Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 4
Date: February 1, 2023
File Nos.: T2733/10921 and T2734/11021

Between:

Kewal Sidhu & Robert Kopeck

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

International Longshore and Warehouse Union Local 500

Respondent

Ruling

Member: Paul Singh

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I. RULING

[1] The Complainants Robert Kopeck and Kewal Sidhu have filed human rights complaints ("CHRC Complaints") in which they allege age-related discrimination against their union, the Respondent International Longshore and Warehouse Union Local 500 ("Union").

[2] The Union denies discriminating and has filed a preliminary motion to dismiss the CHRC Complaints on the basis that the Canadian Industrial Relations Board ("CIRB") has adjudicated and dismissed similar complaints filed by the Complainants ("CIRB Complaints"). The Union says that the CHRC Complaints should be dismissed on the basis of issue estoppel, abuse of process, and a collateral attack on the CIRB ruling.

[3] For reasons that follow, the Union's motion is denied.

II. CONTEXT

[4] At all material times, the Complainants were members in good standing with the Union and were employed on the Vancouver waterfront by various employers under the provisions of a collective agreement in force between the Union and the various employers represented by the BC Maritime Employers Association ("BCMEA").

[5] Pursuant to the terms of the collective agreement, workers in the Complainants' category of work (fork-lift operators) were assigned work to the employers at the waterfront on a daily basis. Work was generally allocated on the basis of a member's accrued seniority, with the more senior members being assigned work ahead of less senior members, and ahead of "casual" workers who were not accorded membership status with the Union.

[6] In about 2011, following the federal government's repeal of mandatory retirement at age 65 in the federal sector, the Union and BCMEA eliminated mandatory retirement in the industry. Members who had acquired the age of 65 and who elected to continue working were allowed to avail themselves of Waterfront Industry Pension Plan income and benefits

("Pension income") that they had accrued over the term of their employment and membership in the Union.

[7] The Union says that many of its members objected to the fact that members could continue earning full wages after availing themselves of Pension income, a term that the Union referred to as "double dipping".

[8] In response to these objections, the Union instituted a rule in 2014 whereby if a member elected to receive Pension income, they would be given work allocation only after other members and casual workers were provided work allocation despite any accrued seniority ("Pensioner Dispatch Rule").

[9] This policy impacted those workers over the age of 65 but under the age of 72 who elected to receive Pension income. However, as workers grew older, there came a point when the receipt of Pension income was no longer optional. Pursuant to regulations under the *Income Tax Act* RSC 1985, c 1 (5th Supp) ("*ITA*") receipt of Pension income was mandatory for those over the age of 71.

[10] In 2017, the Union passed a rule whereby members were required to follow the Pensioner Dispatch Rule at the end of the year in which they were mandated to start collecting Pension income under the *ITA* if they had not already elected to do so earlier ("Pensioner Equalization Rule").

[11] In January 2018, the Complainants filed their CIRB and CHRC Complaints. At the time, both Complainants were over the age of 71 and mandated to receive Pension income under the *ITA*. They both sought to continue working and say that other members and casual workers were assigned work before them despite their decades of accrued seniority due to the operation of the Union's Pensioner Dispatch Rule and Pensioner Equalization Rule. The Complainants alleged that the Union's actions discriminated against them on the basis of age and caused them to sustain income loss and other damages.

[12] On January 23, 2019, CIRB dismissed the CIRB Complaints (2019 CIRB LD 4089; the "CIRB Ruling"). On October 12, 2021, the Canadian Human Rights Commission ("Commission") referred the CHRC Complaints to the Tribunal to institute an inquiry.

III. ANALYSIS

A. The Tribunal has jurisdiction to hear the motion

[13] The Complainants say that the Commission referred their complaints to the Tribunal notwithstanding the Union advancing an argument before the Commission that CIRB previously dismissed similar complaints on similar facts.

[14] The Complainants say that, since the Union failed to seek a judicial review of the Commission's referral decision, the Union is deemed to have accepted the decision and the Tribunal does not have jurisdiction to consider the Union's motion to dismiss. They say that the Tribunal is statutorily obligated to hear their complaints once referred by the Commission pursuant to s. 49 and 50 of the *CHRA*.

[15] I do not accept the Complainants' submissions in this regard.

[16] The Tribunal is the master of its own process and has the power to dismiss a complaint on a preliminary basis, where warranted. As stated by the Federal Court:

> [137] After examining some of the statutory provisions referred to above, Justice von Fickenstein observed that it was "hard to fathom" why it would be in anyone's interest for the Tribunal to hold a hearing in a case where the hearing would amount to an abuse of process: at para. 18. He concluded that **there was no statutory or jurisprudential bar that would preclude the Tribunal from dismissing a complaint on the basis of a preliminary motion on the grounds of abuse of process**, "always assuming there are valid grounds to do so": at para 19. This decision was subsequently affirmed by the Federal Court of Appeal: 2004 FCA 363 (CanLII), 329 N.R. 95.
>
> (Emphasis Added)
>
> *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445

[17] The Commission's referral of a complaint to the Tribunal creates the Tribunal's jurisdiction to conduct an inquiry into the complaint. Subsection 50(2) of the *CHRA* grants the Tribunal powers to make all findings of fact and law that are necessary to determine the matter. While there may have been a separate opportunity for the Union to challenge the Commission's referral decision, this does not preclude or otherwise fetter the Tribunal's

power to determine preliminary matters in the course of its inquiry: *Melissa Paton v. Spearing Service L.P.* 2022 CHRT 37 at para. 13.

[18] Further, the Commission's referral of a complaint for inquiry pursuant to s. 50(1) of the *CHRA* does not require the Tribunal to hold a hearing as submitted by the Complainants. The use of the term "inquiry" in s. 50(1) and the term "hearing" in s. 50(3) of the *CHRA* indicates that the referral of a matter to the Tribunal does not necessarily mandate a hearing. As noted by the Federal Court:

> If Parliament had intended that there be a "hearing" every time that a complaint was referred to the Tribunal it would have used this term instead of the term "inquiry" which is employed in subsection 50(1) of the *Act*. The use of the term "inquiry" in subsection 50(1) and the term "hearing" in subsection 50(3) clearly indicates that the referral of a matter to the Tribunal does not necessarily have to result in a hearing in every case.
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> *Canada (Human Rights Commission) v. Canada Post Corp*., 2004 FC 81 at para 17 (affirmed 2004 FCA 363)

[19] Accordingly, I find that the Tribunal has jurisdiction to consider the Union's motion to dismiss the CHRC Complaints notwithstanding the Commission's referral of these complaints to the Tribunal.

B. The timing of the complaints is not relevant

[20] The Union says the Complainants are "forum shopping" to seek a more favorable result in a different venue. The Complainants dispute this and say that the premise of the Union's motion to dismiss is erroneous because they filed the CHRC Complaints **before** the CIRB Complaints. Specifically, Mr. Kopeck and Mr. Sidhu filed their complaints with the Commission on January 6 and 8, 2018, respectively, and filed their joint complaints with CIRB on January 15, 2018.

[21] The Complainants say that this demonstrates that the CHRC Complaints were the "first priority" of the Complainants given the human rights issues at stake, and not an attempt to forum shop. The Complainants say the CIRB Complaints were merely "secondary" and were filed simply because of the "expediency of the decisions made by CIRB… resulting in

decisions being rendered in weeks, not years, as is the normal case with the CHRC and CHRC adjudication processes".

[22] The Complainants elected to file complaints raising similar human rights issues with both the Commission and CIRB. Absent express statutory language to the contrary, tribunals (such as CIRB) have concurrent jurisdiction to apply human rights legislation: *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52 ("*Figliola*") at para. 45.

[23] In these circumstances, the fact that the Complainants filed the CHRC Complaints a few days prior to the CIRB Complaints, or their intent at the time of filing, are not relevant considerations. What is relevant is whether the issues raised in the CHRC Complaints constitute a collateral attack on the CIRB Ruling or otherwise bar the Complainants from proceeding on the basis of issue estoppel or abuse of process.

[24] It is to these issues that I turn next.

C. The complaints are not subject to issue estoppel

[25] The common law doctrines of issue estoppel, abuse of process, and collateral attack hold that once an issue is decided by a competent court or tribunal, that issue should not be relitigated, except in an appeal or a judicial review proceeding. Underlying these doctrines are the "principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice": *Figliola* at para. 25.

[26] While these doctrines are interrelated, they are not identical concepts. Nevertheless, at the core of each doctrine are the principles of finality and fairness. As noted by the Supreme Court of Canada in *Figliola*:

> 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 really is a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute. (para. 37)

[27] The Union submits that the CHRC Complaints should be dismissed on the basis of issue estoppel.

[28] The test for issue estoppel requires a two-step analysis. First, three pre-conditions must be met: the same question was previously decided; the earlier decision was final; and, the parties or their privies were the same. Second, if these pre-conditions are met, the Tribunal must determine, as a matter of discretion, whether issue estoppel ought to be applied in the interest of fairness considering a number of factors including the purpose of the legislative framework enacted for each proceeding, the availability of an appeal, the procedural safeguards available to the parties, the circumstances giving rise to the prior proceeding, and the potential injustice to the parties of applying estoppel: *Figliola* at para. 27 and 62.

[29] In this case, although the CIRB Ruling (and prior related rulings) were final and the parties before CIRB were the same as the parties now before this Tribunal, I find that the scope of the issues before CIRB and this Tribunal are distinguishable.

[30] In the CIRB Complaints, the Complainants allege that the Pensioner Dispatch Rule and Pensioner Equalization Rule violate s. 37 (the Union's duty of fair representation) and s. 69 (the Union's duty of fair referral) of the *Canada Labour Code* RSC 1985, c L-2 ("*Code")*.

[31] In its ruling, CIRB determined that since the Union's rules were an internal policy and not part of the collective agreement, s.37 of the *Code* was not applicable. As a result, CIRB summarily dismissed this aspect of the complaints without conducting a discrimination analysis. As stated by CIRB:

> …The principles applicable to the DFR [duty of fair representation] are well established. The Board has consistently held that the scope of the DFR under s. 37 of the *Code* relates to the exercise of a right held by the complainant under the applicable CA [collective agreement] and does not extend to internal union matters…The *Code* does not give the Board the authority to review and scrutinize the union's administration or application of its internal rules.
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> …
>
> In the present complaint, Messrs. Kopeck, Sidhu and Elie are alleging that the union adopted a new rule, the Pensioner Equalization Rule, which is arbitrary and discriminatory as it provides for different treatment of workers who are in receipt of the industry pension because of their age.

> Even though this is a new dispatch rule, it is still part of a set of dispatch rules adopted by the union in accordance with its internal procedures for the purpose of meeting its dispatch obligations under the CA.…
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> **The Board concludes that the DFR is not applicable to these circumstances as there is no right under the CA, as a pensioner, to be dispatched in a certain order.** The dispatch rules remain an internal decision and policy of the union. Accordingly, the DFR complaint is dismissed. (Emphasis added)
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> CIRB Ruling at page 8

[32] Regarding the duty of fair referral under s. 69 of the *Code*, CIRB determined that the Union's dispatch rules were not discriminatory on the narrow basis that the relevant *ITA* provisions themselves were not in contravention of the *CHRA*. As stated by CIRB:

> In the present case, the complainants argue that by adopting these dispatch rules, the union is discriminating against them on a prohibited ground. They submit that the union is essentially achieving through the establishment of dispatch rules what it can no longer implement directly through mandatory retirement policies as those are contrary to human rights legislation. The complainants argue that the union's policy constitutes arbitrary and discriminatory conduct as it denies older workers work opportunities and favors younger workers and non-union members (casuals)…
>
> The Pensioner Equalization Rule provides that the grandparented pensioners, who would have been required by the *Income Tax Act* to collect their WIPP benefits [Pension income] by the end of the year that they turn 71, will be subject to the Pensioner Dispatch Rule like any other member who chooses or is required by law to collect the pension benefits. These rules provide that the pensioner would be dispatched after regular members and casual workers since casual workers are not contributing to the industry pension plan.
>
> The dispatch rules under review make a distinction based on the operation of the *Income Tax Act* which forces members to start drawing on their pension benefits at a certain age. As was pointed out by the union, **no court or tribunal has found the *Income Tax Act* provisions that set the age at which contributors must commence collecting pension benefits to be in contravention of the Canadian Human Rights Act. In the Board's view, a dispatch rule, like the Pensioner Equalization Rule or the Pensioner Dispatch Rule, that makes a distinction based on such a legislative requirement does not constitute discrimination based on age and does not violate the duty of fair referral under the Code.**
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> (Emphasis added)

CIRB Ruling at page 10-11

[33] In contrast to the narrow discrimination issue addressed by CIRB, the question before this Tribunal is not whether the *ITA* is discriminatory but whether the Union's policy to treat workers over the age of 71 differently than other workers violated the *CHRA* based on the legal test for discrimination.

[34] In accordance with the legal test for discrimination, the Complainants must establish that they experienced an adverse impact in their employment and that their age was a factor in the adverse impact. If the Complainants prove these elements, the burden then shifts to the Union to establish a *bona fide* occupational requirement to justify their conduct on the basis of factors including health, safety, and cost: *Moore v. British Columbia* 2012 SCC 61; *British Columbia (Public Service Employee Relations Comm.) v. BCGSEU.* [1999] 3 S.C.R. 3.

[35] CIRB did not fully address these broader issues of discrimination that are now before this Tribunal, nor did CIRB apply the legal test for discrimination when ruling on the narrow issue of the Union's duty of fair referral and fair representation.

[36] Accordingly, I find that the full scope of the issues before this Tribunal have not previously been determined by CIRB and the pre-conditions for issue estoppel have therefore not been met.

[37] In the alternative, even if CIRB addressed the same question, then, as a matter of discretion and fairness, I find that issue estoppel should not be applied given my concerns about the quality of the evidence presented and relied upon in each proceeding, and the potential injustice arising from the narrow CIRB Ruling limiting the scope of the Tribunal's consideration of the CHRC Complaints.

D. The complaints are not an abuse of process

[38] The Union also submits that proceeding with the CHRC Complaints would be an abuse of process.

[39] Even in a case where the requirements of issue estoppel are not met, the Tribunal can apply the doctrine of abuse of process to preclude the re-litigation of a matter where it would be abusive to do so: *Constantinescu v. Correctional Services Canada* 2019 CHRT 49 at paras. 111-112 and 133-137.

[40] The Supreme Court of Canada in *Figliola* confirmed several key principles to consider when determining whether there is an abuse of process, including "judicial economy, consistency, finality, and the integrity of the administration of justice" (at para. 33).

[41] The application of finality doctrines such as abuse of process, is a highly discretionary exercise driven by the needs of both substantive and procedural justice. As the Supreme Court of Canada stated in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, "a judicial doctrine developed to serve the ends of justice should not be applied mechanistically to work an injustice" (at para. 30).

[42] As noted earlier, CIRB has not fully resolved the question before this Tribunal. As a result, it would not risk offending judicial economy, consistency, finality, and the integrity of the administration of justice to proceed with the complaints. Accordingly, the CHRC Complaints are not an abuse of process.

E. The complaints are not a collateral attack

[43] The Union also submits that the CHRC Complaints should be dismissed as a collateral attack on the CIRB Ruling.

[44] The doctrine of collateral attack prevents a litigant from challenging an order from one forum in another forum, thereby bypassing the appropriate routes of appeal. As noted by the Supreme Court of Canada in *Figliola*:

> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route*: Canada (Attorney General) v. TeleZone Inc.,* 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. (at para. 28)

[45] However, a collateral attack is not to be confused with re-litigation of issues or facts already decided within an Order (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para 33; *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 71). Rather, it is a specific doctrine precluding a challenge to an Order or the execution of an Order.

[46] If a subsequent proceeding does not constitute an attack on a final Order or represent an attempt to preclude the execution of an Order, then the doctrine of collateral attack has no application (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis), 2015 at page 469).

[47] In this case, the Complainants are not seeking to specifically attack a CIRB order regarding the Union's duty of fair representation or fair referral. Rather, the Complainants are seeking a remedy against their Union at this Tribunal for alleged age-related discrimination under the *CHRA* on the basis of human rights issues not fully addressed by CIRB.

[48] In these circumstances, the CHRC Complaints do not constitute a collateral attack on the CIRB Ruling.

IV. ORDER

[49] For reasons set out above, the Union's motion to dismiss the CHRC Complaints is denied.

Signed by

Paul Singh
Tribunal Member

Ottawa, Ontario
February 1, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2733/10921 and T2734/11021

Style of Cause: Kewal Sidhu & Robert Kopeck v. International Longshore and Warehouse Union Local 500

Ruling of the Tribunal Dated: February 1, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

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