** On November 28, 2012, [Mr. Burke] filed an Application seeking enforcement and clarification of [the] Arbitration Award of Dennis M. Browne [dated] November 24, 2006 and [the] Labour Relations Board Order [dated] March 9, 2012;

**And Whereas:** On December 5, 2012, the Application was adjourned *sine die*,

**And Whereas:** On September 24, 2018, the Applicant filed a Notice of Intention to proceed.

[20] A review of the record of proceedings leads to the conclusion that the terms and conditions attached to Mr. Burke's reinstatement as a Custodian 1 clearly have already been considered and finally determined as a result of the arbitrations, Labour Relations Board decisions, and decisions of the courts. Beginning with the 2006 arbitration decision by Arbitrator Browne, Mr. Burke had the opportunity to return to his employment, provided he obtained a medical clearance and executed the Last Chance Agreement. Arbitrator Browne did not specifically set out the terms and conditions to be included in the Agreement. However, the subsequent decision of Arbitrator Clarke clarified the terms and conditions, and these were accepted by Arbitrator Browne in the 2013 arbitration decision. That decision dealt with all the issues arising from the 2006 arbitration. As set out above, the Employer applied for judicial review of Arbitrator Browne's 2013 decision. That application was dismissed on the basis that the arbitration decision dealt with all the issues and that the result was reasonable. That decision was not appealed.

[21] In the result, Arbitrator Browne's 2013 decision, which clarifies his 2006 decision, together with the 2012 order of the Labour Relations Board, constitute

a final decision with respect to the conditions to be met for Mr. Burke's reinstatement as a Custodian 1. The preconditions for the operation of issue estoppel, being step one of the analysis, are satisfied. That is, (1) the same question has been decided; (2) the decision that creates the estoppel, Arbitrator Browne's 2013 decision, is final; and (3) the parties are the same throughout. With respect to the third criterion, the question of Mr. Burke's standing to take independent action was determined by this Court's decision in which Mr. Burke's notice of appeal was struck out on the basis that he lacked standing before the Court (2015 NLCA 4).

[22] Regarding the second step in the issue estoppel analysis, "whether, as a matter of discretion, issue estoppel *ought* to be applied" (*Danyluk*, at paragraph 33), I am satisfied that a review of both the applications judge's decision and the record of proceedings leads inevitably to the conclusion that, in this case, there was no rationale or basis on which the exercise of discretion not to apply issue estoppel would be warranted.

### **SUMMARY AND DISPOSITION**

[23] The applications judge in the court appealed from did not err in dismissing Mr. Burke's application on the basis that the matters in issue have been dealt with in full and final decisions. Issue estoppel applies.

[24] Accordingly, I would dismiss the appeal, with no order as to costs.

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B. G. Welsh J.A.

I concur: \_\_\_\_\_

F. P. O'Brien J.A.

I concur: \_\_\_\_\_

G. D. Butler J.A.