Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

JOHN THOMPSON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

RIVTOW MARINE LIMITED

Respondent

RULING REGARDING ARBITRATION PROCEEDINGS

Ruling No. 1

2001/11/28

PANEL: Anne Mactavish, Chairperson

[1] John Thompson worked on tugboats operated by Rivtow Marine Ltd. The terms of Mr. Thompson's employment were governed by the collective agreement in force between Rivtow and the Seafarers' International Union, of which Mr. Thompson was a member. On September 17, 1997, Mr. Thompson went on a medical leave of absence. According to Mr. Thompson, in April of 1999, he was found to be fit to return to work. Although he advised Rivtow of his desire to return to work, Mr. Thompson says that the company refused to take him back. On October 18, 1999, Mr. Thompson filed a complaint with the Canadian Human Rights Commission, wherein he alleged that Rivtow's refusal to allow him to return to work constituted discrimination on the basis of a disability. On June 2, 2000, the Seafarers' International Union filed a grievance on Mr. Thompson's behalf with respect to the company's failure to rehire Mr. Thompson after his medical leave.

[2] The grievance is scheduled to be heard on January 9-11, 2002. Six days have been set aside for the hearing of Mr. Thompson's human rights complaint, to commence on January 28, 2002.

[3] Rivtow asks that the Canadian Human Rights Tribunal decline to deal with this complaint, and defer to the arbitration process now underway. In the alternative, Rivtow asks that the Tribunal apply the doctrine of issue estoppel with respect to any issues of fact or law that are determined through the arbitration process. Rivtow also asks that the Tribunal adjourn the hearing in this matter, in order to allow the arbitrator to render his decision, and permit the Tribunal to give proper effect to the doctrine of issue estoppel. Each of these requests will be considered in turn.

I. DEFERENCE TO THE ARBITRATION PROCESS

[4] Rivtow submits that Mr. Thompson should not be permitted to proceed with his complaint in two places at the same time: to allow him to do so would permit forum shopping, and would expose the company to needless expense, relitigating the same facts and issues. This would also be an unwarranted expenditure of scarce resources on the part of the Tribunal. Further, matters should be resolved quickly and with certainty. Allowing the case to proceed in two different fora creates the risk of inconsistent results. According to Rivtow, the *Canadian Human Rights Act* specifically recognizes the undesirability of matters proceeding in more than one forum. In this regard, Rivtow points to Section 41 of the *Act*, which permits the Canadian Human Rights Commission to decline to deal with a complaint where it appears to the Commission that the complainant ought first to exhaust grievance or other similar procedures. Reference is also made to Section 44 of the Act, which allows the Commission to refer a complaint to another authority, where, following an investigation, it appears to the Commission that the complainant ought to exhaust grievance or other procedures.

[5] Although Rivtow asked the Commission not to deal with Mr. Thompson's complaint in light of the pending grievance, the Commission evidently declined to accede to Rivtow's request, and referred the case to the Tribunal for hearing.[(1)]

[6] Rivtow submits that the Canadian Human Rights Tribunal has the inherent jurisdiction in setting its own process and ensuring the fairness of matters proceeding before it to decline to deal with a matter on the basis that it is being appropriately dealt with in another forum. In this case, precisely the same issue is before the Tribunal and the arbitrator. Further, the arbitrator has the duty to apply the provisions of the *Canadian Human Rights Act* to the issue before him, and similar remedies are available in each forum.

[7] The Commission submits that the Tribunal has no jurisdiction to decline to deal with Mr. Thompson's complaint. According to the Commission, the power to decide whether a complaint should be dismissed, referred elsewhere, or referred for hearing vests exclusively with the Commission. The Commission has declined to defer to the grievance process, and has referred the matter to the Tribunal for a hearing. The hearing should, therefore, proceed.

Analysis

[8] There is no doubt that workplace disputes at the Federal level give rise to numerous potential avenues of redress. It is by no means uncommon for matters underlying a human rights complaint to also be the subject of a grievance arbitration, or proceedings under statutes such as the *Canada Labour Code*, Worker's Compensation legislation or the *Employment Insurance Act*. These multiple avenues of redress are the source of much concern, and have been the subject of comment in several recent studies.[(2)]

[9] A review of the *Canadian Human Rights Act* discloses that Parliament was alive to this concern. Indeed, the *Act* specifically contemplates consideration of whether a matter might best be dealt with in another forum at two different points in the complaints

process. In each case, however, the determination of whether the matter should be referred elsewhere is a decision for the Canadian Human Rights Commission, and not for the Tribunal.

[10] Once a complaint is referred to the Tribunal, Section 49 (2) of the *Act* provides that the Chairperson of the Tribunal *shall* institute an inquiry by assigning a member or members of the Tribunal to inquire into the complaint. According to Section 50 (1) of the *Act*, upon due notice being given to the parties, the member or members assigned to the case *shall* inquire into the complaint. In light of the mandatory nature of this language, and having regard to the structure of the legislative scheme as a whole, I do not think that it is open to the Tribunal to simply decline to deal with a complaint on the basis that, in the Tribunal's view, the matter might better be dealt with elsewhere.

[11] While the Tribunal may not have any jurisdiction to refuse to hear a case altogether, as master of its own procedure, it clearly has the power to determine when the hearing will take place. The issue of whether this hearing should be adjourned in light of the pending arbitration will be dealt with further on in this ruling.

II. APPLICATION OF THE DOCTRINE OF ISSUE ESTOPPEL

[12] Rivtow's alternate request is that the Tribunal apply the doctrine of issue estoppel with respect to any issues of fact or law that are determined through the arbitration process. There are three elements necessary to give rise to issue estoppel:

i) The same question is being decided in each proceeding;

ii) The decision which raises the issue estoppel is a final decision; and

iii) The parties to the two proceedings are the same parties or their privies.[(3)]

According to Rivtow, all three conditions will be satisfied in the context of the arbitration decision.

i) The Same Question being decided

[13] Rivtow submits that precisely the same issue is being addressed in the two proceedings: that is, whether Rivtow discriminated against Mr. Thompson on the basis of his disability in refusing to allow him to return to work on tug boats. On this point, Rivtow notes that the arbitrator has not yet rendered his decision, but that the company is prepared to live with whatever the arbitrator decides, whether or not the decision is favourable to the company.

ii) The Decision is Final

[14] Under the provisions of the *Canada Labour Code*, the decision of the arbitrator is final and binding on the parties, subject only to judicial review for jurisdictional error. While the arbitrator has not yet rendered his decision, according to Rivtow, this is because earlier dates set for the arbitration were adjourned at the behest of Mr. Thompson. Rivtow submits that it would be manifestly unfair to deprive the company of the ability to assert a claim of issue estoppel as a result of the delays to the arbitration process caused by Mr. Thompson.

iii) The Parties are the Same or Their Privies

[15] Rivtow notes that Mr. Thompson's grievance is being pursued by his Union, and states that his human rights complaint is being pursued on his behalf by the Canadian Human Rights Commission. According to Rivtow, the Union is really the representative of Mr. Thompson: it is advancing Mr. Thompson's complaint of discrimination and is acting in his interest. In support of this contention, Rivtow cites the decisions of the British Columbia Human Rights Tribunal in *Axton v. B.C. Transit* [(4)], *Tozer v. British Columbia (Minister of Transportation and Highways)* [(5)], and *Cote v. Canadian Forest Products Ltd.* [(6)] Similarly, Rivtow says, the Commission is effectively the proxy of Mr. Thompson, having allied its interests with those of Mr. Thompson.

iv) The Position of the Canadian Human Rights Commission

[16] The Commission relies on the decision of the Trial Division of the Federal Court in *Canada Post Corp. v. Barrette* [(7)] as authority for the proposition that the Canadian Human Rights Tribunal is a statutory body, empowered by Parliament to inquire into human rights complaints. It is a specialized, 'purpose designed' decision maker, and as such its powers are not to be fettered by the actions or processes of other administrative decision makers. Fact or issue estoppel does not arise in the context of hearings before tribunals with concurrent jurisdiction where the mandates, perspectives, legal powers, procedures and parties in each differ.

Analysis

[17] Issue estoppel is a public policy doctrine designed to advance the interests of justice. [(8)] Its object is to prevent parties from relitigating issues that have already been decided in other proceedings. The policy considerations underlying the doctrine include the need to have an end to litigation, as well as the desire to protect individuals from having to defend multiple legal proceedings arising out of the same set of circumstances. [(9)] Concerns have also been expressed about the cost of duplicative proceedings, as well as the risk of inconsistent results if the same issue is pursued in multiple fora. [(10)]

[18] Although motions of this sort are often brought in proceedings before the Canadian Human Rights Tribunal, I note that there is some question as to whether the provisions of the *Canadian Human Rights Act* have modified the common law with respect to issue

estoppel, precluding its application in circumstances such as these.[(11)]

[19] There is discretion to refuse to apply issue estoppel where to do so would be contrary to the interests of justice.[(12)] Quite apart from statutory considerations, a reluctance to apply the doctrine of issue estoppel to the determination of human rights complaints by specialist tribunals has also been expressed on policy grounds.[(13)]

[20] Assuming for the purposes of this motion that a decision of another administrative tribunal can operate so as to estop a complainant from proceeding with a federal human rights complaint, it must be determined whether issue estoppel arises in the circumstances of this case.

i) The Same Question Being Decided

[21] From Rivtow's submissions, it appears that the same issue will be before the labour arbitrator as is now before the Tribunal. I note, however, that the rights in issue in Mr. Thompson's grievance are private rights arising out of the collective agreement between the Seafarers' International Union and Rivtow. In contrast, the rights asserted by Mr. Thompson in his human rights complaint are quasi-constitutional rights which embody public policy and reflect the broader public interest.[(14)]

[22] Given that the arbitrator has not yet rendered a decision (or even commenced the hearing), we do not know what it is that the arbitrator will decide, or the basis for that decision. Accordingly, there is no way of knowing, at this juncture, whether the issues that will have to be determined in the context of Mr. Thompson's human rights complaint will be fully addressed in the arbitration of his grievance.

ii) The Decision is Final

[23] The fact that the grievance arbitration has not even commenced means that not only is the arbitration decision not final, it does not yet even exist.

iii) The Parties are the Same or Their Privies

[24] The final element necessary to give rise to issue estoppel is that the parties to the two proceedings be the same, or be privies of parties to both proceedings. The parties to Mr. Thompson's grievance are Rivtow and the Seafarers' International Union. I am prepared to accept that the Seafarers' International Union is a privy or proxy of Mr. Thompson.

[25] The parties in this proceeding are Mr. Thompson, Rivtow and the Canadian Human Rights Commission. Rivtow maintains that the fact that the Commission is not a party in the grievance proceedings should not preclude a finding that issue estoppel arises here, as the position taken by the Commission appears to coincide with that of Mr. Thompson. In Rivtow's submission, the Commission is a privy of Mr. Thompson.

[26] A review of the *Canadian Human Rights Act* makes it clear that both the Commission and Mr. Thompson are parties to the complaint under the *Act*.[(15)] The Commission does not represent Mr. Thompson: rather, the responsibility of the Commission is to represent the public interest.[(16)] This is reflective of the quasi-constitutional nature of the rights guaranteed by the *Act*. In my view, 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 the ability of the Canadian Human Rights Commission to take positions that it believes are in the public interest being inhibited by findings made in the context of other proceedings, proceedings of which the Commission would likely have had no notice and no opportunity to participate in.

[27] Having concluded that the Commission is not a privy of Mr. Thompson, it follows that the parties to the two proceedings are not the same, and that the third element required to establish issue estoppel is therefore absent.

[28] For the foregoing reasons, I am not persuaded that the doctrine of issue estoppel arises here.

III. SHOULD THE HEARING BE ADJOURNED PENDING THE ARBITRATION?

[29] I note that only three days have been set aside for the arbitration, whereas six days have been allocated for the Tribunal hearing. Based upon Rivtow's assertion that the same matter is to be decided in each case, and the estimates provided by the parties as to the time necessary to complete their human rights case, it appears unlikely that the arbitration will be completed in the time presently allotted for it. Each time the arbitration hearing was adjourned, there was a hiatus of several months before the matter could be rescheduled. Thus it appears that a decision in the arbitration may be many months away. Further, there is no way of knowing at this juncture whether either party will seek a judicial review of the arbitrator's decision.

[30] It is well established that there is a public interest in having complaints of discrimination dealt with expeditiously.[(17)] Given my conclusion with respect to the inapplicability of the doctrine of issue estoppel, I am not prepared to adjourn the hearings scheduled to begin on January 28, 2002.

[31] If Rivtow is concerned about being forced to litigate this matter simultaneously in two different fora, it is, of course open to it to seek to have the arbitration proceedings adjourned.

XXIX. ORDER

[32] For the foregoing reasons, Rivtow's motion is dismissed.

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Anne L. Mactavish

OTTAWA, Ontario

November 28, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T656/4401

STYLE OF CAUSE: John Thompson v. Rivtow Marine Limited

RULING OF THE TRIBUNAL DATED: November 28, 2001

APPEARANCES:

Daniel Pagowski For the Canadian Human Rights Commission

Peter A. Gall For Rivtow Marine Ltd.

1. Rivtow submits that there is no indication that the Commission gave proper, or indeed, any consideration to its arguments with respect to the application of Section 41 (1) and 44 (2) of the *Act*. If this is the case, this is a matter for the Federal Court, and not for this Tribunal. The Canadian Human Rights Tribunal does not have supervisory jurisdiction

over decisions of the Canadian Human Rights Commission (see *International Longshore and Warehouse Union (Marine Section), Local 400 v. Oster*, 2001 F.C.T. 1115.

2. See, for example, Promoting Equality: A New Vision, Report of the *Canadian Human Rights Act* Review Panel (Ottawa: 2000), Chapter 13, and The Final Report of the Advisory Committee on Labour Management Relations in the Federal Public Service, (Ottawa, 2001), Chapter 5

3. *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248

4. (1996) 28 C.H.R.R. D/ 337

5. (1998) 33 C.H.R.R. D/324

6. [2001] BCHRTD No. 13

7. [1999] 2 F.C. 250; (1998), 15 Admin. L.R. (3d) 134; 157 F.T.R. 278 (Rev'd on other grounds [2000] 4 F.C. 145 (F.C.A.)

8. *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46

9. *Angle*, supra., at p.267, per Laskin J. (dissenting)

10. *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.).

11. *Canada (A.G.) v. Canadian Human Rights Commission et al.*, (1991) 43 F.T.R. 47, at p. 69 (F.C.T.D.).

12. *Minott v. O'Shanter Development Co.*, [1999] O.J. No. 5, at para. 23 (Ont. C.A.), at paras. 49-50.

13. *Barrette*, supra., at para. 79 (F.C.T.D.).

14. *Saskatchewan Human Rights Commission v. Cadillac Fairview Corporation Ltd.*, [1999] S.J. No. 217 (Sask. C.A.) at para 20.

15. Section 50 (1). In this regard, I note that the status of the parties in human rights cases at the Federal level differs significantly from the process involved in the British Columbia cases cited by Rivtow. In British Columbia, the Commission is not automatically a party in every case, but must seek to be added by the Tribunal (See the *British Columbia Human Rights Code*, R.S.B.C 1996, c. 210, as am. S.B.C. 1998, c. 19, s.1, at Section 36.). It is therefore entirely possible that the parties to a proceeding before the British Columbia Human Rights Tribunal will be the same as the parties in an earlier administrative proceeding. On this basis, I am of the view that the cases referred to by Rivtow may be distinguished from the present situation.

16. Section 51

17. This principle was restated by Mr. Justice Richard, then of the Federal Court (Trial Division) in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.,* [1997] F.C.J. No. 207