CANDIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

BRUCE TWETEN

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
RTL ROBINSON ENTERPRISES LTD.

Respondent

RULING ON PRELIMINARY MOTION

MEMBER: Pierre Deschamps

2004 CHRT 8
2004/02/11

[1] The Tribunal is called upon to rule on a motion brought by the Respondent whereby the latter seeks to have Mr. Tweten's complaint summarily dismissed before the commencement of the inquiry into his complaint.

I. BACKGROUND

[2] On September 9, 1998, Mr. Tweten filed a complaint with the Canadian Human Rights Commission ("Commission") in which he alleges that he has reasonable grounds to believe that RTL Robinson Enterprises Ltd. ("Respondent") discriminated against him

on the ground of disability by failing to accommodate him, by treating him differently in the course of employment and by refusing to allow him back to work, contrary to section 7 of the *Canadian Human Rights Act*[1]. The record shows that the Commission referred Mr. Tweten's human rights complaint to the Tribunal on July 3, 2003 for it to institute an inquiry.

[3] Following the filing of his human rights complaint with the Commission, Mr. Tweten filed a complaint of unjust dismissal under the *Canada Labour Code*. That complaint was heard on November 28, 2000.

[4] In a decision dated December 29, 2000, the *Canada Labour Code* adjudicator, Ms. Donna C. Read, concluded that there was no evidence for her to find that this was a case of constructive unjust dismissal. Rather, she concluded that Mr. Tweten had quit his job. She thus dismissed Mr. Tweten's complaint.

II. SUBMISSIONS OF THE PARTIES

[5] In its written submissions, the Respondent, relying on the doctrine of issue estoppel, not only argues that the Tribunal is barred from hearing Mr. Tweten's human rights complaint, but also that the complaint should be dismissed because it is frivolous, vexatious or otherwise made in bad faith as per s. 41(1)d) of the *Act*. The Respondent further argues that the complaint constitutes an abuse of process.

[6] With respect to the estoppel issue, it appears from Respondent counsel's letter dated November 12, 2003 that the latter concedes that issue estoppel is impossible to apply to matters involving the Commission. That said, the Tribunal intends nonetheless to address this issue in its ruling.

[7] As for the allegation that the complaint is frivolous, vexatious and made in bad faith, the Respondent refers to the fact that Mr. Tweten did not provide the Respondent, when asked, with relevant information supporting any ongoing limitations or accommodation requirements, that his complaint was investigated by three different investigators on behalf of the Commission over a period of 2 years following the filing of the complaint, that the last investigator recommended that the matter not proceed to the Tribunal, that the Commission nonetheless referred the matter to the Tribunal instead of dismissing the complaint.

[8] Finally, with respect to the allegation that the complaint constitutes an abuse of process, the Respondent argues that all issues have been dealt with in prior proceedings, that for the Tribunal to proceed with the inquiry would allow for inconsistent findings amongst two federally appointed Tribunals (*sic*) (Labour Board and the Human Rights Tribunal) which would bring the administration of justice into disrepute. Furthermore, the Respondent argues that Mr. Tweten has had his claims against the Respondent heard in two other forums at great expense for the Respondent.

[9] In support of the above allegations, the Respondent relies mainly on the decisions rendered in *Barter v. Insurance Corp. of British Columbia*[2] and *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*[3].

[10] For its part, the Commission contends that the doctrine of issue estoppel has no application to this case. In support of its position, it relies on the ruling of this Tribunal in *Desormeaux v. Ottawa-Carleton Regional Transit Commission*[4] as well as on the decision rendered by the Supreme Court of Canada in *Angle v. Canada (Minister of National Revenue - M.N.R.)*[5].

[11] As for the other two grounds, i.e. that the complaint is frivolous, vexatious or made in bad faith and that it constitutes an abuse of process, the Commission submits that the Tribunal does not have jurisdiction to consider these arguments. In this regard, the Commission relies on the decision rendered by this Tribunal in *Roch v. Maltais Transport Lte and Gatan Maltais*[6].

[12] On the whole, the Commission argues that the decision to refer a complaint to the Tribunal is solely within the discretion of the Commission pursuant to section 49(1) of the *Act* and that once a complaint has been referred to the Tribunal, the latter has no discretion but to institute an inquiry as provided by subsection 49(2) of the *Act*.

III. THE LAW

A. Issue estoppel

[13] As stated previously by this Tribunal in *Desormeaux*[7], *Parisien*[8] and *Thompson*[9], "issue estoppel is a public policy doctrine designed to advance the interests of justice. Its object is to prevent parties from relitigating issues that have already been decided in other proceedings. The policy considerations underlying the doctrine include the need to have an end to litigation, as well as the desire to protect individuals from having to defend multiple legal proceedings arising out of the same set of circumstances". It is also meant to reduce "the risk of inconsistent results if the same issue is pursued in multiple fora".

[14] According to the case law[10], for issue estoppel to be successfully invoked three preconditions or requirements must be met:

a) the issue must be the same as the one decided in the prior decision;
b) the prior judicial decision must have been final;
c) the parties to both proceedings must be the same or their privies[11].

Thus, if one of the three preconditions or requirements is lacking, the doctrine does not apply.

B. Frivolous, vexatious complaints and complaints made in bad faith

[15] Section 41(1)d) of the *Act* provides that the Commission can dismiss a complaint found to be trivial, frivolous, vexatious or made in bad faith. It must be noted here that this provision of the *Act* applies solely to the Commission and not to the Tribunal. Thus, the Tribunal's power to dismiss a frivolous, vexatious complaint or one made in bad faith, cannot be derived from this provision of the *Act*. This said, section 53(1) of the *Act* provides however that, at the conclusion of an inquiry, the Tribunal is entitled to dismiss a complaint if it finds that the latter is not substantiated.

[16] It thus appears that, under the scheme of the *Act*, once a complaint has been referred to the Tribunal, the only avenue open to it is to hold an inquiry into the complaint unless the delays associated with the human rights process violate section 7 of the *Charter*[12] or if, as will be seen hereafter, there is an abuse of process. In those circumstances, it is open to the Tribunal to forgo holding an inquiry. Short of such findings, the Tribunal has no discretion with respect to holding or not an inquiry into a complaint.

[17] Furthermore, it must be noted that the Tribunal has no authority under the *Act* to review a decision of the Commission to refer a complaint to the Tribunal. As stated in *Oster*[13] and restated in many other decisions of this Tribunal[14], the Tribunal does not exercise supervisory jurisdiction over the actions and decisions of the Commission. These matters lie within the exclusive purview of the Trial Division of the Federal Court.

[18] Hence, if a respondent is of the view that the Commission's decision to refer a complaint to the Tribunal is unjustified or ill-founded, the only recourse available to that respondent is to seek the judicial review of the Commission's decision before the Federal Court[15].

C. Abuse of process

[19] The doctrine of abuse of process is used in a variety of legal contexts. Among other things, the doctrine is used to deal with the relitigation of issues finally decided in a previous judicial proceeding. As stated by Justice Arbour in *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, "Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) 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"[16]. Justice Arbour further adds that "the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints" and that "the policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel"[17].

[20] For the Tribunal to find that a referral constitutes an abuse of process, the Tribunal must be convinced that the proceedings, if they were to go ahead, would be oppressive or vexatious and would violate the fundamental principles of justice underlying the community's sense of fair play and decency.

IV. ANALYSIS

[21] The Tribunal will now proceed to examine and dispose of each of the arguments raised by the Respondent in its preliminary motion.

A. Issue estoppel

[22] In his letter dated November 12, 2003, Counsel for the Respondent concedes that at least one of the three preconditions for issue estoppel to apply is not met, i.e. identical parties. He further acknowledges that, in the end, it is impossible to apply issue estoppel to matters involving the Commission. The Tribunal agrees.

[23] As stated by the former chairperson of the Tribunal in *Desormeaux*[18] and *Parisien*[19], as well as in *Thompson*[20], the Commission is not a privy of a complainant and does not represent the complainant. The Commission and the complainant are distinct parties to the inquiry under the *Act*, each having a specific role, the role of the Commission being that of representing the public interest.

[24] These views are in keeping with the decision rendered by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees*[21] where Justice Arbour, after having carefully reviewed the state of the law on this aspect of the doctrine, stated that she saw no need to reverse or relax the long-standing application of the mutuality requirement (third precondition).

[25] It thus follows that the parties to the proceedings before the *Canada Labour Code* adjudicator and the Tribunal are not the same. Hence, the Tribunal concludes that at least one of the three elements required for the doctrine of issue estoppel to apply in the present case is absent.

[26] Though this finding is in itself sufficient to dispose of the estoppel issue, the Tribunal is also of the view that the issue now before it was never squarely addressed by

the *Canada Labour Code* adjudicator in her decision. This matter will further be dealt with in relation to the issue of abuse of process.

B. The complaint is frivolous, vexatious or otherwise made in bad faith

[27] The fact that, in relation to his labor law complaint, Mr. Tweten did not provide the Respondent with information on his physical limitations or accommodation requirement does not constitute a sufficient reason for the Tribunal to conclude that Mr. Tweten's complaint is frivolous, vexatious or otherwise made in bad faith and to bring about a dismissal of Mr. Tweten's complaint at this stage of the proceedings. Nor does the finding by the *Labour Code* adjudicator that Mr. Tweten quit his job.

[28] One must not forget that both the Complainant and the Commission are parties to the present proceedings and that both have a right to be heard on the substantive human rights issues raised by the Complaint. The Complainant's failure to provide pertinent information on his condition as well as the compensation he received for his work injury are all matters that the Respondent will be able to raise in the course of the inquiry as a means of defense to the complaint.

[29] In another vein, the fact that the complaint was investigated by three different investigators on behalf of the Commission over a period of two years following the filing of the complaint, that the last investigator recommended that the matter not proceed to the Tribunal and that the Commission nevertheless referred the complaint to the Tribunal are all matters that should have been part of a judicial review of the Commission's decision to refer the complaint to the Tribunal.

[30] In the case at bar, the record shows that the Respondent did not seek judicial review of the Commission's decision to refer Mr. Tweten's complaint to the Tribunal. As stated previously, the Tribunal has no jurisdiction to review that decision.

[31] The Tribunal thus finds that Respondent's second preliminary objection is ill-founded.

C. The complaint constitutes an abuse of process

[32] Abuse of process has, in recent years, been raised several times by respondents to challenge the referral of a complaint by the Commission to the Tribunal[22]. The grounds for these challenges relate mainly to the alleged misconduct and delay of the Commission in processing and investigating a complaint. Many respondents seem to be offended by the fact that, in some cases, the referral is made even though the investigation report recommends the dismissal of the complaint.

[33] In the case at bar, with respect to the issue of abuse of process, the Tribunal is called upon to determine if, in the course of the inquiry it is required to hold under the *Act* once a complaint has been referred to it, the issues litigated before the *Labour Code* adjudicator will be relitigated before it. The determination of this issue requires that the Tribunal closely examine the content of the decision rendered by Ms. Donna C. Read as was done in *Barter*[23].

[34] After reviewing the facts of the case, Ms. Donna C. Read framed as follows the issues she had to decide[24]:

a) Was Mr. Tweten out of time in making a complaint under section 240(2) of the *Canada Labour Code* because he made his complaint more than 90 days "from the date on which the person making the complaint was dismissed"?

b) If not, was Mr. Tweten unjustly dismissed?

c) If he was unjustly dismissed, what is the appropriate remedy?

[35] In his human rights complaint, Mr. Tweten alleges that he has reasonable grounds to believe that the Respondent has discriminated against him on the ground of disability by failing to accommodate him, by treating him differently in the course of employment and by refusing to allow him back to work contrary to section 7 of the *Act*.

[36] In view of the allegations contained in Mr. Tweten's human rights complaint, the issues now before the Tribunal appear to be the following:

(a) Was Mr. Tweten discriminated against on the ground of disability contrary to section 7 of the *Canadian Human Rights Act*?

(b) did the Respondent fail to accommodate him?

(c) was Mr. Tweten treated differently in the course of employment?

(d) did the respondent refuse to allow Mr. Tweten back to work?

[37] It thus appears that the main issue before Ms. Read was whether Mr. Tweten was dismissed or not from his job and if he was, was the dismissal unjust under the provisions of the *Canada Labour Code* whereas the main issue that the Tribunal has to decide is whether Mr. Tweten has been the victim of a discriminatory practice within the meaning of the *Act* in relation to an existing disability. These are two very different issues.

[38] As to the issue of accommodation, it must be noted here that Ms. Read clearly stated in her decision that the parties never got to the point where the issue of what would be an appropriate accommodation was addressed[25]. Thus, this issue still remains to be decided.

[39] Hence, the Tribunal is of the view that the issues that were before Ms. Read don't stand to be relitigated before the Tribunal. There is thus no real risk of having two divergent decisions on the same issues and of having the integrity of the judicial process negatively affected and its credibility undermined by different findings[26].

V. ORDER

[40] For the foregoing reasons, the preliminary motion of the Respondent is dismissed.

Signed by

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Pierre Deschamps

OTTAWA, Ontario

February 11, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T842/9203
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DECISION OF THE TRIBUNAL DATED: February 11, 2004

APPEARANCES:

Bruce Tweten	On his own behalf
Daniel Pagowski	For the Canadian Human Rights Commission
Barry D. Young	For RTL Robinson Enterprises Ltd.

[1] R.S., 1985, ch. H-6.

[2] [2003] B.C.H.R.T.D. No. 9.

[3] [2003] S.C.J. No. 64.

[4] [2002] C.H.R.D. No. 22, File No. T701/0602, 2002/07/19, Ruling No. 1.

[5] [1975] 2 S.C.R. 248.

[6] 2003 CHRT 33, 03/10/22.

[7] *Supra, note 4*, para. 20.

[8] *Parisien v. Ottawa-Carleton Regional Transit Commission*, C.H.R.T., File No. T699/0402, 2002/07/15, Ruling No. 1, para. 19.

[9] *Thompson v. Rivtow Marine Ltd*, C.H.R.T., File No. T656/4401, 2001/11/28, Ruling No. 1, para. 17.

[10] *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, supra note 3, para. 23; *Angle v. (Canada) Minister of National Revenue -M.N.R.)*, supra note, 5. See also *Thompson v. Rivtow Marine Ltd*, *supra note* 9, para. 12; *Cremasco v. Canada Post Corporation*, C.H.R.T., File No. T702/0702, 2002/09/30, para. 69; *Desormeaux v. Ottawa-Carleton Regional Transit Commission, supra note* 4, para. 19; *Leonardis v. Canada Post Corporation and Kordoban*, C.H.R.T., 2002/07/30, Ruling No 1, para. 9.

[11] This precondition is also referred to as mutuality

[12] *Blencoe v. (B.C. (Human Rights Commission))*, [2000] 2 R.C.S. 307; see also, in this respect, *Dumont v. Transport Jeannot Gagnon*, C.H.R.T., File No.T639/2701, 2001/06/13, Ruling No. 1, *Rhault v. Maritime Employers Association*, C.H.R.T., File No T578/3600, 2000/11/03; *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, supra note 4.

[13] *International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster*, [2002] 2 F.C. 430.

[14] *Leonardis v. Canada Post Corporation and Kordoban*, supra note 10, para. 5; *Quigley v. Ocean Construction Supplies*, C.H.R.T., File No. T582/4000, 2001/09/17, para. 7; *Eyerley v. Seaspan International Ltd.*, C.H.R.T., File No. T565/2300, 2000/08/02, Ruling No. 2, para. 4; *Parisien v. Ottawa-Carleton Regional Transit Commission*, supra note 8, para. 9; *Rock v. Maltais Transport Lte and Gatan Maltais*, *supra note* 6, para. 10.

[15] *International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster*, supra note 13; see also *Rock v. Maltais Transport Lte and Gatan Maltais*, supra note 6, para. 12.

[16] *Supra note* 3, para. 37.

[17] *Idem*, para. 38.
[18] *Supra note* 4, para. 31.
[19] *Supra note* 8, para. 32.
[20] *Supra note* 9, para. 26.
[21] *Supra note* 3, para. 32.
[22] *Bozek v. MCL Ryder Transport Inc. and McGill*, C.H.R.T., File No. t716/2102, Ruling No. 1, 2002/11/27; *Rhault v. Maritime Employers Association*, supra note 12; *Dumont v. Transport Jeannot Gagnon*, supra note 12; *Cremaso v. Canada Post Corporation*, *supra note* 10.
[23] *Supra note* 2.
[24] In the Matter of an Adjudication under Division XIV - Part III of the *Canada Labour Code*: Mr. Bruce Tweten v. RTL Robinson Enterprises Ltd., Edmonton, Alberta, Decision, p. 9.
[25] *Idem*, p. 12.
[26] *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.), supra note* 3, para. 51.