Federal Court of Appeal

Cour d'appel fédérale

Date: 20111128

Dockets: A-411-10
A-412-10

Citation: 2011 FCA 332

CORAM: **BLAIS C.J.**
PELLETIER J.A.
DAWSON J.A.

A-411-10

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and AIR CANADA

Respondents

A-412-10

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

AIR CANADA

Respondent

Heard at Ottawa, Ontario, on October 18, 2011.

Judgment delivered at Ottawa, Ontario, on November 28, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Mr. Eddy Morten is profoundly deaf and blind in his left eye. He has very limited vision in his right eye. On August 12, 2004, he booked a flight on Air Canada. Shortly thereafter, he learned that Air Canada would not permit him to fly without an attendant.

[2] On February 1, 2005, Mr. Morten filed a complaint with the Canadian Transportation Agency (Agency) claiming that Air Canada's attendant policy was an undue obstacle to his mobility. On July 8, 2005, the Agency rendered a decision in respect of Mr. Morten's complaint. The Agency agreed that Mr. Morten had encountered an obstacle to his mobility, but concluded that it was not undue. The Agency accepted Air Canada's assessment that Mr. Morten was required to travel with an attendant due to safety-related concerns in the event of an emergency evacuation or decompression.

[3] The *Canada Transportation Act*, S.C. 1996, c. 10 (Act) provides the following avenues of redress from decisions of the Agency:

a. The Agency may review, rescind or vary any decision or order if, in its view, there has been a change in the facts or circumstances (section 32).

b. The Governor in Council may, either on the petition of a party or an interested person or on its own motion, vary or rescind any decision, order, rule or regulation of the Agency (Section 40).

c. This Court may hear an appeal of a decision of the Agency on a question of law or jurisdiction, where this Court grants leave to appeal (subsection 41(1)).

[4] Mr. Morten did not pursue any redress from the Agency's decision. Instead, on September 19, 2005, Mr. Morten made a complaint to the Canadian Human Rights Commission (CHRC or Commission) on the same facts that formed the basis of his complaint to the Agency. After a 16-month investigation, the CHRC referred the matter to the Canadian Human Rights Tribunal (Tribunal).

[5] Air Canada then brought a motion in which it asked the Tribunal to stay its proceeding because the Agency had already adjudicated the same complaint. Air Canada based its motion upon the principles of *issue estoppel*, abuse of process and collateral attack. At the same time, Air Canada advised Mr. Morten that it would support an application for leave to appeal the Agency's decision to this Court (including a request for an extension of time for the bringing of the application for leave) if either Mr. Morten or the CHRC was of the view that the Agency had failed to properly exercise its mandate when it considered Mr. Morten's complaint.

[6] The Tribunal denied Air Canada's motion for a stay. In the Tribunal's view *issue estoppel* did not apply because the parties were not the same; the CHRC was not a party to the proceedings before the Agency. In addition, it would not be an abuse of process for the Tribunal to hear the matter because the CHRC was not a party before the Agency and, in the view of the Tribunal, "the Agency's analysis in dealing with Mr. Morten's claim falls far short of what would

be required under [the test established in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*].” In the Tribunal’s view it would be “an injustice to deprive both Mr. Morten and the CHRC of the opportunity to put Air Canada to the strict proof of its contention that accommodating his needs or others with similar needs, would cause it undue hardship within the meaning of these terms.” Finally, the Tribunal found there was no collateral attack because Mr. Morten did not contest before the Tribunal the legality of the Agency’s decision.

[7] The Tribunal later went on to conclude that Air Canada had not established a *bona fide* justification for its attendant policy because it did not prove it had “incorporate[d] every possible accommodation to the point of undue hardship” in its tariff.

[8] The Tribunal ordered two remedies. First, because Mr. Morten had been denied the opportunity to have his individual level of self-reliance assessed fairly and accurately, the Tribunal ordered Air Canada to “work with the CHRC and Mr. Morten to develop an attendant policy that takes into account the communication strategies utilized by people like Mr. Morten”. To comply with the order Air Canada would be required to amend the tariff which sets out its policy concerning the transportation of travelers with disabilities. Second, the Tribunal awarded Mr. Morten $10,000.00 in damages on the ground that Air Canada’s discriminatory treatment impacted his sense of accomplishment, his efforts to develop his independence over the years and his physical well-being.

[9] The Agency and Air Canada both applied to the Federal Court for judicial review of the Tribunal's decision on the basis that it acted beyond its jurisdiction and contrary to law in all but its award of a monetary remedy. The two applications for judicial review were heard together by the Federal Court.

[10] On October 13, 2010, a judge of the Federal Court decided that the Tribunal acted beyond its jurisdiction when it heard a complaint already decided by the Agency: 2010 FC 1008, 375 F.T.R. 62. He set aside the whole of the Tribunal's decision, except for the award of $10,000.00 for pain and suffering (which Air Canada did not contest in the application for judicial review).

[11] The CHRC filed two appeals from the decision of the Federal Court rendered in the two applications for judicial review. In its appeals the CHRC submits that the Judge erred in law by concluding that the Agency has exclusive jurisdiction to deal with human rights complaints that relate to a federal transportation carrier's policies, tariffs or transportation regulations.

[12] Air Canada filed a cross-appeal from the Judge's determination that the standard of review for the merits of the Tribunal's decision is reasonableness. Air Canada argues that the Tribunal lacks the expertise in the "highly specialized area of aviation law" required to receive deference.

[13] The appeals and the cross-appeal were consolidated in this Court by order dated January 7, 2011. The original of these reasons will be filed in A-411-10, the lead file, and a copy of these reasons shall be placed in court file A-412-10. A judgment will also be entered in each file.

[14] For the reasons that follow, I would dismiss the appeals and the cross-appeal, and I would award one set of costs to Air Canada in respect of both appeals, to be paid by the Commission.

1. **The Appeals**

Issues on Appeal

[15] The Judge viewed the applications for judicial review to raise a true question concerning the jurisdiction of the Tribunal. It followed, in his view, that the Tribunal's decision should be reviewed on the standard of correctness.

[16] For the purpose of this appeal, the Commission accepts this standard of review. The Commission thus frames the issues to be decided on the appeal to be:

1. Did the Judge err in finding that the Tribunal lacked jurisdiction to hear Mr. Morten's complaint?
2. If the Tribunal had jurisdiction, did it act improperly by exercising its discretion in the specific circumstances of Mr. Morten's complaint?

[17] In my view, as explained below, the issues raised on the appeal are:

1. What was the nature of the question before the Tribunal?
2. Did the Judge select the correct standard of review?
3. Is intervention by this Court warranted on the basis of the proper application of the correct standard of review?

Consideration of the Issues

i. The nature of the question before the Tribunal

[18] In my view, the question before the Tribunal was not one of jurisdiction. Mr. Morten's complaint to the Agency was brought under Part V of the Act, entitled "Transportation of Persons with Disabilities." Since the decision of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, it is clear that Part V of the Act is in the nature of human rights legislation and the Agency must interpret the Act according to human rights principles (*VIA Rail* at paragraphs 112 to 117). There is no doubt that the Agency had jurisdiction to hear and adjudicate upon Mr. Morten's complaint.

[19] When Mr. Morten later attempted to re-litigate his complaint before the Tribunal, Air Canada argued that the Tribunal should decline to exercise its jurisdiction to deal with Mr. Morten's complaint by operation of the doctrines of *issue estoppel*, abuse of process and collateral attack. By raising these issues Air Canada did not put in issue the jurisdiction of the Tribunal to adjudicate Mr. Morten's complaint of discrimination. Rather, Air Canada argued that the Tribunal should exercise its discretion to stay the proceeding.

[20] For the purpose of this appeal it is sufficient to assume, without deciding, that the Tribunal did have concurrent jurisdiction with the Agency to deal with a complaint concerning discrimination within the federal transportation network. Properly understood, the question before the Tribunal therefore was whether it should exercise its discretion not to hear Mr. Morten's complaint on the ground that the same complaint had previously been adjudicated by the Agency. This was not a true question of jurisdiction, but rather a question of the Tribunal's exercise of discretion.

ii. Did the Judge select the correct standard of review?

[21] Having determined that the question before the Tribunal concerned the exercise of its discretion to stay Mr. Morten's complaint, I am satisfied that the applicable standard of review of the Tribunal's decision on this point is reasonableness. See: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 51 and 53; and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at paragraph 26. The Judge erred in law in applying the correctness standard of review.

iii. Was the Tribunal's decision not to stay the proceedings reasonable?

[22] While this decision was under reserve, the Supreme Court of Canada rendered its judgment in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. The parties were, accordingly, afforded the opportunity to make brief written submissions to this Court with respect to the application of the *Figliola* decision.

[23] At issue in *Figliola* was what factors ought to guide a tribunal which shares jurisdiction over human rights when deciding whether to dismiss all or part of a complaint on the ground that the complaint has already been decided by the other tribunal with concurrent jurisdiction. Of relevance was paragraph 27(1)(*f*) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, which allowed the British Columbia Human Rights Tribunal to dismiss all or part of a complaint if it determined that "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding."

[24] Paragraph 27(1)(*f*) of the *British Columbia Human Rights Code* obviously has no application to this proceeding. However, the majority of the Supreme Court found that this provision reflects the common law doctrines of *issue estoppel*, abuse of process and collateral attack. The comments of the Supreme Court are, therefore, apposite in this case to the application of these common law principles by the Tribunal.

[25] At paragraph 34, the majority of the Supreme Court summarized the common principles which underlie the doctrines of *issue estoppel*, abuse of process and collateral attack:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[26] At paragraphs 36 and 37, the majority went on to explain how these principles should be applied by a tribunal when considering a request that it not hear a proceeding because the subject matter of the proceeding has previously been the subject of adjudication by another tribunal:

> 36. Read as a whole, s. 27(1)(*f*) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
>
> 37. Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
>
> [emphasis added]

[27] At paragraph 38, the majority warned that a tribunal sharing concurrent jurisdiction is not "to 'judicially review' another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome."

[28] Turning to the application of these principles to the Tribunal's decision, as in *Figliola* it may be said that the Tribunal was "complicit" in an attempt to collaterally appeal the merits of the Agency's decision and decision-making process. The Tribunal dismissed Air Canada's motion for a stay on technical grounds, without considering the unfairness inherent in serial forum shopping. The Tribunal failed to consider whether Mr. Morten should be allowed to ignore the review mechanisms provided in the Act and to instead use the Tribunal to relitigate essentially the same legal issue in an effort to obtain a more favourable result. It did not engage in the required analysis. Specifically, the Tribunal failed to consider that, before the Agency, Mr. Morten knew the case to be met and was afforded the opportunity to meet that case. Any concern on the part of Mr. Morten about the Agency's application of human rights principles ought to have been addressed through the redress provided under the Act for decisions of the Agency - particularly when Air Canada had offered to support an application for leave to appeal the Agency's decision.

[29] For these reasons, the Tribunal's decision to proceed with Mr. Morten's complaint was unreasonable and should be set aside.

[30] The Federal Court did set aside the Tribunal's decision (except for the monetary award). It follows that I would dismiss these appeals. I would also order the Commission to pay one set of costs to Air Canada in respect of both appeals.

Procedural matter

[31] During oral argument, counsel for the Agency was asked by the Court by what authority it had standing to seek judicial review the decision of another federal agency. No satisfactory response was given. While subsection 41(4) of the Act authorizes the Agency to be heard on the argument of an appeal from one of its own decisions, the Act confers no special status on the Agency to challenge decisions made by other tribunals.

[32] If in future, in similar circumstances, one agency purports to challenge the decision of another agency, the issue of the moving party's standing should be raised and addressed in the Federal Court.

[33] The Agency did not seek costs. In circumstances where its standing to challenge the decision of the Tribunal is, at best, uncertain no costs would be awarded to it in any event.

2. **The Cross-appeal**

[34] As the decision of the Tribunal was set aside by the Federal Court, and as I would dismiss the appeals from that decision, for the reasons set out above, it is not necessary to consider whether the Federal Court erred in concluding that the Tribunal's findings on the merits of Mr. Morten's complaint were reviewable on the standard of reasonableness. I would therefore dismiss the cross-appeal without costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-411-10 A-412-10
STYLES OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v. CANADIAN TRANSPORTATION AGENCY and AIR CANADA CANADIAN HUMAN RIGHTS COMMISSION v. AIR CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 18, 2011
REASONS FOR JUDGMENT BY:	Dawson J.A.
CONCURRED IN BY:	Blais C.J. Pelletier J.A.
DATED:	November 28, 2011

APPEARANCES:

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