CANADIAN HUMAN RIGHTS TRIBUANAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

SIMONE SHERMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

REVENUE CANADA

Respondent

RULING

MEMBER: Karen A. Jensen 2005 CHRT 38
2005/10/05

[1] Simone Sherman filed a complaint with the Canadian Human Rights Commission on January 21, 2000 alleging that her employer, Revenue Canada (now the Canada Revenue Agency, (the CRA)), discriminated against her by treating her differently, failing to accommodate her and finally, terminating her employment on the basis of her disability. On August 13, 2004, the Commission referred the complaint to the Canadian Human Rights Tribunal for further inquiry.

[2] Ms. Sherman's complaint of discrimination is part of a long-running dispute that has led to concurrent litigation in multiple forums. The problems began when Ms. Sherman suffered repetitive strain injuries resulting from her work as a Computer Audit Specialist with the CRA. At the heart of the various threads of litigation flowing from her injury is the question of whether the CRA has taken the appropriate actions to accommodate Ms. Sherman's physical restrictions.

[3] Ms. Sherman is now seeking an order declaring that the findings of an Independent Third Party (ITP) reviewer, who reversed the CRA's decision to terminate her employment, are binding on this Tribunal by virtue of the doctrine of issue estoppel. The CRA, in response, has also argued that issue estoppel should apply, but that it should apply with respect to the findings of the Workplace Safety and Insurance Board (formerly the Workers' Compensation Board). On the face of it, the ITPR and Workplace Safety and Insurance Board (WSIB) decisions would appear to contradict each other.

[4] The issues raised in the present motion are as follows:

(1) Does the doctrine of issue estoppel apply to the findings and conclusions of the ITP reviewer and/or to the findings and conclusions in the WSIB decisions?

(2) If issue estoppel applies in either or both cases, should the Tribunal exercise its discretion not to apply the doctrine?

I. DOES ISSUE ESTOPPEL APPLY TO THE ITPR AND/OR THE WSIB DECISIONS?

A. Factual Background

[5] Sometime in about 1994, Ms. Sherman developed work-related repetitive strain injuries. She left work and was later awarded Workers' Compensation benefits.

[6] In 1996, Ms. Sherman returned to work for four hours per day. Two different experts in ergonomic accommodation were retained at different periods in time to assist the CRA with its accommodation efforts. The process was fraught with difficulties.

[7] In May, 1998, the WSIB decided to terminate Ms. Sherman's vocational rehabilitation services and her supplementary benefits. Both decisions were based on the WSIB's view that Ms. Sherman was capable of working full-time at accommodated duties with no income loss and that the CRA had largely fulfilled its accommodation requirements. Ms. Sherman has appealed both WSIB decisions but the matters have been held in abeyance.

[8] Also, during the period between January, 1996 and August, 2000, events occurred which resulted in the filing of three grievances by Ms. Sherman's union. Those grievances relate to the termination of her "injury on duty" pay in September, 1997, her suspension without pay in July, 1998 and the denial of her request in May, 1998 to be returned to work with accommodation and retroactive pay. Some of the issues raised in Ms. Sherman's grievances are also raised in her human rights complaint.

[9] In July 1998, Ms. Sherman also lodged an independent complaint against the CRA alleging that several of her supervisors had harassed her on the basis of her disability, abused their authority, and otherwise discriminated against her. She has requested that an independent third party investigation be conducted into her complaint. Ms. Sherman has refused the suggestion by the CRA that she incorporate her harassment complaint into her human rights complaint before this Tribunal.

[10] On May 14, 1999, Ms. Sherman's employment was terminated for her refusal to complete a Functional Abilities Evaluation (FAE). This decision was subsequently rescinded by the CRA. However, in August 28, 2000, the CRA again terminated Ms. Sherman's employment citing her refusal to complete the FAE and her incapacity to perform the requirements of her position as the primary reasons for her dismissal.

[11] Ms. Sherman contested her termination by way of an Independent Third Party Review. The ITPR is a relatively new process that was developed by the CRA pursuant to the authority of the *Canada Customs and Revenue Agency Act* S.C. 1999, c. 17. The process provides for an independent review of grievances relating to terminations, demotions, lay-offs and certain staffing actions.

[12] On February 24, 2003, after a 19-day hearing preceded by numerous rulings on preliminary issues, the ITP Reviewer rendered his decision. He ordered that Ms. Sherman be reinstated to her pre-injury position with back pay and benefits, effective August 28, 2000. The Reviewer also found that the CRA's obligations to accommodate Ms. Sherman in her position had not been met and that these obligations would continue upon reinstatement.

[13] Ms. Sherman subsequently brought a motion in the Federal Court for a *mandamus* order to compel the CRA to implement disputed aspects of the ITPR decision. Next, she brought a motion for a contempt order concerning the implementation of the *mandamus* order. The *mandamus* order was granted, but the motion for a contempt order has not yet been heard. Another motion for a *mandamus* order has been filed by Ms. Sherman in the Federal Court, but it has also not been heard yet.

[14] In June 2004, Ms. Sherman's grievances proceeded to arbitration before the Public Service Staff Relations Board. In a preliminary ruling on August 27, 2004, the PSSRB held that issue estoppel applied to the nine determinations that underpinned the ITPR

decision. The CRA has applied for judicial review of the PSSRB ruling on issue estoppel. A hearing on this application is expected shortly.

[15] Before this Tribunal, the application of issue estoppel has once again been raised. For the reasons that follow, I find that although the criteria for issue estoppel are more likely to have been met with respect to the ITPR decision than the WSIB decisions, this is a case where it is appropriate to exercise my discretion not to apply the doctrine.

B. Law and Analysis

[16] Issue estoppel is meant to bring finality to litigation. It is a legal tool that has both practical and equitable goals. It is not only inefficient and expensive to continue to litigate the same issues between the same parties, it is also unfair to the successful party to have to fight the battle all over again. (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460)

[17] In this case, however, the successful party, Ms. Sherman, is seeking to use the doctrine for a different purpose. She wants to use her "win" in the ITPR process to expedite the Tribunal's hearing on allegations of discrimination that were not within the jurisdiction of the other forums. She also hopes that it will enable her to obtain further relief for matters that were either determined in another forum or may, at some point, be determined in another forum. The question is whether this is an appropriate use of the doctrine of issue estoppel.

[18] The CRA, on the other hand, is employing the doctrine in the traditional sense - as a shield to prevent Ms. Sherman from relitigating matters that it alleges were conclusively determined by the WSIB. The CRA also argues that the conditions for issue estoppel are not met with respect to the ITPR decision.

[19] 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, supra*, at para 33).

[20] 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) The Same Questions

[21] For the questions to be considered the same, they must have been so fundamental to the decision arrived at in the earlier proceeding that the decision could not stand without them (*Angle v. Canada (Minister of National Revenue)*, [1975] 2 S.C.R. 248). Furthermore, this requirement of the doctrine is met only if, on careful analysis of the relevant facts and the applicable law, the answer to the specific questions in the earlier proceeding can be said to determine at least some of the issues in the subsequent proceeding (*Heynen v. Frito Lay Canada Ltd.* (1999), 45 O.R. (3d) 776 at para. 20).

[22] Issue estoppel applies to issues of fact, issues of law and issues of mixed fact and law. The same issue requirement may apply at two levels in proceedings. It may apply to the underlying or evidentiary findings on which the final determinations are made and it may apply to the final determinations themselves. (*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.)) In some cases, the application of issue estoppel will completely dispose of the matter in the subsequent proceeding. In other cases, it may simply narrow the issues to be determined. The parties argue that it is the latter result

which would follow from a decision to apply the doctrine of issue estoppel in the present case.

The ITPR Decision

[23] The question before the ITP reviewer was whether the CRA's decision to terminate Ms. Sherman's employment was reasonable. Framed in this way, the issue would not seem to be the same as whether Ms. Sherman's termination was discriminatory. However, when one examines the CRA's reasons for dismissing Ms. Sherman, it becomes apparent that the question of whether her termination was in accordance with human rights law was fundamental to the ITP reviewer's decision.

[24] In reviewing the CRA's termination decision, the ITP reviewer was required to determine whether Ms. Sherman was disabled, whether she was capable of performing the duties of her position with or without accommodation, whether she had been provided with accommodation to the point of undue hardship, whether she cooperated with the efforts to accommodate her and whether the requirement of performing the Functional Abilities Evaluations was a *bona fide* occupational requirement.

[25] The three issues raised in Ms. Sherman's human rights complaint are: (1) whether the termination of her employment was discriminatory; (2) whether the CRA failed to accommodate her disability, and; (3) whether she was treated in a differential manner on the basis of her disability during her employment.

[26] The first two issues are the same as those dealt with by the ITP reviewer. However, the issues with regard to differential treatment are not entirely the same as those that were decided in the first proceedings. Ms. Sherman's allegations relating to differential treatment are that she was denied training opportunities, sent home on sick leave, suspended without pay, denied a promotion, not permitted to work at home and given different equipment because, at least in part, she was disabled. These issues were either not dealt with by the ITP reviewer because he lacked jurisdiction or they were dealt with collaterally by him in assessing the good faith efforts of the CRA to accommodate Ms. Sherman before dismissing her. Therefore, these issues do not fall within the "same issue" criterion of the doctrine.

[27] While some of the motion materials submitted by Ms. Sherman seem to indicate that the inquiry before this Tribunal would be limited to the question of remedies, there are other indications that evidence will be led on the "merits" of the complaint. There is certainly no suggestion in the materials that Ms. Sherman has abandoned her interest in establishing the CRA's liability for the above-mentioned allegations with regard to differential treatment. Those allegations involve different issues from the ones that were determined by the ITP reviewer.

The WSIB Decisions

[28] The CRA argues that the decisions of the WSIB address the same issues as those raised in Ms. Sherman's human rights complaint and therefore, this aspect of the test for issue estoppel has been met with respect to the WSIB decisions.

[29] There are, in fact, three WSIB decisions. The ITP reviewer found that issue estoppel applied with respect to the findings in the first WSIB decision of January 30, 1996. However, the reviewer refused to apply the doctrine with respect to the second and third decisions because he held that the CRA had failed to raise the issue in a timely manner and to provide notice to Ms. Sherman.

[30] Such is not the case in the present motion. The CRA has provided full and timely notice of its position with regard to this issue. It matters not that this was done by way of a response to Ms. Sherman's motion. The CRA argues that the second and third WSIB decisions are binding on the proceedings before this Tribunal.

[31] In my view, the fundamental issues to be determined in the second and third WSIB decisions were different from those in the present complaint. The primary issues in those decisions were whether Ms. Sherman was entitled to vocational rehabilitation services or supplementary benefits. Although the WSIB had to consider, to some extent, whether the CRA had accommodated Ms. Sherman's disability, the question confronting the WSIB was whether the employer was sufficiently "on track" with its accommodation efforts to justify the WSIB's withdrawal from the process. This is quite different from the question raised in Ms. Sherman's human rights complaint, namely whether the CRA exhausted every viable accommodation option to the point of undue hardship (*Eyerley v. Seaspan International Ltd.* [2001] C.H.R.D. No. 45 at para. 159).

(ii) Final Judicial Decisions

[32] For the purposes of this aspect of the test, a decision will be considered "judicial" in nature if the decision-maker was capable of receiving and exercising adjudicative authority, and the decision was one that was required to be made in a judicial manner (*Danyluk, supra*, at para 47). A decision is made in a judicial manner if it is based on findings of fact and the application of objective legal standards to those facts (*Danyluk, supra*, at para 41).

[33] A decision is final for the purposes of issue estoppel when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind a finding (Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Toronto: LexisNexis Canada, 2004) at 86).

The ITPR Decision

[34] The ITPR process provides the authority for the reviewer's adjudicative responsibilities to be discharged in a judicial manner. Furthermore, I find that the ITPR decision was final and was required to be rendered in a judicial manner. Thus, I find that the ITPR decision meets this aspect of the test.

The WSIB Decisions

[35] The second and third WSIB decisions are under appeal. However, Ms. Sherman has asked that they be held in abeyance pending the outcome of other proceedings. I do not think it is fair to hold this against the CRA.

[36] In my view, the *Workplace Safety and Insurance Act, 1997,* S.O. 1997, ch. 16 provides the WSIB with the authority to make judicial decisions. Moreover, I find that the Act requires Board decisions to be rendered in a judicial manner. Therefore, I find that this aspect of the test is also met with respect to the WSIB decisions.

(iii) The Parties or their Privies are the Same

[37] For the third requirement to be met, the parties or their privies must be the same. The parties to both the ITPR and the WSIB processes were Ms. Sherman and the CRA. In the proceedings before this Tribunal, there is an additional party that was not a party to the previous proceedings - the Canadian Human Rights Commission.

[38] 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 proceeding(s). 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 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* 2005 CHRT 22 at para. 28).

[39] The Tribunal has been reluctant to find that the Commission was a privy of the complainant because of the impact that this will have on the Commission's ability to represent the public interest in proceedings before the Tribunal (*Parisien v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. 23; and *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. 22).

[40] However, in the present case the Commission has indicated that it will neither be participating in the present motion nor appearing at the hearing on this matter. This would suggest that in the Commission's opinion, there are no public interest issues to be raised beyond those raised by Ms. Sherman and the CRA either in the context of the present motion or in the context of the inquiry into the merits of the complaint. Thus, in this case I am of the view that there is sufficient commonality of interest between the Commission and Ms. Sherman to be able to say that they are privies of one and other. Therefore, this aspect of the test is met with respect to the ITPR and WSIB decisions.

Conclusion with Regard to the Test for Issue Estoppel

[41] I conclude that the preconditions for the application of issue estoppel have been met with regard to the ITPR decision, but not with respect to the WSIB decisions.

II. SHOULD THE DOCTRINE OF ISSUE ESTOPPEL APPLY IN THIS CASE?

[42] In *Danyluk*, the Supreme Court of Canada stated that the doctrine of issue estoppel should not be automatically applied once it has been determined that the preconditions have been met. Rather, tribunals must consider whether it is appropriate, in the particular circumstances of the case, to apply the doctrine having regard to a number of factors.

[43] Since the preconditions for the application of issue estoppel have been met only with respect to the ITPR decision, my discussion of the discretionary factors will be limited to the context of that decision.

[44] Some of the factors enunciated by the Supreme Court are applicable in the present circumstances and others are not. I will deal only with those that are applicable. Moreover, in light of the Supreme Court's statement in *Danyluk* that the list of discretionary factors is open, I have taken the liberty of considering an additional factor: whether the interests of justice will be served by the application of the doctrine.

(i) The Wording of the Statute and the Purpose of the Legislation

[45] The Guidelines for the Independent Third Party Review process provide for a review of management decisions under very limited circumstances. The scope of the relief which may be provided is also very limited. Moreover, there is no suggestion that the ITP reviewer has exclusive jurisdiction over the review of termination decisions.

[46] In fact, Ms. Sherman filed her human rights complaint after the first CRA decision was made to terminate her employment. Thus, she was clearly aware that alternative forums to the ITPR process existed which could provide not only more comprehensive relief than the ITPR process, but which could also address the broader range of allegations stemming from the core issue in all her litigation - the allegedly discriminatory treatment by CRA based on her disability.

[47] The problem with a system of concurrent jurisdiction in multiple forums is that parties like Ms. Sherman are faced with very difficult choices: should they "put all their eggs in one basket" and focus their efforts on obtaining a positive result in the forum that has the broadest jurisdiction and can provide the most comprehensive relief; or should they use the "shotgun approach" and hope that they will achieve success in at least one forum which can then be used, by means of the doctrine of issue estoppel, to obtain favourable decisions and relief in other forums?

[48] In the present case, Ms. Sherman chose the latter approach. She has pursued a number of different avenues for redress. In some of those forums she has been successful, in others less so.

[49] It is difficult to see how the goals of the doctrine of issue estoppel - achieving consistency and finality in litigation and encouraging the resolution of disputes in one forum - are served by allowing Ms. Sherman to use her successful decisions to obtain not only additional remedies, but also to assist her to make out additional components of her complaint in other forums. Recent jurisprudence on this issue has emphasized the principal that when several related issues emanate from a workplace dispute, they should be heard by one adjudicator, to the extent jurisdictionally possible, so that inconsistent results and remedies may be avoided (*Ford Motor Co. of Canada v. Ontario (Human Rights Commission*) (2001), 209 D.L.R. (4^{th}) (Ont.C.A.) at para. 60).

(ii) The Safeguards Available to the Parties in the Administrative Procedure

[50] Another concern that I have relates to the procedural safeguards available to parties under the ITPR process. Although it is endowed with a significant number of procedural safeguards, the ITPR process appears to lack some of the powers necessary to ensure that the parties are able to know and meet the case before them. The ITP reviewer himself stated that the lack of authority in the ITPR Guidelines to summon witnesses and to demand document production constituted a "significant handicap to the fact-finding process" in complex matters such as Ms. Sherman's termination (page 34 of the ITPR decision). This is a consideration in determining whether to exercise the Tribunal's discretion to apply the doctrine of issue estoppel.

(iii) Whether the Interests of Justice will be Served by the Application of the Doctrine

[51] As has been noted, this case involves a multiplicity of proceedings in numerous forums some of which have resulted in decisions that conflict on important points, and some of which have yet to move to the hearing or decision-making stage. Indeed, after reviewing the voluminous documentation regarding the various proceedings, one is left with the distinct impression that the doctrine of issue estoppel simply cannot provide an expeditious shortcut through this patchwork of decisions and procedures.

[52] Part of the difficulty is that Ms. Sherman is not simply asking the Tribunal to apply the previous determinations made by the ITP reviewer to the issue of additional remedies that were or are not now available to her in other forums. Rather, she is asking for an order that some fifty-four findings of the ITP reviewer, which cover a wide range of issues in the complaint, are binding on the Tribunal's decision with regard to other allegations of discrimination such as differential treatment. It is likely that in making determinations regarding the other allegations in the complaint and the appropriate remedies, the Tribunal will be required to make additional findings which are not covered by the ITPR decision. The evidence adduced to prove or refute those allegations may well stray into the realm of those facts that have already been established by the ITPR.

Undoubtedly, then, there will be disagreements about whether evidence can be lead which relates to a point that has already been proved but which may be necessary to provide the context or to prove a fact that is still in issue. It is difficult to see how such controversies will assist the parties or the Tribunal to reach an expeditious and fair result on the merits of the complaint.

[53] Moreover, at this stage in the process, without the benefit of having heard any evidence or argument, it seems imprudent of me to bind the Tribunal to certain determinations which may or may not accord with other evidence which will be led regarding the allegations that are still in issue.

III. CONCLUSION AND ORDER

[54] Although the criteria for the application of issue estoppel have been met with respect to the ITPR decision, this is a case where, having regard to the factors enunciated in the *Danyluk* decision, it is appropriate to exercise my discretion to refuse to apply the doctrine of issue estoppel. Given the multiplicity and complexity of the proceedings and decisions relating to the issues raised in the complaint, I do not believe that the interests of justice will be served by the application of the doctrine in the present case.

[55] Accordingly Ms. Sherman's motion and the CRA's request, in response to the motion, to apply the doctrine of issue estoppel are denied.

_____"*Signed by*"_____
Karen A. Jensen

OTTAWA, Ontario
October 5, 2005

PARTIES OF RECORD

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