Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 23
Date: July 10, 2017
File No: T2160/3416

Between:

Jamison Todd

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

City Of Ottawa

Respondent

Ruling

Member(s): Kirsten Mercer

Table of Contents

I. BACKGROUND

[1] Mr. Todd, (the "Complainant") was hired by OC Transpo (the "Respondent") in 2001 to work as a Bus Operator.

[2] The Complainant asserts that, in 2004, he was diagnosed with Irritable Bowel Syndrome ("IBS") and gastro-esophageal reflux disorder ("GERD") and required accommodation for these conditions by his employer.

[3] The Complainant also asserts that he experienced episodes of chronic pain in his neck and shoulder dating back to 2004, and hip and leg pain starting in 2012.

[4] The Complainant submits that as a result of these and other conditions, he was required to miss work for periods of time on various occasions. His absences from work ultimately became a concern to his employer.

[5] The Complainant and the Respondent entered into a Continuing Employment Agreement (the "CEA"), which governed, among other things, the Complainant's absences from work.

[6] The Complainant was placed on administrative leave in January 2014, and was terminated pursuant to an alleged breach of the CEA on March 10, 2014.

[7] The circumstances leading up to and including the Complainant's termination are the subject of this complaint.

A. The Duty of Fair Representation Complaint

[8] At the relevant time, the Complainant was a member of the Amalgamated Transit Union (the "ATU"). His employment with the Respondent was governed by a collective agreement between ATU Local 279 (the "Union") and the Respondent.

[9] On May 8, 2014, the Complainant filed a complaint pursuant to section 37 of the *Canada Labour Code* ("CLC") with the Canadian Industrial Relations Board (the "CIRB") in which he asserted that the Union failed to discharge its duty of fair representation by

refusing to file a discrimination grievance on his behalf, contesting his termination (the "DFR Complaint").

[10] Section 37 of the CLC provides that:

> A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[11] The Complainant sought a determination of the DFR Complaint by the CIRB (the "CIRB Proceeding") and submitted that by refusing to grieve his termination, the Union had breached the duty owed to him pursuant to s. 37 of the CLC.

[12] Although the Respondent appears to have participated in these proceedings, the DFR Complaint was not a proceeding against the Respondent nor was it a consideration of the Complainant's allegation that he was discriminated against by the Respondent.

[13] It appears that the CIRB conducted a review based on the paper record before it, having received submissions from the Complainant, the Union and the Respondent.

[14] On November 25, 2014, the CIRB dismissed the DFR Complaint in writing (the "CIRB Decision").

[15] In the CIRB Decision, the Board stated that "[t]he Board's role under section 37 is to assess the union's conduct and decision-making process in the handling of a matter, and not the merits of the grievance."

[16] The CIRB Decision is a final decision.

B. The Human Rights Complaint

[17] On November 16, 2014, the Complainant made a human rights complaint pursuant to section 7 and section 10 of the *Canadian Human Rights Act* ("CHRA") alleging that he was discriminated against by his employer on the basis of a disability (the "Complaint").

[18] On April 20, 2015, upon filing its response with the Canadian Human Rights Commission (the "Commission") in this matter, the Respondent requested that the Complaint be dismissed on the basis of s. 41(1)(d) of the CHRA. The Respondent claimed that the issues raised in the Complaint had already been addressed by the CIRB in the CIRB Decision.

[19] On April 5, 2016, the Commission denied the Respondent's request and issued a report pursuant to s. 41(1) of the CHRA (the "Report") recommending that the Complaint proceed to an inquiry before the Canadian Human Rights Tribunal (the "Tribunal"). In the Report, the Commission determined that the CIRB had:

> only considered whether the Complainant's union had breached its duty of fair representation under s. 37 of the CLC and the Complainants human rights allegations against the Respondent were not properly before it. Therefore the substance of the complaint has not been considered. Having regard to all of the above, justice requires the Commission to deal with the complaint.

[20] The Commission adopted the Report (the "Commission's Decision") and advised the parties that they had 30 days to seek judicial review of the Commission's Decision.

[21] Neither party sought judicial review of the Commission's Decision.

[22] By letter dated June 28, 2016, the Commission referred the Complaint to the Tribunal for inquiry.

[23] On December 22, 2016, the Complainant filed a statement of particulars with the Tribunal detailing his Complaint.

[24] On January 17, 2017, the Respondent filed a statement of particulars with the Tribunal in which it responded to the Complaint and alleged (among other things) that the Complaint was an abuse of process. The Respondent further reserved its rights to bring a motion to dismiss the Complaint on that basis.

[25] In its Reply, filed on January 31, 2017, the Complainant denied that the Complaint constitutes an abuse of process.

[26] In a letter to the Tribunal sent of February 3, 2017, the Commission (which is not participating in the hearing of this matter, but reserved the right to participate in the pre-hearing process) advised the Tribunal that it wished to make submissions on the proposed motion to dismiss the Complaint for abuse of process. The Commission further requested that any such motion to dismiss be brought as a preliminary matter and not at the final hearing in order that the Commission might have an opportunity to make submissions.

[27] On February 8, 2017. The Tribunal wrote to the parties requesting that the Respondent bring its motion to dismiss as a preliminary motion.

[28] On March 24, 2017, the Respondent filed its motion to dismiss the Complaint (the "Motion").

C. The Motion to Dismiss

(i) The Respondent's Position

[29] The Respondent submits that the Complaint should be dismissed on the basis that:

i. It is subject to an issue estoppel,

or in the alternative that:

i. It is an abuse of process, and/or

ii. It is a collateral attack on the CIRB Decision.

[30] In the further alternative, the Respondent submits that the findings of fact made by the CIRB ought to bind this Tribunal and that the parties should be precluded from challenging those finding in the Tribunal proceedings.

(ii) The Complainant's Position

[31] The Complainant submits that the Motion is unfounded for the following reasons:

i. The issues before the Tribunal differ from those before the CIRB; and

ii. The parties before the Tribunal differ from those that appeared before the CIRB;

[32] The Complainant further submits that the Tribunal is not bound by the findings of a prior proceeding as:

i. There is no precedent for doing so in absence of a finding that the issue estoppel or abuse of process doctrines apply;

ii. Doing so might introduce information out of context in a manner that would detract from the Tribunal's inquiry;

iii. Factual matters may not have been properly canvassed in the CIRB Proceeding for the purpose of determining the Complainant's human rights complaint; and

iv. It is against the public interest to have human rights issues determined without the benefit of oral evidence.

(iii) The Commission's Position

[33] The Commission adopted the position advanced by the Complainant, and submitted that

i. The Respondent's motion itself is a collateral attack on the Commission Decision;

ii. The Tribunal is not bound by the CIRB's factual findings, rather such findings or recitations ought to be treated by the Tribunal as hearsay.

II. THE ISSUES

A. Does the Tribunal have the jurisdiction to dismiss a Complaint by way of a preliminary motion?

B. Should the Complaint be dismissed by operation of the finality doctrines of:

a. Collateral attack;

b. Issue Estoppel; and/or

c. Abuse of Process?

C. What bearing, if any, should findings of fact made in a prior proceeding have of the determination of the Complaint?

III. THE LAW

A. Jurisdiction of the Tribunal

[34] The proceedings of the Tribunal are conducted pursuant to the CHRA. Section 50(2) of the CHRA provides that

> In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

It is well established that the Tribunal has the authority to dismiss a complaint as a preliminary matter (*Canada (Human Rights Commission) v. Canada Post Corp*., 2004 FC 81 ("*Cremasco*"), affirmed in *Canadian Human Rights Commission v. Canada Post Corp*., 2004 FCA 363 at paras. 14-15; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 ("*FNCFCS*") at para. 140; *Bezoine v. City of Ottawa*, 2017 CHRT 2 at paras. 33-39). However, the Federal Court has cautioned against dismissing a complaint without a full hearing except in "the clearest of cases" (*FNCFCS* at para 140).

[35] Thus, the Tribunal is within its jurisdiction to determine this motion at this time.

B. The Finality Doctrines

[36] The finality doctrines of collateral attack, issue estoppel and abuse of process by relitigation stem from one of the most basic principles of the common law: that an issue,

once determined by a competent court or tribunal, cannot be redetermined except by an appeal or judicial review of the initial decision. This principle is sometimes articulated axiomatically to say that "a party should only be vexed once in the same cause".

[37] The twin values of finality and fairness lie at the heart of these doctrines and these values must be held in tension, with neither one eclipsing the other. This point was highlighted in the Supreme Court of Canada's (the "SCC") overview of the finality doctrines in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola*"), where Abella J. wrote:

> All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it really is a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute. (see para 37)

[38] In many ways, the application of the finality doctrines is a highly discretionary exercise, driven by the needs of both substantive and procedural justice. As the Court stated in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 ("*Danyluk*"), and a majority of the SCC reiterated in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*"): "a judicial doctrine developed to serve the ends of justice should not be applied mechanistically to work an injustice" (*Danyluk* at para 1; *Penner* at para 30).

[39] On the motion before me, the Respondent has failed to demonstrate that the CIRB Decision that the Union discharged the duty of fair representation owed to the Complainant addressed *the same question* as that which is before the Tribunal in this inquiry. The finality of the CIRB Decision is not jeopardized by the Tribunal's consideration of the Complaint.

[40] In absence of evidence that *the same question* has already been decided by a prior proceeding, the finality doctrines of collateral attack, issue estoppel and abuse of process by relitigation are of little relevance.

[41] While I am of the view that it is possible for a prior finding of fact to bind a subsequent adjudicative process by operation of the finality doctrines, I do not find sufficient evidence to warrant an Order to that effect in this case, at this time. What's

more, I am not convinced that the interests of justice or the cause of fairness would be served by imposing such a limitation on the scope of Tribunal's inquiry into this Complaint.

[42] We now turn to consider in more detail each of the specific doctrines invoked by the Respondent on the Motion.

(i) Collateral Attack

[43] The doctrine of collateral attack was articulated by the SCC in *Wilson v. The Queen*, [1983] 2 SCR 594 at page 599:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. (Wilson at 599)

[44] A collateral attack is not to be confused with relitigation of issues or facts already decided within an Order (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ("*CUPE*") at para 33; *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 71). Rather, it is a specific doctrine precluding a challenge to an Order or the execution of an Order.

[45] If a subsequent proceeding does not constitute an attack on a final Order, or represent and attempt to preclude the execution of an Order, then the doctrine of collateral attack has no application (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis), 2015 at page 469).

[46] The Complaint, in which the Complainant is seeking a remedy from the Respondent (his former employer) for discrimination, does not represent an attack on the CIRB's Decision that the Union duly discharged its duty to fairly represent the Complainant.

[47] The Respondent has failed to demonstrate that the Complaint represents an attack on the Order made as a result of the CIRB Decision, or the implementation thereof.

[48] The Complaint therefore is not a collateral attack.

(ii) Issue Estoppel

[49] Where an issue has already been decided by a competent body, that decision may be said to create a bar (an estoppel) against a redetermination of the same issue in a future proceeding.

The law of issue estoppel in Canada builds on three factors. An issue estoppel can be created by a proceeding where these preconditions are met:

i. the judicial decision which is said to create the estoppel is final;

ii. the same question was decided in the prior proceeding; and

iii. 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. (*Danyluk* at para 25)

The SCC in *Penner* confirmed that the leading case for the application of the doctrine of issue estoppel to a Tribunal decision is *Danyluk*. Justice Binnie, writing for the Court, quotes Dickson J. (as he then was) in adopting a strict approach to the application of the issue estoppel analysis. "It will not suffice if the question arose collaterally or incidentally in the earlier proceeding or is one which must be inferred by argument from the judgment." (*Danyluk* at para 24)

[50] The three factors are thus said to create the preconditions for the operation of issue estoppel (*Danyluk* at para 25). If any one of the three conditions are not present in a given case, then an issue estoppel does not arise.

[51] Even where the preconditions are established, the Court in *Danyluk* cautions against a mechanistic application of the doctrine, and articulates a further step in the analysis required to determine if an issue estoppel arises (*Danyluk* at para 33).

[52] If the party seeking to invoke an estoppel is able to demonstrate that the preconditions are established, "the court must still consider whether, as a matter of

discretion, issue estoppel ought to be applied" [emphasis added] (*Danyluk* at para 33). This step has been referred to as the *fairness* test.

[53] The criteria to be considered when applying the fairness test are not fixed, but may include:

- The purpose of the legislative framework enacted for each proceeding;
- The availability of an appeal;
- The procedural safeguards available to the parties;
- The expertise of the decision makers;
- The circumstances giving rise to the prior proceeding; and
- The potential injustice of applying an estoppel in this case. (*Danyluk* at paras 68-80)

[54] In applying the *Danyluk* test to this Motion, let us consider whether the preconditions for an issue estoppel are met:

(a) Was the CIRB Decision a final decision?

[55] There is no dispute that the CIRB Decision was a final decision.

(b) Is the question raised by the Complaint the same as the question that was determined in the CIRB Decision?

[56] The CIRB Decision determines whether the Union discharged its duty to fairly represent its member in the manner prescribed by section 37 of the CLC.

[57] The CIRB made no determinations or orders about the Respondent, or the Respondent's conduct, nor would it have had the jurisdiction to do so in the CIRB Proceeding.

[58] What's more, as was described above, the CIRB made an explicit point of stating in the CIRB Decision that it is not making a determination of the Complainant's grievance against his employer.

[59] In my view, this fact is fatal to the Respondent's motion to dismiss the Complaint on the basis of the finality doctrines. Where a prior proceeding does not consider the same

question or determine the same issues as those in which the finality doctrines are being invoked, the adjudicative tools of issue estoppel, collateral attack and abuse of process by relitigation are of little use.

(c) Are the parties to the Complaint the same as the parties to the CIRB proceeding?

[60] A duty of fair representation complaint is a proceeding between a union and its member.

[61] The Respondent was not the subject of the CIRB Decision. While there was very little evidence before me on this factual question, it appears from the language of the CIRB Decision that the Respondent and the Complainant both participated in the CIRB Proceeding and likely had an opportunity to be heard on the issues before the CIRB. As such, it is likely that both the Complainant and Respondent were parties to both proceedings.

[62] There is insufficient evidence before me to determine with finality whether the Respondent was a party to the CIRB Proceeding. However, as I have already found that the CIRB did not consider the same question as that which is raised in the Complaint, determining whether the Respondent was a party to the CIRB Proceeding is not necessary to dispose of this motion.

(d) Does fairness nonetheless operate against the application of the doctrine of issue estoppel in this case?

[63] Only when the preconditions for the operation of the doctrine of issue estoppel are met do we turn to consider whether fairness would nonetheless preclude the operation of the doctrine in the specific case.

[64] As the preconditions are not met in this case, there is no need to consider the fairness factors on this motion.

[65] Having said that, as I have found that the CIRB Decision expressly states that the CIRB was not attempting to address or resolve the grievance underlying Mr. Todd's DFR Complaint, I find that it would be unfair to use the CIRB Decision to preclude the Complainant from raising those issues here.

(iii) Abuse of Process by Relitigation

[66] Even in a case where the strict requirements of issue estoppel are not met, the doctrine of abuse of process can nonetheless preclude a relitigation of the same issue twice where it would be abusive to do so.

> Canadian courts have applied the doctrine of abuse of process to preclude litigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirement) are not met but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice. (*CUPE* at para 37)

[67] Although the formal requirements that are applied with regard to issue estoppel are relaxed when considering the doctrine of abuse of process, the mischief with which the court is concerned is the same. The doctrine of abuse of process is engaged where a party, dissatisfied with the result obtained before one decision maker, seeks to achieve a different result in another forum to the effect of wasted time and resources for the parties and the proper administration of justice (*Danyluk* at para 20; *CUPE* at paras 37, 51).

[68] In considering the application of the doctrine of abuse of process (albeit within the context of a different statutory framework) the SCC in *Figliola* confirmed several key principles to be considered in the abuse of process analysis: "judicial economy, consistency, finality, and the integrity of the administration of justice". (*Figliola* at para 33; *CUPE* at para 37)

[69] The determination as to whether a subsequent proceeding constitutes an abuse of process is a discretionary matter.

[70] In *Penner* the SCC elaborated on the discretionary application of issue estoppel and the need for flexibility and in *CUPE*, the SCC confirmed that the discretionary factors for issue estoppel apply equally to the doctrine of abuse of process. (*CUPE* at para 53)

[71] The SCC also clarified that the requisite fairness considerations apply to both the conduct of the prior proceeding, as well as to any consideration of whether the prior proceeding can preclude the litigation of related facts or findings in a subsequent proceeding.

> 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. [Emphasis added] (*Penner* at para 39)

[72] I have already found that the CIRB Decision did not address or attempt to resolve the Complainant's Complaint. Rather, the CIRB expressly stated that it was making no attempt to do so.

[73] Although the material before me on this Motion is somewhat incomplete in this regard, it does not appear that either the parties to the CIRB Proceeding or the Board considered or addressed the underlying discrimination grievance. Nor could the parties, based on the statutory purpose and scope of a section 37 proceeding, reasonably have concluded that the CIRB Decision would dispense with the Complainant's allegation of discrimination on the part of the employer.

[74] While the DFR Complaint and the Complaint arose from an overlapping factual matrix, the two proceedings do not consider the same issues or even bind the same parties.

[75] A future Tribunal decision regarding the merits of the Complaint does not run the risk of redetermining the issues decided in the CIRB Decision, nor could any such decision regarding discrimination by the Respondent experienced by the Complainant (or not) undermine the CIRB Decision and therefore there is no real concern regarding finality,

consistency of result or the integrity of the administration of justice as between the CIRB Proceeding and the Tribunal proceeding.

[76] Because of the distinct nature of the two proceedings, I also find that there is no real concern with judicial economy in this case. Any sacrifice of judicial resources made as a result of the Tribunal's consideration of evidence that formed part of the CIRB Decision is offset by the more important consideration of ensuring the procedural fairness of a full hearing of the Complaint. For the forgoing reasons, I find that the Complaint is not an abuse of process.

C. Prior Factual Findings

[77] The Respondent raises an alternative argument that certain factual findings made in the CIRB Decision bind this Tribunal, and that the Complainant ought to be prevented from raising those issues at a hearing before the Tribunal.

[78] In order to make such a finding, this Tribunal would have to be convinced that the interests of fairness and the administration of justice are best served by foreclosing certain areas of inquiry at the hearing.

[79] In my view, to limit the scope of the hearing in this way would be an unusual step- although not without precedent (*Davidson v. Health Canada*, 2012 CHRT 1 at para 16 ("*Davidson*")).

[80] While I agree with the Respondent that it is within the jurisdiction of the Tribunal to make such an order where a relitigation of already determined facts would constitute an abuse of process, I do not agree that a reconsideration of facts necessarily constitutes an abuse of process. Furthermore, for the reasons detailed below, I do not find that making such an order in this case, and on the basis of the facts currently before me, would be in the interest of justice.

(i) The Respondents Submissions

[81] In making its alternative argument, the Respondent relies on three cases in support of its submission that the Complainant should be precluded from leading evidence that was the subject of a factual finding made by the CIRB. The Respondent submits that a relitigation of facts that were the subject of a finding by the CIRB constitutes an abuse of process and should be barred by the Tribunal.

[82] The Respondent relies on *OC Transpo v A.T.U., Local 279,* [2005] 142 L.A.C. (4th) 343 in support of its motion. In that case, an arbitration panel found that a relitigation of factual findings arising from a prior criminal proceeding would constitute an abuse of process. It appears that, in that case, each of the adjudicative bodies were examining the same conduct of the same party, albeit through a different legal lens and applying a different standard of proof.

[83] The arbitration panel specifically noted the SCC's language in *CUPE*, highlighting that a finding arising from a prior robustly-contested proceeding should be shown deference.

[84] In *re George Brown*, 1644-13-M OLRB, 2014 CanLII 38605 (ON LRB) , the Ontario Labour Relations Board (the "OLRB") considered whether or not to adopt factual findings made by the same parties before a labour arbitrator interpreting a different but related section of the *Labour Relations Act* (the "*LRA*"). Although the OLRB was considering different subsections of s. 5 of the LRA, it determined that in the specific context, conflicting findings directed at the same parties in closely related questions would "undermine the integrity of the labour relations system".

[85] In *Davidson*, this Tribunal considered whether evidence ought to be put before it in respect of the fairness of a selection process that had already been the subject of a proceeding before the Public Service Commission Appeal Board (the "PSCAB"). Once again, the Tribunal found that the matter at issue in the second proceeding had been through a rigorous process and had been the subject of two appeals, each of which had considered the fairness of the Complainant's treatment in the selection process.

[86] The Tribunal in *Davidson* found that the precise allegations of unfairness had been made previously and had been determined by the PSCAB. The Tribunal was satisfied that

the material questions had been asked and answered and the Member determined that a reconsideration would not be a good use of judicial resources in that case.

(ii) The Complainant's Submissions

[87] The Complainant submits that the findings made by the CIRB were, as a matter of fact, made for another legislative purpose, in the absence of some procedural protections that would be available before the Tribunal, and were not made in the context of a human rights analysis. As such, the Complainant submits that it would be unfair to read in findings from a different forum.

[88] The Complainant did not cite any authorities in support of his submissions.

(iii) The Commission's Submissions

[89] The Commission dealt with this issue only in passing, and submitted that the findings of the CIRB are elements of evidence that a Tribunal can take into account, and which ought to be given the same weight as hearsay, although it cites no authority for this proposition.

(iv) Analysis

[90] In each of the cases relied upon by the Respondent, the adjudicative body making an order to preclude relitigation of certain facts determined that relitigation would be unfair and/or could risk undermining the administration of justice on the facts of the specific case before it.

[91] In this case, as has been previously discussed, the essential question that was at issue before the CIRB is fundamentally different than that which is before this Tribunal. Furthermore, there are critical distinctions between the two proceedings that must be weighed when considering the applicability of findings made in the CIRB context to the fact finding exercise being pursued before this Tribunal, such as the different legislative

objectives, the distinct legal questions, the disparate procedural safeguards and even the different parties that are the subject of each proceeding.

[92] None of the cases relied upon by the Respondent stand for a proposition that a relitigation of facts considered by a prior proceeding cannot be put before a subsequent adjudicative body where it would be in the interest of justice to do so. The abuse of process doctrine is a tool designed to enhance the administration of justice, and should not be deployed to work an injustice.

[93] The application of the doctrine of abuse of process by relitigation is a highly discretionary, and requires a careful consideration of the specific facts surrounding the proceedings.

[94] As a general matter, it would appear to me that the greater the differences between the two proceedings, the less the subsequent proceeding ought to be bound by the former.

[95] Any application of the abuse of process doctrine to the facts in this case, should be subject to an analysis of the *Danyluk* fairness factors. Based on what is before me at this stage, I am particularly concerned with the following issues:

i. The different legislative purposes of a section 37 panel and this Tribunal;

ii. The different procedural safeguards available to the parties in each proceeding;

iii. The quality of the evidence presented and relied upon in each proceeding;

iv. The expertise of the CIRB panel in considering human rights issues; and

v. The potential injustice of the CIRB Decision limiting the scope of the Tribunal's consideration of the Complaint.

[96] I am not convinced at this stage that it would be in the interest of justice to limit the facts to be considered at the hearing into the Complaint. However, I do not preclude the possibility of making such a finding in the face of a more complete factual picture.

[97] Although I do not find cause to grant the Respondent's motion at this time, in my view, any questions of the admissibility and appropriate weight to accord the facts raised in this inquiry are best determined in the context of the hearing of the Complaint.

IV. DISPOSITION

[98] Having regard to all of the above considerations, I am not convinced that the issues before the Tribunal have adequately been addressed in a prior proceeding. Consequently, I do not find any basis on which to apply the finality doctrines to dismiss the Complaint.

[99] Although there is some overlap between the facts that were before the CIRB in their consideration of the DFR Complaint and those at issue before this Tribunal, based on the evidence and submissions before me on this Motion, and upon consideration, I do not find sufficient grounds to grant the Respondent's motion to prevent the parties from leading evidence on factual matters considered by the CIRB at this stage of the proceedings.

[100] I do not believe that the interest of justice would be served by foreclosing any avenue of inquiry at this stage.

[101] Accordingly, I dismiss the Respondent's motion to dismiss the Complaint.

[102] I also dismiss the Respondent's motion to narrow the factual inquiry at this stage of the proceeding.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
July 10, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2160/3416

Style of Cause: Jamison Todd v. City of Ottawa

Ruling of the Tribunal Dated: July 10, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Alayna Miller, for the Complainant

Daniel Poulin, for the Canadian Human Rights Commission

David Patacairk, for the Respondent