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

**BETWEEN:**

**SHELLEY LEONARDIS**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADA POST CORPORATION**

**- and -**

**GLEN KORDOBAN**

**Respondents**

**RULING ON PRELIMINARY MATTERS**

**Ruling No.1**

**2002/07/30**

**MEMBER: Athanasios Hadjis**

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[1] The Complainant alleges that Glen Kordoban ("**Kordoban**") discriminated against her by harassing her on the ground of sex, contrary to Section 14 of the *Canadian Human Rights Act* ("***Act***"). She also claims that Canada Post Corporation ("**Canada Post**") discriminated against her by treating her in an adverse differential manner and by failing to provide her with a workplace free of harassment, on the ground of sex, in

contravention of Sections 7 and 14 of the *Act*. Both complaints were filed with the Canadian Human Rights Commission ("**Commission**") on August 30, 1999. The hearing into the complaints is scheduled to begin on September 23, 2002.

[2] The Respondents have raised three preliminary matters. They submit that the complaints ought to be dismissed because:

a) they were filed outside the time limit set out in Paragraph 41(1)(e) of the *Act*;

b) the issue raised in the complaints has already been determined in labour arbitration; and

c) the complaints are vexatious pursuant to Paragraph 41(1)(d) of the *Act*.

## I. TIMELINESS

[3] The Complainant is an employee of Canada Post. She alleges that between January 1997 and February 1998, her manager, Kordoban, sexually harassed her. The Respondents contend that since the complaints were filed over one year after the last incident of alleged sexual harassment, the complaints should be dismissed, pursuant to Paragraph 41(1)(e) of the *Act*. Subsection 41(1) states the following:

41. (1) Subject to Section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

*(My emphasis)*

[4] In its written submissions regarding these preliminary matters, the Commission does not make any comment on whether the complaints were actually filed within one year

after the last alleged act of discrimination. Instead, the Commission contends that any challenge to the exercise of its discretion in dealing with a complaint, pursuant to Subsection 41(1) of the *Act*, must be brought solely before the Federal Court of Canada.

[5] Indeed, the Canadian Human Rights Tribunal does not exercise supervisory jurisdiction over the actions and decisions of the Commission. This authority falls within the exclusive purview of the Trial Division of the Federal Court.[(1)] However, the Respondents submit that it is not a review of the Commission's decision that they seek. Instead, they claim that Paragraph 41(1)(e) has the effect of conferring on respondents the benefit of a one year limitation period. In effect, a substantive right is thereby created, the benefit of which can be raised by a respondent in its defense to the complaint.

[6] In support of this argument, the Respondents rely upon the decision of the Federal Court, Trial Division, in the case of *Canada (Canadian Human Rights Commission)* v. *Canadian Broadcasting Corp. (re:Vermette)*.[(2)] The Court found that Paragraph 41(1)(e) accords respondents a substantive right or benefit to the one year limitation period. The Court added that substantive rights must be determined in accordance with full and fair hearings. Such issues must fall within the Tribunal's "province" because, in the normal course of litigation, the Tribunal is better placed to conduct such a hearing since it receives more evidence than does the Commission in its preliminary role. This situation therefore entitles a respondent to present a defence, before the Tribunal, to the effect that it was inappropriate in the circumstances for it to have been deprived of the benefit of the limitation period set out in Paragraph 41(1)(e).[(3)]

[7] However, in the more recent case of *Oster* v. *International Longshore & Warehouse Union (Marine Section), Local 400*,[(4)] Mr. Justice Gibson, also of the Trial Division of the Federal Court, reached a different conclusion. The Court was called upon to review a decision of the Canadian Human Rights Tribunal in which the reasoning set out in *Vermette* was followed. The Tribunal had thus held that the respondent was entitled to bring the question of the timeliness of the complaint, before the Tribunal. The Court disagreed and found that Subsection 41(1) should not be interpreted as creating a legal right in favour of a respondent, to not be investigated by the Commission in specific circumstances. After reviewing an excerpt from the Tribunal's decision, Mr. Justice Gibson stated:[(5)]

With great respect to the learned member of the Tribunal who wrote the foregoing, I reach a different conclusion and favour the position adopted by Mr. Justice Evans in *Barrette*[(6)] that the discretion conferred on the Commission in paragraph 41(e) of the *Act* "... is incompatible with the notion that it {section 41 of the *Act*} should be interpreted as if it created a legal right not to be investigated in specific circumstances". Mr. Justice Evans' reasoning would appear to have been supported by a number of others of my colleagues.[(7)]. If I am correct that a discretionary authority of the Commission to extend the one year time limitation for the filing of a complaint that is conferred by paragraph 41(e) of the *Act* is judicially reviewable by this Court under sections 18 and 18.1 of the *Federal Court Act*, and the foregoing cited decisions would appear to support my view in that regard, and I certainly find nothing on the face of either the *Canadian*

*Human Rights Act* or the *Federal Court Act* to contradict that view, the position adopted by Mr. Justice Muldoon in *Vermette* and adopted by the Tribunal in this matter could lead to what I regard as a rather anomalous result: this Court could judicially review a time extension by the Commission and affirm it and yet the same decision of the Commission would be open to substantive review by the Tribunal in the event that the Commission referred the complaint to the Tribunal. In the absence of specific statutory language demonstrating that Parliament intended such a result, I conclude that it did not so intend.

In the result, I conclude that the Tribunal erred against a standard of correctness, in assuming jurisdiction with respect to the Union's preliminary objections. The Union, having decided not to seek judicial review before this Court of the Commission's discretionary decision to extend the time limit under paragraph 41 (e) of the *Act*, was simply precluded from adopting the alternative recourse that it chose, that being to raise precisely the same issues that it could have raised on judicial review, before the Tribunal.

*(My emphasis)*

Accordingly, Subsection 41(1) cannot be interpreted as providing additional substantive rights to respondents that can be decided upon by this Tribunal.

[8] The Respondents submit that the finding in *Oster* is based on a mistaken hypothesis. The Court referred to the anomalous result that would arise if a Court, in reviewing the Commission's decision, were to reach a conclusion that could later be contradicted by a Tribunal conducting a "substantive review" of the same issue. This possibility could never arise, argue the Respondents, because the doctrine of issue estoppel would serve to prevent the same issue from being reheard.

[9] However, in order for the doctrine of issue estoppel to be invoked, it must be established that:[(8)]

1) the prior decision dealt with the same question;

2) the prior decision was final;

3) the parties to the prior decision or their privies are the same persons as the parties in the subsequent proceedings.

The Respondents' submission fails to take into account the third condition. The Commission is not a party to the judicial reviews of its own decisions, although the Commission may occasionally be granted intervener status by the reviewing Court. On the other hand, the Commission is usually a party before the Tribunal conducting the hearing into the complaint and before whom this issue of timeliness would be argued. The parties in both instances are therefore unlikely to be the same, and consequently, the third requirement of issue estoppel is not met.

[10] Moreover, it has been held that there even exists some discretion to refuse to apply issue estoppel where to do so would be contrary to the interests of justice.[(9)] Similarly, some reluctance to applying the doctrine of issue estoppel to the adjudication of human rights complaints by specialist tribunals has been expressed, on policy grounds.[(10)]

[11] I therefore do not see on what basis the reasoning in *Oster* should not apply to the present case. The Respondents are as a result precluded from challenging, before this Tribunal, the Commission's exercise of its discretion under Paragraph 41(1)(e) of the *Act*. This aspect of the Respondents' preliminary motion is dismissed.

## II. LABOUR ARBITRATION

[12] Copies of several documents were filed together with the Respondents' preliminary motion. According to this material, the Complainant complained to her union on February 2, 1998, about the alleged sexual harassment that she had suffered at the workplace. On March 4, 1998, she filed a formal grievance under the collective agreement. The collective agreement contains provisions that guarantee to employees a workplace environment that is free of sexual harassment. For instance, there is an undertaking by the employer to discipline any employee who sexually harasses another employee. The Complainant's grievance was heard by a labour arbitrator and a decision was issued on November 30, 1998, dismissing her grievance. The arbitrator found that although some of the actions that she had complained of were vulgar and inappropriate, they did not constitute sexual harassment. As indicated earlier, the formal human rights complaints were filed by the Complainant with the Commission on August 30, 1999.

[13] The Respondents contend that since the subject matter of the human rights complaints was dealt with in the labour arbitration, the matter has been resolved. The Respondents should not be called upon to defend themselves for a second time on the same issue. There are two elements to their argument. First, relying on the Supreme Court of Canada decision in *Weber* v. *Ontario Hydro*,[(11)] it is submitted that as long as the essential character fo an issue falls within the ambit of the applicable collective agreement, an employee is obliged to follow the labour arbitration process, to the exclusion of any other claims resolution process. Secondly, the Respondents contend that the Commission advised the Complainant to proceed through the labour arbitration process instead of filing human rights complaints. In so doing, the Commission exhausted its power to deal with the complaints.

### A. The *Weber* Issue

[14] The Supreme Court of Canada in *Weber* decided that where the essential character of a dispute arises under a collective agreement, the claimant must proceed exclusively by way of labour arbitration. The courts have no power to entertain a civil action in respect of that dispute. The employee in that case was attempting to bring a civil action against his employer based on tort and breach of his rights under the *Canadian Charter of Rights*

*and Freedoms*. The Respondents argue that similarly, the Complainant should be barred from filing a complaint with the Commission and having it heard by the Tribunal, since the alleged discriminatory conduct arises in the employment context and is therefore subject to the collective agreement.

[15] The applicability of *Weber* to proceedings undertaken pursuant to the *Act* has been addressed in several subsequent decisions. The case of *Canadian Broadcasting Corporation* v. *Paul*,[(12)] dealt with the situation where an employee opted to file a human rights complaint with the Commission instead of filing a grievance with her union. The Trial Division of the Federal Court decided that *Weber* can be distinguished inasmuch as that judgment did not apply to the situation where Parliament has specifically granted concurrent jurisdiction to another forum. The Court also analyzed the relationship between the *Canada Labour Code* and the *Act* and determined that to give exclusive jurisdiction to a labour arbitrator would in effect suspend the discretion to deal with a complaint that is expressly conferred on the Commission by Section 41 of the *Act*. The Court decided therefore that the Commission retains jurisdiction over discriminatory practices taking place in unionized workplaces.

[16] In *Société Radio-Canada v. Syndicat des Communications de Radio-Canada (FCN-CSN)*[(13)], the Federal Court of Canada, Trial Division recently held that certain amendments to the *Canada Labour Code*, enacted subsequent to the *Paul* decision, did not result in the elimination of the Commission's concurrent jurisdiction. The Court agreed with the finding in *Paul* that a clear and unequivocal legislative provision is required in order for the Commission's authority under Paragraph 41(1) (a) of the *Act* to be excluded.

[17] The Canadian Human Rights Tribunal has alos had occasion to deal with this issue. In the case of *Eyerley*,[(14)] the complainant was employed at a unionized workplace. He had opted to file a human rights complaint after his union had already filed a grievance on his behalf. The Tribunal reached the same finding as in *Paul* to the effect that *Weber* can be distinguished with regard to human rights proceedings under the *Act*. The Tribunal therefore held that it retained concurrent jurisdiction to hear the complaint. Similar conclusions have been drawn in subsequent Tribunal rulings, in the *Quigley*, *Parisien and Desormeaux*[(15)] cases.

[18] For the same reasons, I agree that *Weber* can be distinguished from this case and that the Tribunal retains the jurisdiction to inquire into the complaints.

**B. The Commission's Power to Deal with the Complaints Has Been Exhausted**

[19] The Respondents stated in their written submissions that the Complainant met with the Commission before she filed her grievance and that she filed the grievance upon the recommendation of the Commission. No document or other evidence was provided to me to substantiate this allegation. The Respondents contend that by advising the Complainant to pursue the labour arbitration process, the Commission in effect exercised and exhausted the discretionary power afforded to it by virtue of Paragraph 41(1)(a). As such,

once this advice was given, the Commission was *functus officio*. It could no longer go back and relitigate the same issue by deciding to now deal with the human rights complaint.

[20] The Respondents point out that such a finding would be consistent with the rationales for the doctrine of *res judicata*. As Sopinka, Lederman and Bryant have noted, the rule of estoppel by *res judicata* is grounded on the state's interest that there be an end to litigation and that no individual should be sued more than once for the same cause or punished more than once for the same offence.[(16)] To find that the Commission is prevented or estopped from backtracking after it has recommended that a matter be referred to labour arbitration would serve the same public policy considerations.

[21] Even if we are to assume that the facts of the case are indeed as presented by the Respondents in their written submissions, this question is still one that relates to the Commission's jurisdiction to decide whether or not to deal with a complaint. As interesting as the Respondent's argument may be, I indicated earlier in this ruling that such questions fall within the exclusive purview of the Federal Court, not the Tribunal's. It is therefore not for this Tribunal to decide on this aspect of the Respondents' submissions.

[22] For these reasons, I dismiss the second aspect of the Respondents' preliminary motion relating to the labour arbitration process.

## III. THE COMPLAINT IS VEXATIOUS

[23] According to Paragraph 41(1)(d), the Commission shall not deal with a complaint if it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. It is again evident that this provision relates to the Commission's discretionary power to decide whether or not to deal with a complaint. I must reiterate that the review of such decisions is a matter for the Federal Court of Canada and not for this Tribunal. I therefore dismiss this third element of the Respondents' preliminary motion.

## IV. ORDER

[24] For all of these reasons, the Respondents' preliminary motion is dismissed.

"Original signed by"

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Athanasios Hadjis

OTTAWA, Ontario

July 30, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

TRIBUNAL FILE NOS.: T708/1302 & T709/1402

STYLE OF CAUSE: Shelley Leonardis v. Canada Post Corporation and Glen Kordoban

RULING OF THE TRIBUNAL DATED: July 30, 2002

APPEARANCES:

Robert A. Philp, Q.C. For the Complainant

Giacomo Vigna For the Canadian Human Rights Commission

Zygmunt Machelak For Canada Post Corporation and Glen Kordoban

1. [1]*Parisien* v. *Ottawa-Carleton Regional Transit Commission (Ruling No. 1)* (July 15, 2002), T699/0402 at para. 9 (C.H.R.T.);*Desormeaux v. Ottawa-Carleton Regional Transit Commission (Ruling No. 1)* (July 19, 2002,), t701/0602 at para. 10 (C.H.R.T.) *Eyerley* v. *Seaspan International Ltd.*, [2000] C.H.R.D. No. 14 at para. 4 (C.H.R.T.) (Q.L.); *Quigley* v. *Ocean Construction Supplies*, [2000] C.H.R.D. No. 46 at para.7 (C.H.R.T.) (Q.L.).

2. [2][1996] F.C.J. No. 1274 (F.C.T.D.)(Q.L.), aff'ing (1994), 94 C.L.L.C. 17,034 (C.H.R.T).

3. [3]*Vermette* (F.C.T.D.) *ibid.* at paras. 28-29.

4. [4][2001] F.C.J. No. 1353 (F.C.T.D.)(Q.L.).

5. [5]*Ibid*. at paras. 29-30.

6. [6]*Canada Post Corporation* v. *Barrette*, [1999] 2. F.C. 250 (F.C.T.D.), rev'd on other grounds [2000] 4 F.C. 145 (F.C.A.).

7. [7]The Court made reference, in a footnote, to the following decisions: *Canadian Broadcasting Corp*. v. *Graham* (1999), 170 F.T.R. 142 (F.C.T.D.); *Canada Post Corporation* v. *Canada (Canadian Human Rights Commission)* (*Re: Canadian Postmasters' and Assistants' Association*) (1997), 130 F.T.R. 241 (F.C.T.D.), aff'd (1999), 245 N.R. 397 (F.C.A.); leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 323 (S.C.C.) (Q.L.);*Canada Post Corp*. v. *Canada (Attorney General)* (*Re: Banks*) [2000] F.C.J. No. 425 (F.C.T.D.) (Q.L.); *Brine* v. *Canada Ports Corp*. (1999) 175 F.T.R. 1 (F.C.T.D.); *Prinesdomu* v. *Teleglobe Canada Inc*. (1999), 171 F.T.R. 4 (F.C.T.D.).

8. [8]See *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248 at page 267.

9. [9]*Danyluk* v. *Ainsworth Technologies* [2001] 2 S.C.R. 460 at paras. 62-67; *Minott* v. *O'Shanter Development Co.*, [1999] O.J. No. 5 at paras. 49-50 (Ont. C.A.) (Q.L.); *Thompson* v. *Rivtow Marine Limited*, [2001] C.H.R.D. No. 47 at para. 19 (C.H.R.T.) (Q.L.)

10. [10]*Barrette* (F.C.T.D.) *supra* note 6 at para. 79; *Thompson*, *ibid*.

11. [11][1995] 2 S.C.R. 929

12. [12][1999] 2 F.C. 3 (F.C.T.D.), rev'd on other grounds [2001] F.C.J. No. 542 (F.C.A.) (Q.L.).

13. [13] (July 16, 2002), T-1219-00 at paras. 50-51 (F.C.T.D.)

14. [14]*Supra* note 1.

15. [15]*Ibid*.

16. [16]J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 1068.