CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

KEN O'CONNOR

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

RULING

MEMBER: Karen A. Jensen 2006 CHRT 05
2006/01/31

[1] On September 27, 2000, Ken O'Connor filed a complaint with the Canadian Human Rights Commission ("the Commission") alleging that the Canadian National Railway Company ("CN") had violated s. 7 of the *Canadian Human Rights Act* by discriminating against him in the course of his employment on the basis of his disability.

[2] On October 4, 2004, the Commission referred the complaint to the Tribunal for further inquiry. CN is now requesting that the Tribunal exercise its discretion to refuse to hear Mr. O'Connor's complaint on the basis that the matter has already been conclusively determined at a grievance arbitration. CN invokes the doctrines of issue estoppel and abuse of process on this motion.

I. BACKGROUND

[3] Mr. O'Connor began working for CN at Capreol, Ontario in April of 1980 as a Track Maintainer. In 1981, he suffered a lower back injury while at work. As a result of a serious reoccurrence of that injury in 1987, he subsequently underwent two back operations.

[4] Mr. O'Connor was assessed by the then Workers' Compensation Board (now the Workers' Insurance and Safety Board ("WSIB") and, in 1992, he was granted a 20% permanent partial disability pension ("PPD pension"). This pension carried with it the following permanent work restrictions:

- Lifting of weights limited to 10 kilograms;
- No repetitive bending or twisting, especially against resistance;
- No strenuous pulling or pushing;
- Limited low level work;
- Opportunity to change positions as required.

[5] Pursuant to an arrangement with the Workers' Compensation Board, CN paid the pension directly to Mr. O'Connor.

[6] From 1990 to 1995, Mr. O'Connor was provided with upgrading and retraining at Cambrian College through WSIB's Vocational Rehabilitation Services. As a result of his retraining, Mr. O'Connor found employment, for a short time as an assistant in an addiction/detoxification centre. According to Mr. O'Connor, however, he was unable to find full-time work in this area that was less physically demanding than the duties of his position with CN.

[7] In July, 1997, Mr. O'Connor was told by his family physician that he was fit to return to work at CN without restrictions. Armed with a medical card attesting to his fitness, Mr. O'Connor requested that CN put him back to work. A Functional Analysis Evaluation completed in August, 1998, confirmed that there were no physical restrictions preventing Mr. O'Connor from returning to his previous position of track maintenance/foreman on a full-time, full duty basis.

[8] This is where a wrinkle appears in the case. At the time of his request, CN was still paying Mr. O'Connor a permanent partial disability pension ("PPD pension") based upon WSIB's determination that he had permanent work restrictions. Apparently, as a result of a WSIB policy, these restrictions and the requirement that CN pay Mr. O'Connor a PPD pension could not be lifted under any circumstances.

[9] In February 2000, CN's physician refused to recommend Mr. O'Connor's reinstatement for two reasons. Firstly, he expressed concern that a full return to work was incompatible with the permanent WSIB restrictions for which Mr. O'Connor continued to receive a pension. Secondly, CN's physician was concerned about the impact of the pain medication that Mr. O'Connor was taking on his ability to perform his work safely.

[10] Based on the opinion of CN's company physician, CN refused to reinstate Mr. O'Connor into service. However, he was subsequently offered several positions which

were deemed to be consistent with his WSIB restrictions. Mr. O'Connor did not accept these offers.

[11] In September 2000, Mr. O'Connor filed a complaint with the Canadian Human Rights Commission alleging that, in failing to reinstate him in his former position and to accommodate his disability, CN had discriminated against him.

[12] Prior to the filing of his human rights complaint, Mr. O'Connor's union had filed a grievance against CN, citing CN's failure to accommodate Mr. O'Connor's disability and violations of the collective agreement. That grievance was heard on January 13, 2004 by Mr. Michel Picher of the Canadian Railway Office of Arbitration.

[13] Mr. Picher subsequently rendered a decision in which he dismissed the grievance, stating that CN was justified in limiting the positions for which Mr. O'Connor was eligible to those that fit his WSIB restrictions. He also held that CN had discharged its duty to accommodate Mr. O'Connor.

[14] On October 4, 2004 the Canadian Human Rights Commission referred Mr. O'Connor's complaint to the Tribunal. After some preliminary disclosure and exchange of documentation had taken place between the parties, CN brought a motion to have the complaint dismissed on the basis of *res judicata* and abuse of process.

II. ISSUE

[15] The sole issue to be determined in this motion is whether the complaint should be dismissed on the basis of the doctrines of *res judicata* or abuse of process.

[16] For the reasons that follow, I find that both doctrines apply in the instant case. Moreover, I find that, in the circumstances of the case, there is no reason to exercise my discretion to refuse to apply the doctrines. Therefore, Mr. O'Connor's complaint against CN is dismissed.

III. ANALYSIS

A. The Tribunal's Jurisdiction to Deal with the Motion

[17] The Canadian Human Rights Commission argues that the Tribunal does not have jurisdiction to entertain CN's motion since the Commission has effectively ruled on this issue. CN's arguments regarding the doctrines of *res judicata* and abuse of process were squarely before the Commission when it decided to refer the complaint to the Tribunal. Therefore, the Tribunal cannot rule on the motion without sitting in review of the Commission's decision, a function which is within the exclusive purview of the Federal Court.

[18] I disagree with the Commission's arguments in this regard. In *Canada (Human Rights Commission) v. Canada Post Corp.* 2004 FC 81 at para.10 (*"Cremasco")*, the Federal Court (Trial Division) held that when the Tribunal rules on a *res judicata* motion, this does not constitute a review of the Commission's decision to refer the complaint to the Tribunal. The issue on a *res judicata* motion is whether it would be an abuse of the Tribunal's process to rehear a matter that has been determined in another forum. That is quite a different matter from a motion asking the Tribunal to consider whether it was an abuse of the Commission's process to have referred a complaint that is, for example, out of time (*International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 2 F.C. 430 (T.D.)).

[19] It is true that in the *Cremasco* case, the Court found that the question of abuse of process was not squarely before the Commission when it decided to refer the matter to the Tribunal. In my view, however, the Court's decision did not hinge on this issue.

Rather, the key to the Court's decision in *Cremasco* is that the Tribunal, as master of its own process, has an obligation to ensure that its processes are not abused. If the circumstances of the case are such that it would be an abuse of process or contrary to the interests of justice for the case to be heard by the Tribunal, then the Tribunal may refuse to hear the case even if the Commission has referred it to the Tribunal.

B. The Doctrine of *Res Judicata*

[20] The doctrine of *res judicata* has two common rationales. The first is the need for finality. The second is that a party should not be "vexed" twice by the same cause (*Cremasco v. Canada Post Corporation* 2002/09/30 - Ruling No. 1, at para. 50, aff'd 2004 FCA 363).

[21] As the Supreme Court of Canada has repeatedly stated, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* 2003 SCC 42, at para. 50).

[22] However, there has also been some reluctance to apply the doctrine of issue estoppel to the determination of human rights complaints by tribunals such as this one. One of the primary concerns is that the dismissal of a complaint deprives the parties of the opportunity to have the merits of the case determined by a tribunal that specializes in the adjudication of human rights disputes (see, for example: *Gohm v. Domtar Inc. (No. 1)* (1989), 10 C.H.R.R. D/5968 at para. 43199 (Ont. Bd. Inq.); and *Withler v. Canada (Attorney General)* 2002 BCSC 820 at para. 42). Therefore, many have urged that caution and restraint be used in the application of the doctrine of *res judicata* to the adjudication of human rights complaints (*Cremasco, supra*, at para. 83, and *Buffet v. Canada (Canadian Armed Forces)* 2005 CHRT 16 at para. 40).

[23] On two points, however, there is a clear consensus: the application of the doctrine is to be determined on a case-by-case basis, paying close attention to the particular facts of the case; and adjudicators have the discretion to refuse to apply the doctrine if doing so would work an injustice.

C. The Two Branches of *Res Judicata*

[24] There are two principal branches of the doctrine of *res judicata*. The first branch is known as issue estoppel. Issue estoppel applies where there are common issues in the two proceedings. The issues in question in the second proceeding must have been necessary to the decision in the first proceeding. Depending on the nature of the issue in respect of which the estoppel is being raised, issue estoppel may bar relitigation of only a discrete issue or it may bar the second action in its entirety (*Hough v. Brunswick Centres Inc.*, (1997) 9 C.P.C. (4^{th}) 111 (Ont. Gen. Div.) at paras. 24 and 25).

[25] The second branch of *res judicata* is known as "cause of action" estoppel. In the present case, the parties have not argued that cause of action estoppel applies. Therefore, I will confine my analysis to the application of issue estoppel.

D. Issue Estoppel: The Test

[26] The two-part test for the application of the doctrine of issue estoppel is now well-known: (1) the criteria for issue estoppel must be met; and (2) if the criteria are met, the Tribunal must determine, based on certain discretionary factors, whether it is appropriate, in the circumstances, to apply the doctrine (*Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 at para. 33).

[27] The criteria to be met for the application of issue estoppel are as follows:

(i) the same questions are being decided in both proceedings;
(ii) the judicial decision which is said to create the estoppel is a final decision; and
(iii) the parties, or their privies, are the same.

(i) Same Questions in Both Proceedings

[28] For this requirement to be met, the determination of the issue in the first litigation must have been necessary to the result (*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.) at para. 23). In other words, issue estoppel covers fundamental issues determined in the first proceeding, issues that were essential to the decision.

[29] Mr. O'Connor argues that the arbitrator's decision was limited to the question of whether he was entitled to exercise his seniority to return to his original position at full wages. In Mr. O'Connor's view, the arbitrator did not deal with the central issue in his human rights complaint which is the following: Was the condition imposed by CN that Mr. O'Connor must be assigned to occupations within the WSIB restrictions a *bona fide* occupational requirement as contemplated by the *Canadian Human Rights Act*? Mr. O'Connor also argues that the arbitrator's conclusion with respect to the accommodation issue was not essential to his final decision and, therefore, cannot be subject to issue estoppel.

[30] In my view, while the arbitrator may not have characterized the issues in the same way as Mr. O'Connor has done in this motion and he may not have used the same terminology that the Tribunal would use in analyzing the complaint, the arbitrator dealt with substantially the same issues that would arise during an inquiry by the Tribunal. As the Ontario Court of Appeal stated in *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4^{th}) 683 at p. 703, a different characterization of the issues and process for analyzing them does not necessarily mean different questions. (See also: *Barter v. Insurance Corporation of British Columbia* 2003 BCHRT 9 at para. 45).

[31] There were two principal issues that were raised during the arbitration proceedings: (1) whether Mr. O'Connor had been prevented from exercising his seniority rights under the Collective Agreement; and, (2) whether CN had failed to meet its legal duty under the *Canadian Human Rights Act* to accommodate Mr. O'Connor.

[32] In his complaint, Mr. O'Connor states that CN discriminated against him on the basis of his disability by denying him the opportunity to return to his original position and by failing to accommodate him. Thus, with the exception of the reference to the collective agreement, the issues in both proceedings are framed in similar terms.

[33] Were the specific issues that the arbitrator dealt with in arriving at his conclusion sufficiently similar to those that would be dealt with by the Tribunal to meet this part of the test? To answer that question, it is helpful to set out the issues that the Tribunal would consider in analyzing the complaint and then compare them to the issues addressed in the arbitrator's reasons.

[34] In a hearing before this Tribunal, the onus would first fall upon Mr. O'Connor to establish a *prima facie* case that he was treated adversely by CN and that his disability, or perceived disability, was a factor in the adverse treatment. The burden would then shift to CN to lead credible evidence of a non-discriminatory explanation for its conduct. In that regard, one of the defenses that would be open to CN would be to prove that its actions were based on a *bona fide* occupational requirement ("BFOR"). To do this CN would be required to establish that:

(1) CN adopted the standard for a purpose rationally connected to the performance of the job;

(2) CN adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate and work-related purpose; and,

(3) the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose in that it was impossible to accommodate employees sharing Mr. O'Connor's characteristics without imposing undue hardship on CN (*B.C. (P.S.E.R.C.) v. B.C.G.S.E.U.* [1999] 3 S.C.R. 3 ("*Meiorin*").

[35] Section 15(2) of the *Canadian Human Rights Act* provides that, in assessing undue hardship, the Tribunal will consider the health, safety and cost factors involved in the accommodation measures.

[36] The Tribunal will also examine the extent to which the complainant cooperated with the employer's efforts to accommodate his disability. Generally speaking, employees are obligated to accept reasonable accommodation offers. Moreover, the employer's duty is discharged if a proposal that would be reasonable in all the circumstances is turned down (*Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970 at para. 44).

[37] Let us now look at how the arbitrator's decision jives with this analysis. The arbitrator began his reasons by acknowledging that there was a conflict between the medical evidence pointing to Mr. O'Connor's fitness to work without restrictions and the seemingly immutable WSIB restrictions. Thus, I think that the arbitrator tacitly acknowledged that either Mr. O'Connor was not disabled, but was being treated by CN as though he was disabled, or he was disabled and was being denied the right to return to his original position on that basis. I think it is clear from the arbitrator's reasons that he recognized that under either circumstance, CN had to justify its requirement that Mr. O'Connor be free from WSIB restrictions.

[38] To that end, the arbitrator looked at the implications of refusing to accept the WSIB restrictions and simply placing Mr. O'Connor in his original position. He noted that if CN did this, it would still be required, in accordance with the WSIB award, to pay him his 20% PPD pension in addition to his full wages. The arbitrator noted, at one point in his decision, that CN had already paid hundreds of thousands of dollars to Mr. O'Connor in rehabilitation, retraining and disability benefits. Thus, in my view, it is implicit in the arbitrator's decision that if Mr. O'Connor was not disabled, the employer had provided a good reason as to why he could not be placed in his original position: CN was bound by the WSIB decision and therefore, would be required to accommodate his restrictions and pay the PPD pension. It was unreasonable to expect the employer to pay both full wages and a PPD pension.

[39] The arbitrator also considered the implications of accommodating Mr. O'Connor in his original position if he was, in fact, disabled as per the WSIB award. He noted that CN had understandable concerns that Mr. O'Connor might re-injure himself if he was returned to his original position. CN would then face the resulting costs of compensation for the re-injury. Furthermore, there was the issue of whether Mr. O'Connor's use of narcotics for pain relief would interfere with his ability to perform the functions of his work safely. Thus, the arbitrator concluded that it was not possible for CN to return Mr. O'Connor to his original position.

[40] Finally, the arbitrator then looked at whether CN had discharged its obligation to accommodate Mr. O'Connor within his WSIB restrictions. He held that this was plainly not a case where the Company had acted in bad faith or sought to shirk its obligation to accommodate Mr. O'Connor in suitable employment. He noted that Mr. O'Connor had

been offered two positions which were compatible with his work restrictions. However, Mr. O'Connor declined these positions because they were outside of Capreol, Ontario where he was living. Therefore, he found that Mr. O'Connor had not discharged his obligation under the law to participate in the accommodation process.

[41] In my view, while the arbitrator did not explicitly mention the *Meiorin* test, the elements of the analysis and the findings that relate to each step in that test are all there in his reasons. The first part of the analysis is whether the requirement that Mr. O'Connor be free from the WSIB restrictions was rationally connected and necessary to the performance of the job. The arbitrator's conclusions regarding the safety and health implications of not following the WSIB restrictions would seem to address these issues. That is, the arbitrator recognized that CN had legitimate concerns that if it ignored the restrictions, there was a risk of re-injury. Moreover, there was the issue of the impact of pain medication on the safe performance of the job.

[42] The second part of the test deals with whether CN could accommodate Mr. O'Connor in spite of the fact that he did not meet the requirement of being restriction-free. The arbitrator's conclusions with regard to the cost implications as well as the health and safety issues involved in returning Mr. O'Connor to his original position speak to the issue of accommodation to the point of undue hardship. In my view, it is implicit in the arbitrator's reasons that he thought it would create undue hardship for CN to accommodate Mr. O'Connor in his original position if he was still subject to the WSIB restrictions. This is the same issue that the Tribunal would be called upon to determine.

[43] Moreover, the arbitrator's analysis of CN's efforts to accommodate Mr. O'Connor in positions that were within his WSIB restrictions involved a review of the factors that the Tribunal would consider. These include the existence of work in Mr. O'Connor's home location, the extent of Mr. O'Connor's participation in the process and the total cost of the accommodation efforts. The arbitrator's conclusion that Mr. O'Connor had not fulfilled his obligation to accept an offer of reasonable accommodation falls squarely within the analysis that would be undertaken by this Tribunal. Finally, the arbitrator's conclusion that CN had not failed its obligation to accommodate Mr. O'Connor directly deals with an issue that would arise in the Tribunal's inquiry into the complaint.

[44] Therefore, in my view, it cannot be said that the arbitrator missed any of the essential issues in the human rights analysis. Neither can it be said that the issue of CN's accommodation of Mr. O'Connor was peripheral to the arbitrator's decision. In my view, the arbitrator's conclusion with regard to accommodation was integral to his decision.

[45] For these reasons, I find that the issues in the arbitration proceeding were the same as those that would be examined in a hearing before the Tribunal. Therefore, the first requirement of the issue estoppel test has been met.

(ii) Final Judicial Decision

[46] It appears well settled that, for the purposes of the second element of the issue estoppel test, arbitration decisions constitute "judicial decisions" (see for example: *Scotia Realty Ltd. And Olympia & York SP Corporation and Campeau Corporation* (1992), 9 O.R. (3d) 414; *Desormeaux v. Ottawa-Carleton Regional Transit Commission* [2002] C.H.R.D. No. 22 at para. 28, aff'd 2005 FCA 311). Moreover, the arbitrator's decision is not under appeal and is, therefore, final. Accordingly, this aspect of the test is met.

(iii) The Parties, or Their Privies, are the Same

[47] In this case, like *Smith, J. v. Canadian National Railway* 2005 CHRT 22, the parties in the arbitration proceedings are clearly not the same as the parties before this Tribunal. However, when the parties to the proceedings are not the same, this aspect of the test may still be met if one party was the privy of another in the previous proceedings.

[48] In order to be a privy, there must be a sufficient degree of common interest between the party and the privy to make it fair to bind the party to the determinations made in the previous proceedings. (*Danyluk*, supra, at para. 60). Decisions about whether there is a sufficient degree of mutual or common interest to say that one party was the privy of another must be made on a case-by-case basis (*Smith, J. v. Canadian National Railway*, *supra*, at para. 28).

[49] In *Smith v. CN*, I stated that it is not possible to say that in all cases the union and the complainant are privies. Each fact situation must be examined on a case-by-case basis to determine whether the union and the complainant have sufficiently similar interests in the resolution of the dispute to find that they are privies of one another.

[50] Unlike the *Smith* case, I find nothing on the record to indicate that the union and Mr. O'Connor had divergent interests in the resolution of the grievance. There is no suggestion that Mr. O'Connor's opportunity to advance his own interests was in any way fettered by the union's handling of his grievance. Similarly, there is no indication that he was denied the opportunity to provide evidence or make arguments on his own behalf. Thus, for the purposes of this aspect of the test, I find that the union and Mr. O'Connor were privies of one another.

[51] However, this does not end the analysis. The Commission's participation in the proceedings must also be examined. The Commission was not a party to the grievance proceedings, but maintains that although it will not be appearing or presenting evidence or argument during the Tribunal hearing, it remains a party to the Tribunal's proceedings. Although the Commission made submissions on the present motion, they were limited to the issue of the Tribunal's jurisdiction.

[52] Can it be said that the Commission was privy to the arbitration proceedings? To do so would require that I find that the union and the Commission are privies. In my view, this cannot be done. The requisite community of interest is simply not there. The role of the union in the arbitration proceedings is to represent the interests of the grievor and the members of the bargaining unit. The Commission's role in Tribunal proceedings is to represent the public interest. It is perhaps arguable, in light of the Commission's decision not to participate in the Tribunal hearing, that in some notional sense it was privy to the arbitration proceedings. In my view, however, this is a stretch.

[53] I think that the better approach to take is a purposive one. As this Tribunal stated in *Toth v. Kitchener Aero Avionics* 2005 CHRT 19 at para. 16, the purpose of determining whether the Commission is a party in the context of an issue estoppel motion is largely to ensure that a party is not deprived of an opportunity to address the issues in the case. Given the Commission's stated intention not to participate in the hearing, I do not see how it could later assert that it was deprived of an opportunity to address the issues in the case. Therefore, in the present case, I find that for the purpose of determining whether issue estoppel applies, the Commission is not a party to the Tribunal proceedings.

[54] In view of my conclusion that the union and Mr. O'Connor are privies, it follows that the parties or their privies are the same as those in the arbitration proceedings.

[55] As a result of this analysis, I find that all three criteria for the application of issue estoppel have been fulfilled. However, in situations like the present and the one in *Cremasco*, where it is more difficult to say with certainty that the requirement of identity of parties has been met, the Supreme Court of Canada has indicated that it is appropriate to look to the doctrine of abuse of process.

E. Abuse of Process

[56] CN argues that if the Tribunal finds that the conditions for the application of issue estoppel have not been met, it should find that it would be an abuse of process to permit Mr. O'Connor to relitigate issues that were conclusively determined by the arbitrator.

[57] In *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 77 at para. 37, the Supreme Court of Canada stated that the doctrine of abuse of process is appropriately used to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) have not been met, but where allowing the litigation to proceed would nonetheless violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice.

[58] The Federal Court has upheld this Tribunal's power to examine whether the doctrine of abuse of process applies to the particular facts of a case (*Cremasco,* at para. 41*)*. The test for this doctrine was succinctly stated by the Tribunal in *Cremasco* at para. 81. The Tribunal must ask itself: "Would it be fair to proceed?" In *Cremasco*, the Tribunal explained that the public perceives the human rights process as an integral part of the justice system. Therefore, if the reputation of the larger system is to be preserved, one must consider whether, in the view of reasonable and informed but ordinary people, it would be fair to proceed with the complaint.

[59] There is no indication on the record that the circumstances in this case have changed or that fresh evidence is now available that is relevant to the issue of Mr. O'Connor's accommodation. Nor is there any suggestion that the grievance arbitration was tainted by fraud, dishonesty or unfairness of any kind.

[60] Therefore, in my view, a reasonable and informed person with an intuitive grasp of fair play would say that Mr. O'Connor has had his day "in court", to use the vernacular. As this Tribunal stated in *Cremasco* at para. 96, it would be wrong to have a hearing, with all its accompanying inconvenience and expense, when the matter has been conclusively determined by the arbitrator.

F. The Discretionary Factors

[61] I have concluded that the criteria for both issue estoppel and abuse of process have been met. There remains, however, the question of whether I ought to exercise my discretion to refuse to apply the doctrines in the circumstances of the case. The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result (*City of Toronto* at para. 53).

[62] The Tribunal's discretion must be exercised in accordance with the particular facts of each case. The list of factors which may be taken into account is open-ended. In all cases, 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 (*Danyluk,* at para. 63).

[63] The following factors should be considered in the exercise of the Tribunal's discretion:

a) the wording of the statute;
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 decision-maker;
f) the circumstances giving rise to prior administrative proceedings;
g) potential injustice.

[64] The *Canada Labour Code*, which sets out the legislative scheme for adjudicating disputes in federally regulated workplaces, provides for the expeditious resolution of disputes (*Canada Labour Code* R.S.C. 1985, c. L-2, s. 57). The Canadian Railway Office of Arbitration was established to ensure that this goal is met. In the present case, it appears that the arbitrator had access to a number of procedural safeguards, such as the power to summon witnesses, administer oaths, hear evidence, order production, hear oral and written arguments and make preliminary rulings. It also appears that Mr. O'Connor was fully supported by his union. Mr. O'Connor has not raised any concerns with respect to the fairness of the proceedings.

[65] Moreover, there is no question that the arbitrator is highly experienced and knowledgeable in the area of labour relations and human rights in Canada. He is also very familiar with the particular circumstances of the CN work environment. Although the arbitrator's decision is subject to a privative clause in the *Canada Labour Code*, parties may still apply to the Federal Court for a review of the arbitrator's decision if they believe that serious errors have been made (*Canada Labour Code, s. 58*). This was not done in the present case.

[66] In my view, the circumstances of the case do not give rise to any concerns about potential injustice. Mr. O'Connor was given a fair hearing before an experienced arbitrator. Although he has raised concerns with regard to the arbitrator's interpretation of the applicable workers' compensation legislation, I see no evidence of any serious error that would lead to a miscarriage of justice.

[67] Finally, at the time of the arbitration hearing, Mr. O'Connor was in receipt of a disability pension. He sought to return to his original position, with the result that he would have received full wages plus the disability pension. He failed to achieve this result. CN, however, continued to offer Mr. O'Connor work that fit within his WSIB restrictions.

[68] According to his Statement of Particulars, Mr. O'Connor is currently employed by CN as a Flagman in Mimico, Ontario. In addition, he continues to receive a disability pension. The option remains for him to bid for his original position if he is successful in having his restrictions lifted.

[69] On the basis of all of these considerations, I find that there are no compelling reasons to exercise my discretion to refuse to apply either the doctrine of issue estoppel or abuse of process.

IV. ORDER

[70] For these reasons, CN's motion is granted. Mr. O'Connor's complaint against Canadian National Railway is hereby dismissed.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario

January 31, 2006

PARTIES OF RECORD

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Daniel Pagowski	For the Canadian Human Rights Commission
J. Curtis McDonnell	For the Respondent