Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

ALAIN PARISIEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

OTTAWA-CARLETON REGIONAL TRANSIT COMMISSION

Respondent

RULING ON JURISDICTION

Ruling No. 1

2002/07/15

MEMBER: Anne L. Mactavish

[1] Alain Parisien alleges that the Ottawa-Carleton Regional Transit Commission ("OC Transpo") discriminated against him by refusing to accommodate his disability and by terminating his employment, contrary to section 7 of the *Canadian Human Rights Act*. OC Transpo dismissed Mr. Parisien on February 15, 1996 for chronic absenteeism. At the time of the incidents giving rise to his complaint, Mr. Parisien was a member of Local 279 of the Amalgamated Transit Union. Following Mr. Parisien's dismissal, the Union filed a grievance on Mr. Parisien's behalf. This grievance proceeded through an expedited arbitration process, and was heard by the Hon. George Adams on November 20, 1998. On December 4, 1998, Mr. Adams rendered a decision wherein he concluded that OC Transpo had just cause to dismiss Mr. Parisien. Accordingly, the grievance was dismissed.

[2] In the meantime, on September 20, 1996, Mr. Parisien had filed a complaint with the Canadian Human Rights Commission, alleging that OC Transpo failed to accommodate his disability by refusing to allow him to participate in a rehabilitation program. According to Mr. Parisien's complaint, had OC Transpo accommodated his disability, his employment with the company would have continued. In April, 2002, the Commission referred Mr. Parisien's human rights complaint to the Canadian Human Rights Tribunal for hearing.

[3] OC Transpo challenges the jurisdiction of the Tribunal to deal with Mr. Parisien's complaint, submitting that:

i) Mr. Parisien's human rights complaint was within the exclusive jurisdiction of the labour arbitrator;

ii) the doctrine of *res judicata* prohibits the Tribunal from taking jurisdiction over Mr. Parisien's complaint due to the application of issue estoppel; and

iii) cause of action estoppel applies, so as to deprive the Tribunal of jurisdiction.

[4] The Canadian Human Rights Commission contends that the Tribunal is not the proper forum for addressing OC Transpo's submissions in this regard. According to the Commission, OC Transpo advanced similar arguments to those being asserted here while Mr. Parisien's case was still before the Commission. Notwithstanding OC Transpo's submissions, the Commission decided to refer this case to the Tribunal for a hearing. The Commission submits that the proper forum for reviewing the Commission decision to refer this matter to the Tribunal is the Trial Division of the Federal Court of Canada. The Tribunal has no jurisdiction to review the conduct of the Commission.

[5] Each of these issues will be addressed in turn, dealing first with the Commission's submissions as to the jurisdiction of the Tribunal to entertain OC Transpo's motion.

JURISDICTION OF THE TRIBUNAL TO ENTERTAIN OC TRANSPO'S MOTION

[6] The Commission relies on the decision of Gibson J. in *Oster v. International Longshore & Warehouse Union (Marine Section) Local 400* [(1)] as authority for its submission that the Tribunal has no jurisdiction to deal with OC Transpo's motion.

[7] In *Oster*, the Commission had decided to extend the statutory time limit for filing a complaint pursuant to Section 41 (1) (e) of the *Canadian Human Rights Act*. After the matter was referred to the Tribunal for a hearing, the respondent brought a preliminary motion before the Tribunal seeking the dismissal of Ms. Oster's complaint on four grounds: that the complaint was filed out of time, that there had been an unreasonable delay causing prejudice to the respondent, that there was an abuse of process, and that the complaint was barred by the principle of *res judicata*. The Tribunal subsequently dismissed the respondent's motion. On judicial review, the issues raised by the respondent included whether the Tribunal applied the wrong test in determining whether the respondent had suffered prejudice by reason of the delay in filing the complaint, whether the Tribunal had erred in determining that the respondent should be deprived of the benefit of the one year time limit in the *Act*, and whether the Tribunal erred in failing to consider whether the complaint constituted an abuse of process. It is noteworthy that Gibson J. did not specifically address the Tribunal's decision on the *res judicata* issue.

[8] In concluding that the Tribunal erred in assuming jurisdiction with respect to the respondent's preliminary objections, Gibson J. noted that having decided not to seek judicial review of the Commission's decision to extend the time limit under Section 41 (1) (e) of the *Act*, the respondent was precluded from raising issues before the Tribunal that arise directly out of this decision.

[9] While it is clear from the decision in *Oster* that the Canadian Human Rights Tribunal does not exercise supervisory jurisdiction over the actions and decisions of the Canadian Human Rights Commission, and that these matters lie within the exclusive purview of the Federal Court, I do not read *Oster* to support the position of the Commission in this case.

[10] The Commission characterizes OC Transpo's motion as a challenge to the Commission's decision to refer Mr. Parisien's complaint to the Tribunal. If that were so, such a challenge should properly have been brought in the Federal Court.

[11] However, OC Transpo's motion is not a request for the Tribunal to review the Commission's decision to refer Mr. Parisien's case to the Tribunal. Rather, OC Transpo is challenging the jurisdiction of the Tribunal to proceed with its inquiry on the basis of the grounds cited above.

[12] While the Tribunal may not purport to review Commission decisions, it does not follow from *Oster* that once a discretionary decision is made by the Commission pursuant to sections 41 or 44 of the *Act*, the Tribunal is absolutely without jurisdiction to deal with the underlying facts giving rise to that challenge. The issue of delay illustrates this point: while the Tribunal may not have the jurisdiction to review a Commission decision taken pursuant to section 41 (1) (e) of the *Act* to deal with a complaint filed beyond the one year time limit, the Tribunal may nevertheless consider whether the pre-hearing delay (including the time elapsed between the Commission decision and the hearing) is such that a fair hearing is no longer possible.[(2)]

[13] In this case, it is instructive to keep in mind the powers of the Commission at the investigatory stage. The Commission is a screening body rather than an adjudicative one, and, unlike the Tribunal, is not empowered to decide general questions of law.[(3)] Having received submissions from OC Transpo on the *res judicata* issue, it was open to the Commission to exercise its discretion pursuant to section 44 of the *Act*, and to decline to refer Mr. Parisien's complaint to the Tribunal for hearing on the ground that an inquiry is not warranted or on any ground mentioned in section 41 (c), (d) or (e). The Commission did not, however, have the power to decide the evidentiary issue of whether the doctrine of *res judicata* applies to deprive the Commission (and therefore the Tribunal) of jurisdiction. As the Federal Court of Appeal noted in *Canada Post Corporation v. Barrette*, at the investigatory stage:

... the Commission must turn its mind to the decision of the arbitrator, not to determine whether it is binding on the Commission, but to determine whether, in light of that decision, and of the findings of fact and credibility made by the arbitrator, the complaint may not be such as to attract the application of paragraph 41 (1) (d).[(4)]

[14] It is clearly within the power of the Tribunal to examine the limits of its own jurisdiction, and to decide any procedural or evidentiary question relating to a complaint.[(5)] As a consequence, I am satisfied that I have jurisdiction to entertain OC Transpo's motion.

EXCLUSIVE JURISDICTION OF THE ARBITRATOR UNDER THE COLLECTIVE AGREEMENT

[15] Mr. Parisien was employed by OC Transpo as a full-time bus operator between November of 1977 and February 15, 1996. Mr. Parisien allegedly suffers from post-

traumatic stress disorder as well as a chronic sleep disorder. While I do not intend to review Mr. Parisien's attendance history in any detail at this juncture, for the purposes of this motion, suffice it to say that Mr. Parisien has had considerable difficulty in attending work on a regular basis because of his illnesses. According to OC Transpo's records, between January of 1984 and February of 1996, Mr. Parisien was absent from work for 1,664 full days and 33 part days. On February 15, 1996, OC Transpo terminated Mr. Parisien's employment due to chronic innocent absenteeism.

[16] On February 21, 1996, Mr. Parisien's Union filed a grievance on Mr. Parisien's behalf. The grievance form describes the grievance as: "Grieving termination as being unjust". As noted previously, this grievance was dismissed. OC Transpo now challenges the jurisdiction of the Tribunal to deal with Mr. Parisien's complaint , submitting that under the principles established by the Supreme Court of Canada in *Weber v. Ontario Hydro* [(6)], and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners* [(7)], an arbitrator has exclusive jurisdiction to address all issues arising out of the collective agreement.

[17] In *Weber*, the Supreme Court of Canada determined that where the essential character of a dispute arises under a collective agreement, the claimant must proceed by way of arbitration. For the reasons given in my earlier ruling in *Eyerley v. Seaspan International Limited* [(8)], I am of the view that *Weber* does not stand for the proposition that concurrent jurisdiction may not exist between labour arbitrators and statutory human rights adjudications processes. Similarly, I am satisfied that the decision in *Regina Police* is readily distinguishable from the present situation. Further, I am not persuaded that the essential nature of Mr. Parisien's human rights complaint arises out of the collective agreement. [(9)] Rather, Mr. Parisien's complaint is based upon an alleged breach of OC Transpo's statutory obligations under the *Canadian Human Rights Act*.

APPLICATION OF THE DOCTRINE OF ISSUE ESTOPPEL

[18] OC Transpo contends that the doctrine of *res judicata* prohibits the Tribunal from taking jurisdiction over Mr. Parisien's complaint due to the application of issue estoppel. Issue estoppel is designed to prevent parties from relitigating issues that have been decided in earlier proceedings. There are three elements necessary to give rise to issue estoppel:

i) The same question is being decided in each proceeding;

ii) The decision which raises the issue estoppel is a final decision; and

iii) The parties to the two proceedings are the same parties or their privies. [(10)]

According to OC Transpo, all three conditions are present here.

[19] Issue estoppel is a public policy doctrine designed to advance the interests of justice. [(11)] 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. [(12)] Concerns have also been expressed about the cost of duplicative proceedings, as well as the risk of inconsistent results if the same issue is pursued in multiple fora.[(13)]

[20] Although motions of this sort are often brought in proceedings before the Canadian Human Rights Tribunal, I note that there is some question as to whether the provisions of the *Canadian Human Rights Act* have modified the common law with respect to issue estoppel, precluding its application in circumstances such as these.[(14)]

[21] There is discretion to refuse to apply issue estoppel where to do so would be contrary to the interests of justice.[(15)] Quite apart from statutory considerations, a reluctance to apply the doctrine of issue estoppel to the determination of human rights complaints by specialist tribunals has also been expressed on policy grounds.[(16)]

[22] Assuming for the purposes of this motion that a decision of another administrative tribunal can operate so as to estop a complainant from proceeding with a federal human rights complaint, it must be determined whether issue estoppel arises in the circumstances of this case.

i) Is The Same Question Being Decided in Each Proceeding?

[23] OC Transpo submits that the arbitral doctrine of innocent absenteeism, that is, the principle that an employer is entitled to receive its part of the employment bargain, is interdependent with the employer's duty to accommodate to the point of undue hardship. In determining whether just cause exists for the dismissal of an employee, a labour arbitrator must consider whether the absenteeism was caused by a disability within the meaning of human rights legislation, and if so, whether the employer has accommodated the employee to the point of undue hardship.[(17)]

[24] In this case, OC Transpo submits that Mr. Parisien's union placed the issue of the employer's obligation to accommodate Mr. Parisien squarely before Arbitrator Adams, and that Mr. Adams turned his mind to the accommodation issue in concluding that the standard of undue hardship had been met. For this reason, OC Transpo says that this case is distinguishable from the decision of the Ontario Court of Appeal in *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)*.[(18)]

[25] The Commission argues that the issue before Arbitrator Adams was whether the termination of Mr. Parisien by OC Transpo was unjust, whereas the issue before the

Tribunal is whether there has been a breach of Section 7 of the *Canadian Human Rights Act*.

[26] I am of the view that the issue before Arbitrator Adams was not the same as the issue that this Tribunal will be required to resolve. It is evident from Mr. Adams' decision, as well as from the grievance form and the submissions of the parties to the arbitration, that while the parties certainly raised the *Canadian Human Rights Act*, ultimately, the issue for the arbitrator was whether Mr. Parisien's dismissal by OC Transpo was unjust. The issue for this Tribunal is whether Mr. Parisien has been the victim of a discriminatory practice within the meaning of the *Canadian Human Rights Act*. It should further be observed that the rights in issue in Mr. Parisien's grievance are private rights arising out of the collective agreement between the Amalgamated Transit Union and OC Transpo. In contrast, the rights asserted by Mr. Parisien in his human rights complaint are quasi-constitutional rights which embody public policy and reflect the broader public interest. [(19)]

ii) Is the Decision a Final One?

[27] The *Canada Labour Code* provides that a decision of an arbitrator is final and binding on the parties, subject only to judicial review for jurisdictional error. No judicial review proceedings have been commenced with respect to the Adams decision.

[28] Mr. Parisien advises that he was not aware that there was any way to challenge the decision of Arbitrator Adams, and that he had assumed that the arbitration decision was final.

[29] In the absence of a timely application for judicial review having been brought, I am of the view that the requirement of finality has been established.

iii) Are the Parties to the Two Proceedings the Same?

[30] The final element necessary to give rise to issue estoppel is that the parties to the two proceedings be the same, or be privies of parties to both proceedings. The parties to Mr. Parisien's grievance were OC Transpo and the Amalgamated Transit Union. I am prepared to accept that the Amalgamated Transit Union is a privy of Mr. Parisien.

[31] The parties in this proceeding are Mr. Parisien, OC Transpo and the Canadian Human Rights Commission. OC Transpo maintains that the fact that the Commission is not a party in the grievance proceedings should not preclude a finding that issue estoppel arises here. According to OC Transpo, in order to found the complaint, the Commission must establish discrimination on the same fact situation as was before Mr. Adams. This will involve relitigating the same issue on behalf of the same complainant. OC Transpo says that to this extent, the Commission can be seen as a privy of Mr. Parisien.

[32] A review of the *Canadian Human Rights Act* makes it clear that the Commission and Mr. Parisien are both parties to the inquiry under the *Act*.[(20)] Each has a distinct role in

proceedings before the Tribunal.[(21)] The Commission does not represent Mr. Parisien: rather, the responsibility of the Commission is to represent the public interest.[(22)] This is reflective of the quasi-constitutional nature of the rights guaranteed by the *Act*. In my view, a finding that the Commission is a privy of a complainant would be contrary to the policy considerations underlying the *Act*. Such a conclusion would result in the ability of the Canadian Human Rights Commission to take positions that it believes are in the public interest being inhibited by findings made in the context of other proceedings, proceedings of which the Commission would likely have had no notice and no opportunity to participate in.

[33] Having concluded that the Commission is not a privy of Mr. Parisien, it follows that the parties to the two proceedings are not the same, and that the third element required to establish issue estoppel is therefore absent.

[34] For the foregoing reasons, I am not persuaded that the doctrine of issue estoppel arises here. I further note that even where the three elements required to establish issue estoppel are present, there is residual discretion in decision makers to decline to apply the doctrine of issue estoppel where to do so would cause an injustice.[(23)] In my view, there are several reasons why it would be appropriate to exercise that discretion in this case. Mr. Parisien's grievance was dealt with through an expedited arbitration process, a process intended to be without prejudice to either party. Perhaps because of the expedited nature of the arbitration, the arbitration decision makes no mention of the *Canadian Human Rights Act*, nor of any human rights jurisprudence. There is no mention of the concept of undue hardship: indeed, the whole issue of accommodation was disposed of in two sentences. In these circumstances, even if the necessary elements were present on which to found an issue estoppel, I would decline to do so.

APPLICATION OF THE DOCTRINE OF CAUSE OF ACTION ESTOPPEL

[35] OC Transpo also invokes the doctrine of cause of action estoppel, contending that to the extent that the interests of the Commission differ from those of Mr. Parisien, cause of action estoppel applies to deprive the Tribunal of jurisdiction to deal with this matter.

[36] Like issue estoppel, cause of action estoppel is an aspect of the *res judicata* rule of evidence whereby a party who has litigated and lost a lawsuit is estopped from bringing a second action to contradict the result in the earlier suit. While issue estoppel operates to prevent a party from rearguing an issue that has already been determined, cause of action estoppel prohibits the assertion of claims in a second action that should properly have been raised in an earlier suit, thus preventing litigation by installment.[(24)]

[37] In its submissions with respect to this issue, OC Transpo reiterates its contention that Mr. Adams took jurisdiction with respect to the same human rights issue in issue in this complaint, and disposed of the issue in dismissing Mr. Parisien's grievance. OC Transpo then contends that to allow Mr. Parisien's complaint to proceed would amount to litigation by installment.

[38] I have some difficulty with OC Transpo's submissions in relation to cause of action estoppel given its contention that Mr. Adams took jurisdiction with respect to the human rights issue, and dealt with the issue in the context of the arbitration. As previously noted, where an issue is raised and disposed of in earlier litigation involving the same parties, it is issue estoppel, not cause of action estoppel, that may arise. I have already addressed the matter of issue estoppel earlier in this ruling.

[39] In contrast, cause of action estoppel would come into play where a party did not raise a cause of action in earlier litigation that properly belonged in the earlier proceeding.[(25)] In such cases, cause of action estoppel could operate to prevent that party from asserting a new cause of action arising out of the same factual situation in subsequent litigation. I do not understand OC Transpo to be asserting that while the issue of discrimination was not raised before Mr. Adams, it should have been, and that this omission gives rise to the principle of cause of action estoppel, thus depriving the Tribunal of jurisdiction.

[40] As I have previously noted, the issue of OC Transpo's obligations under the *Canadian Human Rights Act* were raised in the arbitration proceedings, albeit in the context of a consideration of whether there had been a breach of contractual rights under the collective agreement. As a result, this is not a situation where cause of action estoppel would arise.

EFFECT OF CHANGES TO OC TRANSPO'S ABSENTEEISM POLICY

[41] Finally, OC Transpo submits that the issue as to whether its absenteeism policy offends the *Canadian Human Rights Act* is moot, as the policy has since been amended. In the circumstances, any public interest that the Commission may have in these proceedings is outweighed by the interest in avoiding duplicative proceedings.

[42] It seems to me that the fact that OC Transpo's absenteeism policy may have subsequently been changed is something that could affect the remedy that may be granted, should Mr. Parisien's complaint ultimately be sustained, but should not affect the jurisdiction of this Tribunal to deal with Mr. Parisien's complaint.

[43] For the foregoing reasons, OC Transpo's motion is dismissed.

(Original signed by)

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Anne L. Mactavish

WINNIPEG, Manitoba

July 15, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T699/0402

STYLE OF CAUSE: Alain Parisien v. Ottawa-Carleton Regional Transit Commission

RULING OF THE TRIBUNAL DATED: July 15, 2002

APPEARANCES:

Alain Parisien On his own behalf (Complainant)

Patrick O'Rourke For the Canadian Human Rights Commission

Stephen Bird For the Respondent

1. [1] [2001] F.C.J. No. 1533

2. [2] *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307

3. [3] See section 50 (2) of the *Act*. See also *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 at 891.

4. [4] [2000] 4 F.C. 145, at p. 157 (F.C.A.)

5. [5] See section 50 (3)(e) of the *Act*

6. [6] [1995] 2 S.C.R. 929

7. [7] [2000] 1 S.C.R. 360

8. [8] Ruling No 2, 2000/08/02

9. [9] In this regard, it is worth noting that the collective agreement in force between OC Transpo and the Union did not contain a 'no discrimination' clause.

10. [10] *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248

11. [11] *Danyluk v. Ainsworth Technologies Inc.,* [2001] S.C.J. No. 46

12. [12] *Angle*, supra., at p.267, per Laskin J. (dissenting)

13. [13] *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.)

14. [14] *Canada (A.G.) v. Canadian Human Rights Commission et al.*, (1991) 43 F.T.R. 47, at p. 69 (F.C.T.D.).

15. [15] *Minott v. O'Shanter Development Co.*, [1999] O.J. No. 5, at para. 23 (Ont. C.A.), at paras. 49-50.

16. [16] *Canada Post Corp. v. Barrette,* [1999] 2 F.C. 250; (1998), 15 Admin. L.R. (3d) 134; 157 F.T.R. 278, at para. 79. (Rev'd on other grounds [2000] 4 F.C. 145 (F.C.A.)

17. [17] *United Steelworkers of America , Local 7884* v. *Ford Coal,* [1999] B.C.J. No. 2109, (B.C.C.A.). See also *Air BC Ltd. and C.A.L.D.A., Re*, 50 L.A.C. (4th) 93.

18. [18] [2001] O.J. No. 4937, Leave to Appeal to the Supreme Court of Canada requested [2002] S.C.C.A. No. 69 (S.C.C.) In *Ford*, the Ontario Court of Appeal held that a complainant was not estopped from bringing a human rights complaint where an arbitrator did not address the issue of the existence of a poisoned work environment. Accordingly, the Court ruled that the same question had not been before the arbitrator.

19. [19] *Saskatchewan Human Rights Commission v. Cadillac Fairview Corporation Ltd.*, [1999] S.J. No. 217 (Sask. C.A.) at para 20.

20. [20] Section 50 (1)

21. [21] *Premakumar v. Air Canada*, Ruling No 2, 2002/04/26

22. [22] Section 51

23. [23] *Danyluk*, supra.

24. [24] Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (2d Ed.) at pp. 1078 et seq. This has been described as the 'might and ought' principle (Lange, The Law of *Res Judicata* in Canada, at p. 113).

25. [25] Sopinka, ibid., at p. 1079.