CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

JIM SMITH

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

RULING ON ISSUE ESTOPPEL

MEMBER: Karen A. Jensen 2005 CHRT 22
2005/06/15

[1] On February 28, 2002, Jim Smith filed a complaint with the Canadian Human Rights Commission alleging that Canadian National Railway ("CN") has been discriminating against him in employment on the basis of his disability.

[2] On May 19, 2004, the Canadian Human Rights Commission ("Commission") referred the complaint to the Tribunal for further inquiry. CN is now requesting an order indicating that the Tribunal does not have jurisdiction to hear the complaint because the matter has already been decided in another forum.

I. BACKGROUND

[3] Mr. Smith began working for CN in April, 1979. In November, 1997, Mr. Smith hurt his back while working. The Workers' Compensation Board provided him with compensation benefits. A number of efforts were made to return Mr. Smith to his job as a train engineer. These efforts ultimately failed.

[4] In June, 2002, Mr. Smith's union advanced a grievance on his behalf alleging that the Company had contravened the Collective Agreement by failing to accommodate Mr. Smith's disability. The grievance was heard before Arbitrator Michel Picher.

[5] Arbitrator Picher rendered a decision on July 14, 2003 in which he dismissed the grievance. In his decision, Arbitrator Picher held that CN had fulfilled its responsibilities under the Collective Agreement and the *Canadian Human Rights Act* to accommodate Mr. Smith.

[6] On December 3, 2003, Mr. Smith and his union filed an application for judicial review of the arbitrator's decision. On August 5, 2004, prior to a hearing on the merits, the application for judicial review was discontinued.

[7] In June and July of 2003, Mr. Smith was given an opportunity to train for a new position as a Traffic Coordinator in Prince George, British Columbia. If he successfully

completed the training program, Mr. Smith was to be offered the Traffic Coordinator position. However, CN decided to terminate the program before Mr. Smith had completed it.

[8] Shortly after the training program was aborted, the WCB terminated the vocational rehabilitation assistance it had been providing to Mr. Smith.

[9] Mr. Smith appealed the decision to terminate the WCB assistance he had been receiving. The decision was subsequently upheld by a Workers' Compensation Review Officer on July 12, 2004.

[10] On July 29, 2003, CN wrote to the Canadian Human Rights Commission to request that the human rights complaint that Mr. Smith had filed in February, 2002, be dismissed on the grounds that the issues in the complaint had already been fully resolved by Arbitrator Picher in his decision of July 14, 2003.

[11] On May 19, 2004, the Canadian Human Rights Commission referred the complaint to the Tribunal for further inquiry.

II. ANALYSIS

A. The Commission's Decision to Refer the Complaint to the Tribunal

[12] Mr. Smith argues that the Commission's decision to refer the complaint for further inquiry cannot now be reviewed by this Tribunal. However, in my view, the present motion does not involve a review of the Commission's decision.

[13] Rather, it involves an examination of the Tribunal's jurisdiction and a decision as to whether, under the circumstances of the present case, the doctrine of issue estoppel applies to oust the Tribunal's jurisdiction over the complaint (*Desormeaux v. Ottawa-Carleton Regional Transit Commission,* [2002] C.H.R.D. No. 22 at paragraphs 13 and 14).

B. Application of the Doctrine of Issue Estoppel

[14] There comes a point in time when battles must be declared at end. The doctrine of issue estoppel is one of the devices that have been developed by the courts to determine the appropriate end to litigation. The doctrine has been extended, with some necessary modification, to administrative tribunals and officers.

[15] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R 460, the Supreme Court of Canada set out a two-staged approach to the application of the doctrine in the context of administrative tribunals. The first stage involves a three-part test. If all of the elements of the test are met, then one passes to the second stage, which involves an exercise of the Tribunal's discretion.

[16] The three requirements which must be met in the first stage of the application of the doctrine of issue estoppel are as follows:

(i) the same question is 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 to the two proceedings are the same (*Danyluk, supra*, at paragraph 25).

[17] According to CN all three requirements are met in the present case.

[18] I do not agree. In my view, only one of the three requirements for the application of issue estoppel is met and therefore, the doctrine does not apply to oust the Tribunal's jurisdiction over Mr. Smith's complaint.

(i) The Same Questions Being Decided

[19] CN argues that the issues before the arbitrator were virtually identical to the issues currently before the Tribunal.

[20] Mr. Smith, on the other hand, argues that Arbitrator Picher's decision is limited to the issue of whether CN had a duty to accommodate Mr. Smith in his hometown of Terrace, B.C. In contrast, he argues, the complaint before the Tribunal extends to allegations regarding CN's conduct with respect to the accommodation efforts as a whole, as well as with respect to Mr. Smith's workers' compensation claim, and the decision to terminate the training program in Prince George.

[21] In my view, it is clear that Arbitrator Picher's decision did, in fact, deal with more than just the accommodation of Mr. Smith in Terrace. He noted that once it became evident to the Company that Mr. Smith was willing to consider employment at a location other than Terrace, it identified the Traffic Coordinator's position in Prince George as a possibility. Arbitrator Picher stated that CN's efforts with respect to the Prince George position, as well as its efforts to bring him back as a train engineer in Terrace, constituted reasonable accommodation of Mr. Smith's disability.

[22] Thus, in my view, Arbitrator Picher's decision did, in fact, deal with more than just the accommodation of Mr. Smith in Terrace.

[23] However, in my view, Arbitrator Picher's decision did not deal with all of the issues raised in Mr. Smith's human rights complaint. Of necessity, his decision was limited to the events that took place up to the date of the hearing. The complaint, however, covers allegations of discrimination dating from March 26, 2001 and ongoing. Therefore, the complaint encompasses allegations based on circumstances arising after the arbitration hearing, such as the termination of the training program in Prince George and the alleged retaliation by CN (see *Smith v. Canadian National Railway*, Ruling on the Motion to Add a Party and Amend the Complaint 2005 CHRT 23).

[24] Furthermore, there is some indication on the file that Mr. Smith may not have been able to put all of the issues and evidence regarding the accommodation options in Terrace before the arbitrator as a result of the decision of union counsel not to call him as a witness.

[25] For these reasons, I find that the issues in the complaint proceedings are different from the issues that were addressed by the arbitrator.

(ii) The Finality of the Decision

[26] 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. Although, in the present case, judicial review proceedings were commenced, they were subsequently discontinued. Therefore, I find that the arbitrator's decision was final and this requirement of the test has been met.

(iii) The Parties or their Privies are the Same

[27] For the third requirement to be met, the parties or their privies must be the same. It is clear that in the present case, the parties in the two proceedings are not the same. Are their privies the same?

[28] In order to be a privy, there must be a sufficient degree of mutual interest between the parties to make it fair to bind the parties to the second proceeding to the decision of the first (*Danyluk, supra,* at paragraph 60). Determinations about whether there is a sufficient degree of mutual interest such that the parties may be said to be privies of one

and other must be made on a case-by-case basis (J. Sopinka, S.N. Lederman and A.W. Bryant, eds, *The Law of Evidence in Canada* (2nd ed., 1999 at p. 1088)).

(iv) The Union and Mr. Smith as Privies

[29] CN argues that because the collective bargaining regime supplants the relationship between the individual and the employer, Mr. Smith's interests can only be advanced through the grievance procedure, including arbitration. In addition, the union has a duty, under s. 37 of the *Canada Labour Code,* to fairly represent employees in the bargaining unit in the handling of their grievances.

[30] As a result, CN argues, in the arbitration context, the interests of Mr. Smith and the union are identical.

[31] CN states that support for its arguments may be found in previous decisions of this Tribunal in which the union and the grievor have been found to be privies for the purposes of issue estoppel (*Thompson v. Rivtow Marine Ltd.*, [2001] C.H.R.D. No. 47; *Parisien v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. No. 23; and *Desormeaux, supra*).

[32] I have examined the Tribunal decisions cited by CN and find that there is nothing in those decisions to suggest that in every case, there will be a privity of interest between the union and the grievor/complainant. Rather, my reading of those decisions leads me to the conclusion that, in the particular circumstances of those cases, the Tribunal was prepared to accept that the union and the complainant were privies. As has been noted, this is a determination that must be made on a case-by-case basis.

[33] Although the unionized employee's interests are advanced by and through the union, this does not necessarily mean that the interests of the union and the employee are always one and the same. Conflicts do arise between the interests of an employee and the bargaining unit with respect to the handling of a grievance (*Re McRaeJackson* [2004] C.I.R.B.D. No. 31).

[34] The union is not required to respond to the interests of an employee in every case where to do so might be detrimental to the interests of the bargaining unit. The duty of fair representation requires only that the union make its decisions about the handling of a grievance in a fair and reasonable manner (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1.S.C.R. 509).

[35] Therefore, in my view, it is not possible to say that in all cases, there is a privity of interest between the union and the complainant. Each fact situation must be examined on a case-by-case basis to determine the extent to which a mutuality of interest exists.

[36] In the present case, a review of the file suggests that although, generally speaking, the union and Mr. Smith shared common interests in the resolution of the grievance, there were several points of difference which, in my opinion, are significant enough to find that, in this particular case, the union and Mr. Smith are not privies. They are as follows:

(1) In his affidavit, Mr. Smith deposes that his grievance hearing lasted two hours and that no witnesses were called. During a break, he asked that he be allowed to give evidence to counter CN's allegations. This request was refused by counsel for the union who said that he preferred the "keep it simple" principle.

[37] Specifically, Mr. Smith alleges that he had relevant evidence relating to alternative employment possibilities within the company that went to the heart of the matter being decided by the arbitrator. He alleges that he was prevented from providing this important testimony.

[38] CN does not take issue with Mr. Smith's assertions regarding his lack of testimony. However, it counters that Mr. Smith's affidavit evidence establishes that although he did not testify, he was given an opportunity to provide suggestions to counsel as to how to proceed with the presentation of his case. CN further suggests that Mr. Smith had a choice as to whether to follow union counsel's advice not to testify.

[39] In my view, it is not clear that Mr. Smith did, in fact, have that choice. While the Memorandum of Agreement between CN and the union creating the arbitration procedure provides *each party* with the right to examine all witnesses and to give evidence at the hearing, it is the union and CN that are the parties to the dispute, not Mr. Smith (Memorandum of Agreement between CN and the Union creating the Canadian Railway Office of Arbitration, dated September 1, 1971, paragraph 11). Moreover, it is the union that has carriage of the grievance, not the grievor (*Re McRaeJackson, supra*, at para. 40).

[40] In my view, the fact that Mr. Smith was not able to testify during the arbitration hearing despite his wish to do so, is an important factor in determining whether there was a privity of interest between the union and Mr. Smith.

(2) The second issue which militates against a finding of privity between Mr. Smith and the union concerns the application for judicial review of the arbitrator's decision.

[41] On December 3, 2003, the union and Mr. Smith filed an application for judicial review of the arbitrator's decision. On August 5, 2004, the application was discontinued. The Notice of Discontinuance was signed on behalf of Mr. Smith and the union by counsel for the union.

[42] Although he was a party to the application, Mr. Smith deposes that he was not asked to consent to the discontinuance and that, had he been asked, he would have refused to consent. Mr. Smith states that when he was advised in May, 2004 that the union's lawyer had recommended discontinuing the application for judicial review, he wrote to union counsel expressing his concerns and objections. Notwithstanding Mr. Smith's objections, the decision was made to discontinue the judicial review application.

[43] In my view, the two circumstances listed above demonstrate that there was an insufficient degree of mutual interest to consider the union and Mr. Smith privies in the present case.

(v) The Commission and Mr. Smith as Privies

[44] CN argues that the Tribunal's decisions in which it has held that the Commission is not a privy of the complainant are incorrect (see, for example: *Rivtow Marine, supra; Parisien, supra; Desormeaux, supra;* and *Tweten v. RTL Robinson Enterprises Ltd.* 2004 CHRT 8).

[45] CN asserts that the Commission's status with respect to a complaint before the Tribunal, where the Commission is not the complainant, is merely derivative in nature. Therefore, the interests between the complainant and the Commission are so inextricably linked that the doctrine of issue estoppel should apply to bind the Commission to the previous decision.

[46] I disagree with CN on this point. In my view, the submissions of the Canadian Human Rights Commission on this motion are apposite.

[47] The Commission argues that to suggest that it is a privy of the complainant constitutes a fundamental misunderstanding of the legislative scheme that Parliament has established for the adjudication of human rights in Canada. Section 51 of the *Act* clearly sets out the role of the Commission as being distinct from that of the complainant.

[48] The Commission represents the public interest before the Tribunal. In so doing, it must have regard to the nature of the complaint, but this does not preclude the Commission from taking a different position from that of the complainant if the public interest warrants this.

[49] As the Tribunal stated in *Desormeaux v. Ottawa-Carleton Regional Transit Commission, supra,* 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 binding the Commission to proceedings to which it was not a party and would, therefore, prevent it from taking positions before this Tribunal that it believes are in the public interest.

[50] Moreover, this is not a situation like the one in the recent ruling of this Tribunal on a motion in *Paulette Toth v. Kitchener Aero Avionics* 2005 CHRT 19. There, the Commission had chosen not to participate as a party for the purpose of determining whether the doctrine of issue estoppel applied. Here, the Commission has fully participated in the motion on this issue.

[51] In support of its argument that the Commission should be considered a privy of the complainant, CN relies on the case of *Re Bouten and Mynarski Park School District No. 5012* (1982), 139 D.L.R. (3d) 651 (Alta. Q.B.). In that case, the Alberta Court of Queen's Bench found that the Alberta Human Rights Commission was a privy to the complainant.

[52] Mr. Bouten was employed as teacher. When his employment was terminated, he launched an appeal to the Minister of Education alleging that the termination was discriminatory. He was unsuccessful in that forum and subsequently made a complaint to the Alberta Human Rights Commission. Before embarking on a hearing on the merits, the Board of Inquiry asked the Court to determine whether the doctrine of *res judicata* applied to oust the Board's jurisdiction over the complaint. The Court held that, in the circumstances of the case, the doctrine applied.

[53] In my view, the reasoning in the *Re Bouten* case does not apply to the present case. While the Court of Queen's Bench found that the Alberta Human Rights Commission and the complainant shared the same interests in the resolution of the complaint, this Tribunal has noted that the interests of the Canadian Human Rights Commission and the complainant are distinct. The Commission does not represent the complainant; rather, the responsibility of the Commission is to represent the public interest (see for example: *Desormeaux, supra,* at para. 31).

[54] Furthermore, it must be noted that in the *Re Bouten* case, Mr. Bouten, unlike Mr. Smith, was a party to the first proceeding in which discrimination in the termination of employment was alleged. In addition, Mr. Bouten was represented by his own counsel and testified in the first proceeding before a board of reference.

[55] Such is not the case here. The union was a party to the arbitration, not Mr. Smith. Thus, in order to be consistent with the *Re Bouten* decision, CN would have had to argue that the union and the Commission are privies. This, it has not done. For these reasons, I am of the view that *Re Bouten* is not applicable to the present case.

[56] Thus, I find that neither the parties nor their privies were the same in the two proceedings. As a result, the third component of the test for issue estoppel has not been met in the present case.

(vi) Second Part of the Danyluk Test

[57] Having found that two out of three of the requirements for the application of issue estoppel have not been met, I am of the view that there is no obligation for me to proceed to the second part of the *Danyluk* test.

III. CONCLUSION AND ORDER

[58] I find that the doctrine of issue estoppel has no application in the present case and therefore, the Tribunal's jurisdiction over the complaint is not ousted.

[59] Accordingly, CN's motion is dismissed.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario
June 15, 2005

PARTIES OF RECORD

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APPEARANCES:	
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Daniel Pagowski	For the Canadian Human Rights Commission
Joseph H. Hunder	For Canadian National Railway