CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

SANDY CULIC

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

RULING

MEMBER: Karen A. Jensen 2006 CHRT 06
2006/02/16

[1] Ms. Sandy Lipp (née Culic, hereinafter referred to as "Ms. Lipp") began her employment with Canada Post in 1990 as a temporary employee. In 1993, she became a part-time postal clerk in Regina, Saskatchewan. From 1994 or 1995 on, Ms. Lipp experienced health problems that necessitated workplace accommodation.

[2] Then, in 2001, Ms. Lipp was diagnosed with major depression and an anxiety disorder that was, to some extent, related to conflicts with her supervisor at Canada Post. She was off work for a number of months. During that time, Ms. Lipp became pregnant.

[3] In the Fall of 2001, Ms. Lipp attempted to return to work, but was told by Canada Post that more medical information was needed before she could return. The Corporation was apparently concerned that Ms. Lipp had not sufficiently recovered from her depression and anxiety disorder to allow her to return to work. It was suspected that Ms. Lipp might be willing to disregard her psychological problems in order to log in the required number of hours to qualify for Employment Insurance during her maternity leave.

[4] The Corporation was not satisfied with the information provided by Ms. Lipp's physician attesting to her fitness to return to work. Therefore, in November of 2001, Canada Post arranged for Ms. Lipp to attend a two-day independent medical examination ("IME") with physicians in Winnipeg. Ms. Lipp indicated that she could not travel to Winnipeg for a number of reasons including difficulties with her pregnancy and a great fear of traveling.

[5] Canada Post was prepared to fly Ms. Lipp to Winnipeg, to pay for a bus trip, or to rent a car and pay for Ms. Lipp and her boyfriend to attend the IME. However, Canada Post was not prepared to lift the requirement that she attend the IME in Winnipeg and warned Ms. Lipp that if she did not attend she would be placed on disciplinary leave without pay.

[6] Ms. Lipp did not attend the IME on November 22 and 23, 2001. Consequently, she was placed on disciplinary leave without pay until such time as Canada Post received the results of an IME concerning her fitness to return to work.

[7] Through her union, Ms. Lipp filed grievances on November 7 and December 19, 2001 asserting that Canada Post had violated the collective agreement by engaging in an unreasonable delay in returning her to the workplace and in putting her on disciplinary leave without pay.

[8] On April 16, 2004, an arbitrator dismissed Ms. Lipp's grievances. The arbitrator held that Canada Post was justified in requiring Ms. Lipp to attend the IME in order to determine her fitness to return to work. Therefore, the arbitrator rejected the assertion that there had been unreasonable delay in returning her to work. With respect to the second grievance, the arbitrator held that given Ms. Lipp's "defiant stance" regarding the IME, the imposition of disciplinary leave without pay was justified.

[9] On March 18, 2003, Ms. Lipp filed a complaint with the Canadian Human Rights Commission in which she alleged discrimination on the basis of sex (pregnancy) and disability (shoulder and neck injuries, fibromyalgia). The allegedly discriminatory conduct includes Canada Post's refusal to return Ms. Lipp to her former position in October 2001, the requirement that she attend an IME in Winnipeg, the way that the meeting with the Plant Manager was handled, the disciplinary action taken against her when she refused to attend the IME in Winnipeg, and other aspects of Canada Post's treatment of Ms. Lipp from October 2001 and ongoing.

[10] The complaint was referred to the Tribunal on September 28, 2005. Canada Post subsequently brought a motion requesting that the complaint be dismissed on the basis of the doctrine of *res judicata*.

I. ISSUE

[11] The sole issue to be determined in this case is whether the doctrine of *res judicata* or abuse of process apply to the present complaint.

[12] I find that the doctrine of *res judicata* does not apply in the circumstances of the present case. It is far from clear that the issues in the complaint have been determined by the arbitrator. For this reason also, it would not be an abuse of process for the Tribunal to hear the complaint. Therefore, this is not a case where it would be appropriate to dismiss the complaint on the basis of either doctrine.

II. ANALYSIS

Res Judicata

[13] The doctrine of *res judicata* is a legal tool used to bring finality and closure to litigation. It is a means of ensuring that once a final decision has been rendered, the same issues between the same parties are not relitigated in another forum. (*Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460)

[14] However, caution and restraint must be used in the application of the doctrine of *res judicata* to the adjudication of human rights complaints, since the dismissal of a complaint results in a denial of the opportunity to be heard (*Cremasco v. Canada Post Corporation* 2002/09/30 - Ruling No. 1, at para. 83, aff'd 2004 FCA 363, and *Buffet v. Canada (Canadian Armed Forces)* 2005 CHRT 16 at para. 40). For this reason, it has been said that a complaint should only be dismissed on the basis of *res judicata* in the very clearest of circumstances (*Cremasco, supra*, at para. 106).

[15] There are two principal branches of the doctrine. The first branch is known as issue estoppel. Issue estoppel applies where there are common issues in the two proceedings. Depending on the nature of the issue in respect of which the estoppel is being raised, issue estoppel may bar relitigation of only a discrete issue or it may bar the second action in its entirety (*Hough v. Brunswick Centres Inc.*, (1997) 9 C.P.C. (4th) 111 (Ont. Gen. Div.) at paras. 24 and 25).

[16] The second branch of *res judicata* is known as "cause of action" estoppel. In the present case, the parties have not argued that cause of action estoppel applies. Therefore, I will confine my analysis to the application of issue estoppel.

A. Issue Estoppel: The Test

[17] 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).

[18] 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) Same Questions in Both Proceedings

[19] For this requirement to be met, the determination of the issue in the first litigation must have been necessary to the result (*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (O.C.A.) at para. 23). In other words, issue estoppel covers fundamental issues determined in the first proceeding, issues that were essential to the decision.

[20] This aspect of the test requires careful analysis, in my view. While it is not necessary that the adjudicator employ the same methodology and terminology that would be used by the Tribunal, it must be clear that the adjudicator has dealt with the human rights

issues in the case (*Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 at p. 703). Human rights are quasi-constitutional rights. Therefore, it is of the utmost importance that no one be denied the opportunity to ensure that these rights have been respected (*Cremasco, supra*, at para. 83, and *Buffet, supra*, at para. 40).

[21] In her complaint, Ms. Lipp alleges that Canada Post has discriminated against her on the basis of disability (shoulder and neck injuries as well as fibromyalgia) and sex (pregnancy). Ms. Lipp alleges that the way that Canada Post handled the process of investigating her fitness to return to work was discriminatory; she was treated differently during this process because she was pregnant and/or disabled.

[22] In contrast, the two grievances which were the subject of the arbitration proceedings do not specifically allege discrimination. In her grievances, Ms. Lipp was asserting her right, pursuant to the collective agreement, to return to her modified duties once she had established that she was psychologically fit. Thus, the focus of the arbitration proceedings was different from the human rights complaint; Ms. Lipp's fitness to return to work and Canada Post's justification for demanding further proof of her fitness were the issues in the arbitration proceedings.

[23] Canada Post argues that even though the arbitrator did not engage in a human rights analysis *per se*, nor did he mention the words "discrimination" or "accommodation", his essential findings and conclusions are, nonetheless, determinative of the issues in Ms. Lipp's complaint.

[24] What were the arbitrator's essential findings? The arbitrator found that Ms. Lipp's request to return to her former duties was probably more motivated by a desire to qualify for Employment Insurance than a true improvement in her psychological health. He held that Canada Post had a right to know whether Ms. Lipp was, in fact, fit to return to her former duties. Given Canada Post's lack of confidence in Ms. Lipp's physicians' reports, the arbitrator held that an IME was justified.

[25] The arbitrator held that Canada Post was justified in requiring that Ms. Lipp attend the IME in Winnipeg. He noted that Canada Post's physician was of the view that the only option for an IME was in Winnipeg. He also noted that Canada Post had offered Ms. Lipp a number of travel alternatives.

[26] The arbitrator implicitly found that the events which were alleged to be part of the delay were necessary steps in the process of obtaining the information that Canada Post needed. Therefore, he held that Canada Post did not engage in unnecessary delay in returning Ms. Lipp to her former position.

[27] With regard to the second grievance, the arbitrator held that Ms. Lipp was warned that if she refused to attend the IME in Winnipeg she would be placed on disciplinary leave without pay. He stated that any vagueness in the letter to Ms. Lipp explaining why an IME was necessary was attributable to requirements designed to protect Ms. Lipp's privacy. Therefore, the arbitrator held that Canada Post was justified in placing Ms. Lipp on disciplinary leave without pay.

[28] Are these conclusions and findings determinative of the issues that arise in Ms. Lipp's complaint? In a complaint of this nature, the Tribunal will consider whether Ms. Lipp was treated differently from other employees and whether this different treatment was based, at least in part, on the fact that she was disabled or pregnant or both. To succeed, a complainant need only show that the ground alleged was a factor in the respondent's conduct; it does not need to be the sole or overriding factor: *Martin v.*

Carter Chevrolet Oldsmobile, 2001 BCHRT 37 at para. 21; *Cooke v. Vancouver Island Aids Society* (1999), 35 C.H.R.R. D/56 at para. 52 (B.C.H.R.T.); and *Holden v. Canadian National Railway* (1991), 14 C.H.R.R. D/12 at para. 7 (F.C.A.).

[29] The Tribunal will then examine whether Canada Post has provided a credible, non-discriminatory explanation for its conduct. The evidence will be looked at as a whole, not as discrete events in isolation of one another.

[30] The Tribunal may also be called upon to determine whether a requirement results in adverse effect discrimination or indirect discrimination. If the effect of an apparently non-discriminatory requirement is to impose a heavier burden on an employee or to deprive an employee of a benefit by reason of their disability and/or sex, then unless the requirement is a *bona fide* occupational requirement, it will be found to be discriminatory. The key factor in determining whether a requirement is a *bona fide* occupational requirement is whether the employer has accommodated the employee to the point of undue hardship. (See: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at para. 49; and *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429 at para. 120) Employee participation in the accommodation efforts is also an important factor in the Tribunal's analysis.

[31] Can it be said that the arbitrator's decision addressed these issues either expressly or by necessary implication? For the following reasons, the answer to this question is "no".

[32] Firstly, the arbitrator did not examine whether Ms. Lipp was treated differently on the basis of her pregnancy and/or disability. Although he found that Ms. Lipp was probably seeking to return to work because she was pregnant and needed the money, he stopped short of analyzing whether this fact, as well as Ms. Lipp's disabilities, might have influenced the way Canada Post handled the investigation of her return to work and the requirement that she attend an IME in Winnipeg. The arbitrator did not ask whether, looking at the whole process, Ms. Lipp was treated differently than other employees because, at least in part, she was disabled and pregnant. Indeed, the arbitrator was not asked to make a determination on this issue and it was not necessary to do so in order to decide whether Canada Post had engaged in undue delay in returning Ms. Lipp to her former position.

[33] Can it be said that the arbitrator's conclusion that Canada Post did not engage in undue delay in returning Ms. Lipp to her former duties constitutes an implicit finding that Canada Post did not discriminate against Ms. Lipp? After all, in drawing this conclusion, the arbitrator explicitly rejected the union's argument that barrier after barrier had been erected to prevent Ms. Lipp's return to work. Is the rejection of this argument an implicit finding that Canada Post did not discriminate against Ms. Lipp? In my view, it is not possible to say this. The arbitrator clearly interpreted the events that occurred as steps in the process of trying to obtain more information about Ms. Lipp's psychological health. In light of that finding, the events were viewed as justifiable. However, this does not necessarily lead to the conclusion that the process or parts of it were <u>not</u> discriminatory.

[34] In the human rights context, a complaint may be found to have merit even if discrimination is only one among a number of factors influencing the impugned conduct. Therefore, it is possible to argue that a desire to obtain more information may not have been the only factor influencing Canada Post's conduct toward Ms. Lipp; discrimination may also have played a role. In my view, there must be some indication in the arbitrator's reasons that he addressed this issue and rejected it before it can be said that the issue of

discrimination had been conclusively determined. Otherwise, the possibility that discrimination played a role in the treatment of Ms. Lipp is still a "live issue" for the Tribunal to address during its inquiry into the complaint.

[35] Furthermore, while the arbitrator found that Canada Post was justified, on the basis of the provisions of the collective agreement and the arbitral jurisprudence, in requiring further medical information, there is no indication that he considered whether the requirement resulted in indirect discrimination. In that regard, it might be argued that although, on the face of it, the requirement of traveling to Winnipeg for an IME makes sense for the reasons set out by the arbitrator, it is, nonetheless, discriminatory in its effect since it imposed a greater burden on Ms. Lipp than it would on other employees because she was pregnant. It does not appear that the arbitrator considered the possibility of adverse effect discrimination.

[36] The next step in the human rights analysis would be to examine whether Canada Post had an obligation to accommodate Ms. Lipp's pregnancy and if so, whether it had done so to the point of undue hardship. There is no indication that the arbitrator examined whether, for example, in requiring that Ms. Lipp attend an IME in Winnipeg, Canada Post was required to accommodate Ms. Lipp's pregnancy. He noted that several travel alternatives had been proposed for attending the IME in Winnipeg and that the plant manager rejected the union's suggestion that the Winnipeg psychiatrist be flown into Regina. However, it is not clear whether these options were proposed as a way of dealing with Ms. Lipp's fear of traveling or her pregnancy-related difficulties. In my view, the arbitrator did not address the issue of accommodation either explicitly or by necessary implication.

[37] Finally, Canada Post has argued that the arbitrator's finding that an IME was needed before the accommodation process could be engaged, is exactly the same issue that the Tribunal would face in the adjudication of Ms. Lipp's complaint. Indeed, Canada Post goes so far as to argue that had the arbitrator not found that an IME was warranted, he would have found that Canada Post had failed its obligation to accommodate Ms. Lipp. Therefore, the finding that the IME was justified precludes any analysis that the Tribunal might undertake.

[38] I disagree. In her complaint, Ms. Lipp has not alleged that Canada Post failed to accommodate her depression and anxiety disorder. She has alleged discrimination on the basis of sex (pregnancy) and her shoulder, neck and fibromyalgia-related disabilities. As such, the arbitrator's finding that the IME was necessary does not preclude an analysis of whether the alleged discrimination occurred or not.

[39] In my view, it is speculative to say that had the arbitrator found that the IME was not necessary, he would have found that Canada Post had failed its obligation to accommodate Ms. Lipp. There is no indication in the arbitrator's reasons, nor does it follow by necessary implication from his conclusions, that he would have made any finding at all with respect to the duty to accommodate Ms. Lipp. In her grievance, Ms. Lipp was asserting that she was fit to return to her modified duties. She was not claiming that she needed accommodation on the basis of her psychological problems. Had the arbitrator found that the IME was not justified, he would presumably have ordered that she be returned to her former duties and compensated for lost wages. I do not think it is possible, based on the arbitrator's analysis, to speculate on any other conclusions that he might have drawn.

[40] For these reasons, I think that this is not a case where, although the terminology and methodology may be different, the human rights issues have been covered in some way by the arbitrator. In my view, the arbitrator was not called upon to determine whether Canada Post's conduct toward Ms. Lipp was discriminatory. The question was whether Canada Post had engaged in undue delay and whether the disciplinary action was justifiable. These are different questions from those that the Tribunal would be called upon to consider. Nor can it be said that any of the issues raised in Ms. Lipp's human rights complaint were decided by necessary implication in the arbitration. Therefore, this aspect of the test has not been met.

III. CONCLUSION REGARDING *RES JUDICATA*

[41] The doctrine of *res judicata* will not apply unless all three criteria have been met. Therefore, given my finding that the first criterion has not been met, it is not necessary for me to consider the second and third elements of the test. Moreover, a consideration of the discretionary factors for the application of the doctrine is also unnecessary.

A. Abuse of Process

[42] Canada Post has also argued that it would be an abuse of process to allow the matter to be heard by this Tribunal since the arbitrator has conclusively determined the very issues that would be dealt with by the Tribunal. Canada Post states that Ms. Lipp is seeking to have the Tribunal reach a different conclusion from the one reached by the arbitrator and this is clearly an abuse of process.

[43] However, for the reasons that I have provided above, a hearing before this Tribunal would not constitute a rehearing of the same issues that were determined by the arbitrator. Therefore, I find that it would not be an abuse of process for the Tribunal to hear this complaint.

IV. ORDER

[44] For all of the foregoing reasons, Canada Post's motion is dismissed.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario
February 16, 2006

PARTIES OF RECORD

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APPEARANCES:	
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