Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Paulette Toth

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Kitchener Aero Avionics

Respondent

Decision

Member: Dr. Paul Groarke
Date: May 18, 2005
Citation: 2005 CHRT 19

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I. Introduction

[1] The Respondent has made a motion to stay or dismiss the complaint on the basis of the doctrine of *res judicata.* The Notice of Motion states that the case has already been heard under Part III of the *Canada Labour Code,* RSC 1985, c. L-2. It follows that the question before the Tribunal has already been decided.

[2] The facts behind the complaint are relatively simple. Ms. Toth was hired in 2000. She subsequently went through a process of *in vitro* fertilization and became pregnant. She alleges that Mr. Aylward, the President of the company, resented the fact that she took sick leave and maternity leave as a result.

[3] Ms. Toth filed a human rights complaint in 2002, alleging that she had been discriminated against under section 7 of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6. Her position was terminated the following year. The human rights complaint was later amended to include the termination.

[4] This is only half the story. As it turns out, Ms. Toth also filed a complaint under the *Canada Labour Code,* alleging that she had been unjustly dismissed. There was a hearing in April 2004. The adjudicator found that Ms. Toth had been unjustly dismissed and ordered the Respondent to pay her salary in lieu of notice.

[5] The motion before me proceeded by means of a *voir dire*. There was an affidavit from both sides: one from Mr. Salveta, a human resources adviser who represented the Respondent at the labour hearing, and one from the Complainant. There was cross-examination on the affidavits. Ms. Toth agreed that Mr. Aylward's attitude towards her pregnancy was central in the labour hearing.

[6] Mr. Taylor appeared for the Respondent. He submitted that the issues in the present proceeding are "identical" to the issues that were before the adjudicator under the *Canada Labour Code*. As he sees it, the essential question in the labour hearing was whether Ms. Toth

was discriminated against because she underwent a process of *in vitro* fertilization and became pregnant. This is the question before the Tribunal.

[7] Mr. Verbanac appeared for the Complainant. He submitted that the hearing under the *Canada Labour Code* addressed financial and employment matters. It did not deal with the issues under the *Canadian Human Rights Act.* This seems unconvincing. Mr. Taylor referred me to the Complainant's Statement of Particulars, which states that the Complainant's argument before the Tribunal will follow a "similar format" to the argument presented to the adjudicator.

[8] The Respondent acknowledges that there may be situations where proceedings with respect to the loss of employment under the *Canada Labour Code* and the *Canadian Human Rights Act* might be distinguished. In the present case, however, it submits that the Complainant has already won her case. It would be wrong to let her now turn to the Tribunal and shop for additional remedies.

II. The Doctrine of Res Judicata

A. Does the case meet the criteria in Danyluk?

[9] The doctrine of *res judicata* holds that judicial decisions, at least, are final. They stand against the world. The doctrine has been extended into the administrative realm and is now of general application. The specific branch of the doctrine that appears to apply in the present circumstances is commonly called "cause of action" estoppel. The argument is essentially that the case has been heard. It cannot be heard again.

[10] Mr. Taylor and Mr. Verbanac agreed that three conditions must be established, to bring the doctrine of *res judicata* into operation. These conditions are set out in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 at 477. They are as follows:

(1) the party relying on the doctrine must establish that the prior decision was final;

(2) it must establish that the parties were the same; and

(3) 3) it must establish that the decision dealt with the same question.

(i) The decision was final

[11] The Complainant accepts that the decision of the adjudicator in the present case was final. The Respondent is not satisfied with this, however, and relies on section 243 of the *Canada Labour Code.* That section reads as follows:

> 243(1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

The Respondent submits that I cannot revisit the issues considered by the adjudicator without offending the intentions of this provision.

(ii) The parties are the same

[12] Counsel for the Complainant submits that the Human Rights Commission was not a party to the hearing under the *Canada Labour Code.* It follows that the parties to the two hearings are not the same.

[13] Mr. Vebanac relies on the ruling of this Tribunal in *Parisien v. Ottawa-Carleton Regional Transit Commission,* CHRT T699/0402 (15 July 2002), where the Complainant had filed an unsuccessful grievance. The Canadian Human Rights Commission, which appeared at the human rights inquiry, had not participated in the grievance process. The Tribunal held that the doctrine of *res judicata* did not apply.

[14] The Tribunal in *Parisien* recognized that the human rights process engages fundamental rights, which go beyond the private rights of the parties. This may have a bearing on other cases. I am dealing with a different set of circumstances, however. The Human Rights Commission, which represents the public interest, did not appear at the hearing in the present case.

[15] There is a complication. Although the Commission has advised the Tribunal that it has nothing to say on the motion, it continues to take the position that it remains a party to the inquiry. I think the way out of this difficulty is to recognize that legal terms have a certain flexibility. The Commission may be a party to the present inquiry for some purposes and not for others. I am satisfied, however, that it is not a party for the purpose of determining whether the doctrine of *res judicata* applies.

[16] This is ultimately a matter of fairness. The purpose of determining whether the Commission is a party in the context of the immediate motion is largely to determine whether it has been deprived of an opportunity to address the issues in the case. I cannot see how anyone can make such an assertion in the present circumstances. It follows that the parties before me, for the purposes of *res judicata,* are the same parties that appeared before the adjudicator in the labour hearing.

(iii) The question is the same

[17] The more difficult issue is whether the question before the Tribunal is the same as the question that was before the adjudicator. Mr. Verbanac submitted that the question before the adjudicator was whether the termination of the Complainant's position could be justified on business and employment grounds. The Respondent says that this merely reflects the process under the *Canada Labour Code,* which puts the onus on the employer to justify the termination. This forces the employer to go first.

[18] The adjudicator sets out the position taken by the two sides in the labour hearing in the first paragraph of his award. "The employer", he writes, "states that Ms. Toth was terminated for

legitimate business reasons due to a downturn in profits, and that her former duties were redistributed among the remaining employees." The Complainant replied "that the reason for her termination was that the employer objected to her taking sick leave, and then maternity leave, after going through a process of *in vitro* fertilization."

[19] It is apparent from the adjudicator's decision that the Complainant's case proceeded on the basis that the Respondent's attitude towards her pregnancy was completely inappropriate. The Complainant alleged that the business reasons put forward by the Respondent were nothing more than a pretext, which was advanced to justify the termination. This is a common form of argument in the caselaw of human rights.

[20] There is no transcript of the labour hearing. Ms. Toth nevertheless told the adjudicator that Mr. Aylward's behaviour deteriorated after he discovered that she was undergoing *in vitro* fertilization. She agreed on the witness stand that the case she presented to the adjudicator was "all" about her pregnancy and maternity leave. As Mr. Salveta put it, the "core" of her position was that Mr. Aylward terminated her position because she became pregnant.

[21] I cannot see any way around it. The legal question before the Tribunal is whether Ms. Toth was discriminated against. The legal question before the adjudicator was whether she was unjustly dismissed. These two questions collapse into each other. The adjudicator's decision was premised on the finding that Mr. Aylward's attitude to the pregnancy entered into his decision to let her go. I think this constitutes a finding of discrimination.

[22] If Ms. Toth was unjustly dismissed, it was because she was discriminated against. It follows that the same question was at least implicitly before the adjudicator. A ruling in favour of the Respondent on the human rights complaint would contradict the ruling of the adjudicator. It would not be possible to find that the Complainant's position was properly terminated without offending the privative clause in section 243 of the *Canada Labour Code*.

[23] The situation might be different if there was a distinct allegation of harassment, which could be severed from the termination. The underlying factual issues in the two hearings are the same, however. The adjudicator had to consider the Respondent's entire course of conduct, in reaching his conclusions. Any other allegations are an integral part of the course of conduct that culminated in the termination. It is all part of the same fabric.

[24] The Respondent has argued that the present case is governed by the principle set out by Justice Abella, in *Rasanen v. Rosemount Instruments Limited* [1994] O.J. No. 200 (Ont. C.A.). The plaintiff in *Rasanen* had sought termination pay under the *Employment Standards Act*, R.S.O. 1980, c. 137. He also sued for wrongful dismissal. There was a hearing by a referee under the *Employment Standards Act,* before the action came to trial.

[25] Justice Abella agreed with the trial judge, who held that *res judicata* applied. At p. 278, she writes that the question in the two proceedings should not be narrowly construed.

> In my view, the question to be decided in these proceedings is the same question that was, and was necessarily, decided in the earlier *Employment Standards Act* proceedings: was there an entitlement by the employee to compensation from the employer arising from the termination of his employment? There is no doubt that under the *Employment Standards Act* this question has a different linguistic and quantitative formulation than at common law. But a different characterization and process does not, in this case, mean a different question.

I am aware that the reaction to *Rasanen* has been somewhat mixed. I nevertheless think that the same reasoning applies to the present case.

[26] There is a healthy measure of common sense in the analysis provided by Justice Abella. The fact that there were differences in the two processes was not decisive. The parties in *Rasanen* had the opportunity to call witnesses, present their cases, and respond to the position on the other side. The substance of the allegations was the same. This was sufficient to bring *res judicata* into operation.

[27] I think there is probably a public interest exception, which might apply in a case that raises issues that go beyond the private interests of the parties. The Tribunal has implicitly recognized this, in declining to apply the doctrine when the Human Rights Commission chooses to appear. The present case does not raise these kinds of issues, however, and bears the features of private litigation.

[28] The principle in *Rasanen* is that a case should only be heard once. It is sometimes said that a party cannot litigate in installments. If a hearing or trial is deficient, that can be dealt with by review or appeal. But that is the end of it. It would be wrong to let a Complainant start again, merely by moving a case to another statutory regime.

[29] The Complainant has cited cases where adjudicators have refused to hear allegations of discrimination or harassment, on the basis that the Complainant has a source of redress under the *Canadian Human Rights Act*. I think this presents a different kind of situation. If it is apparent at the outset of a hearing that a complaint is more properly made under different legislation, it makes sense for an adjudicator to decline the case. Here, the Complainant made the allegation of discrimination in the course of a hearing that was properly before the adjudicator.

III. Additional remedies

[30] This does not dispense entirely with the motion. The decision in *Danyluk* holds that there is a discretionary element in the doctrine of *res judicata.* Even if the technical requirements of the law have been met, Mr. Verbanac submits that the Complainant should be allowed to seek additional remedies under the *Canadian Human Rights Act.*

[31] The first remedy that the Complainant is seeking is payment of the discretionary bonus. This is an issue that arises naturally out of the termination of Ms. Toth's employment. It was dealt with explicitly by the adjudicator. I do not see how I can reconsider this issue without reviewing the substance of his decision, which is protected by section 243 of the *Canada Labour Code*.

[32] Then there is pain and suffering. Mr. Verbanac says that his client is not entitled to compensation for pain and suffering under the *Canada Labour Code*. Mr. Taylor disagrees. He has referred me to s. 242(4) of the *Canada Labour Code*, which gives an adjudicator the authority to do anything "that it is equitable to require the employer to do in order to remedy or counteract any consequences of the dismissal." This language is very broad.

[33] Mr. Taylor has also given me a number of cases. In *Greyeyes v. Ahtahkakoop Cree Nation,* [2003] C.L.A.D. No. 205, for example, at para. 45, an adjudicator stated that the purpose of an award under the relevant provisions of the *Canada Labour Code* is to make the complainant whole. This includes compensation, at para. 51, "for any psychological harm suffered as a consequence of being unlawfully dismissed." In *Papequash v. Key Indian Band*, [2003] C.L.A.D. No. 142, at para. 226, an adjudicator made an award for "mental distress".

[34] The Complainant submits that these cases are exceptional. Even if an adjudicator has the power to award damages for mental distress, it is an extraordinary form of relief, which is rarely sought or given. An adjudicator does not have the explicit jurisdiction enjoyed by the Tribunal in this area.

[35] The Complainant has also asked for a remedy under s. 53(3) of the *Canadian Human Rights Act,* which gives the Tribunal the power to compensate a Complainant for wilful and reckless conduct. This is apparently unavailable under the *Canada Labour Code.* I was nevertheless given caselaw in support of the proposition that aggravated damages are available under section 242 of the *Canada Labour Code*. These kinds of damages were described by Lord Devlin in *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 2 W.L.R. 269, [1964] 1 All E.R. 367 (H.L.), at 1121. I think that they provide a similar form of relief.

[36] There is a substantial overlap in the remedies that were available under the *Canada Labour Code* and the remedies that she is seeking under the *Canadian Human Rights Act*. The adjudicator could have compensated the Complainant for emotional distress, if only by extending the period of salary in lieu of notice. In the circumstances, I am not convinced that a

complainant is entitled to seek additional remedies in a second hearing, under a different statute. The additional relief that might be available under the *Canadian Human Rights Act* is not sufficient to justify a second hearing.

[37] The present ruling naturally applies to the facts of the present case. I have already suggested that there is an exception, in cases which call for a public interest remedy that is not available under the *Canada Labour Code*. The remedies sought by the Complainant under the *Canadian Human Rights Act* are personal and compensatory, however. They do not engage the larger public interest or take the case out of the realm of private litigation.

[38] There are other considerations. It is significant, for example, that the Respondent is not entitled to costs under the *Canadian Human Rights Act*. I think it would be unfair to force it to go through a second hearing, at its own cost, when the matter has already been decided in another forum.

[39] I cannot see any reason not to apply the doctrine of *res judicata* in the present case. The fact that there are differences, even substantial differences, in the remedies available in different forums, is not sufficient to justify a second hearing. Justice Abella recognized in *Rasanen* that “broader remedies” were available in the lawsuit. It did not matter. A party is only entitled to one adjudication.

[40] It is evident that Ms. Toth has other sources of redress. She could, for example, have filed a lawsuit for wrongful dismissal. It seems clear that she would be barred from doing so. I think she must also be barred here. It is asking too much of me, to find that the Tribunal can somehow deal with the termination, in spite of the fact that a court cannot do so. The cases cited by the Complainant are distinguishable on the facts.

IV. Order

[41] The motion asks me to stay or dismiss the complaint. I am not sure what a “stay” would consist of in the present circumstances. The Tribunal is a statutory Tribunal, moreover, with

limited powers. In addition, there is evidence before me, which goes at least implicitly to the merits of the case. Finally, there is the fact that the doctrine of *res judicata* is based on the need for finality in the legal process. In the circumstances, I think the appropriate course of action is to dismiss the complaint.

Signed by

Dr. Paul Groarke
Tribunal Member

Ottawa, Ontario
May 18, 2005

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T986/10604

Style of Cause: Paulette Toth v. Kitchener Aero Avionics

Decision of the Tribunal Dated: May 18, 2005

Date and Place of Hearing: April 4 to 6, 2005

Kitchener, Ontario

Appearances:

Bernard Verbanac, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Gerry Taylor and Jennifer Breithaupt, for the Respondent