Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

EDDY MORTEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

RULING

CHAIRPERSON: J. Grant Sinclair

2007 CHRT 48
2007/10/25

Air Canada's Motion

[1] Air Canada brings a motion asking the Tribunal to permanently stay the hearing of the human rights complaint of Eddy Morten which he filed with the Canadian Human Rights Commission (CHRC) on September 19, 2005. The CHRC referred his complaint to the Tribunal on February 23, 2007.

Mr. Morten and His Human Rights Complaint

[2] In his human rights complaint, Mr. Morten claims that Air Canada requires him to travel with an attendant when there is no such requirement for an able-bodied person. He alleges that, in doing so, Air Canada discriminates against him because of his disability, contrary to s. 5 of the *Canadian Human Rights Act* (*CHRA*).

[3] Mr. Morten describes himself as a 43 year old male who is deaf-blind. He has some tunnel vision and lives totally independently without home care support. In August 2004, Mr. Morten purchased an airline ticket through his travel agency to fly on Air Canada from Vancouver to San Francisco. He has traveled alone to Europe twice and to the United States frequently on Air Canada and other airlines.

[4] About two weeks after he booked his flight, he was told by his travel agency that Air Canada would not allow him to travel on the flight to San Francisco unless he was accompanied by an attendant. He did not make the trip.

[5] Mr. Morten does not have access to an attendant and cannot afford to pay for an attendant fare. More importantly, he firmly believes that he is well able to fly independently and does not require an attendant.

Canada Transportation Agency Decision

[6] In February 2005, Mr. Morten filed an application with the Canada Transportation Agency (Agency), under the *Canada Transportation Act (CTA).* He claimed that the requirement of Air Canada that he travel with an attendant was an "undue obstacle" to his mobility.

[7] The Agency issued its decision on July 8, 2005. It agreed with Mr. Morten that Air Canada's requirement is an obstacle to his mobility. But the Agency concluded that it is not undue. Accordingly, the Agency took no action on Mr. Morten's application.

[8] Air Canada argues that the same issues raised by Mr. Morten in his human rights complaint have already been dealt with by the Agency and should not be re-litigated. Air Canada pleads issue estoppel, collateral attack and abuse of process.

[9] Mr. Morten's complaint to the Agency is under Part V of the *CTA*. Section 172 empowers the Agency on application, to determine whether there is an undue obstacle to the mobility of persons with disabilities using the federal transportation network. If the Agency concludes this to be the case, it can require corrective action or direct compensation be paid for any expense incurred by a person with a disability, or both.

[10] Part V of the *CTA* must be considered in conjunction with s. 5 of that *CTA*, which declares Canada's national transportation policy. In particular, s. 5 (g)(ii) provides that each carrier or mode of transportation should operate, as far as is practicable, so as not to cause an undue obstacle to the mobility of persons including those with disabilities.

[11] Both Mr. Morten and Air Canada made submissions to the Agency concerning Air Canada's requirement that he travel with an attendant. In reaching its decision, the Agency noted that Air Canada had consulted with Mr. Morten's travel agency and his representative with respect to his disability. On the basis of these consultations, Air Canada concluded that Mr. Morten was not "self-reliant" and required an attendant. According to Air Canada's applicable tariff, "non self-reliant" means a person who is not self-sufficient and capable of taking care of his/her needs

during a flight or during an emergency evacuation or decompression, and has no special or unusual needs beyond assistance in boarding or deplaning.

[12] On the question of whether Air Canada's requirement was an "undue" obstacle, the Agency accepted Air Canada's assessment of the safety-related concerns that could arise in the event of an emergency evacuation or decompression. Air Canada's position is that, in these situations, Mr. Morten could hinder not only his own safety but the safety of all passengers. The collective safety of the passengers and crew must take precedence over the personal preference of an individual passenger.

The Agency and Human Rights Principles

[13] The Supreme Court of Canada in its 2007 decision in *CCD v. Via Rail*, recognized that the test for finding an "undue obstacle" to mobility under the *CTA* is the same test for determining "undue hardship" under s. 15 of the *CHRA*. And in defining and identifying undue obstacles in the transportation context, the Agency must apply the principles of the *CHRA* (*Council of Canadians with Disabilities v. Via Rail Canada Inc*., 2007 SCC 15, at para. 115).

[14] Where an employer or service provider seeks to justify an otherwise discriminatory, policy or practice under s.15 of the *CHRA*, they must demonstrate that they have made every possible accommodation short of undue hardship.

[15] The human rights principles as to what constitutes undue hardship have been considered in a number of Supreme Court decisions. These decisions may be summarized as follows. Where there is a barrier to mobility, the barrier can only be justified if it is impossible to accommodate the individual without imposing undue hardship on the person who has imposed the barrier. The point of undue hardship is reached when all reasonable alternatives to accommodation are exhausted and there remains only unreasonable or impractical options for accommodation (*VIA Rail* at paras. 129, 130*).*

[16] For the Agency to conclude that there is no undue obstacle to the mobility of persons with disabilities, it must be satisfied that no reasonable alternative to burdening such persons exists. The burden to satisfy the Agency is on the person who has imposed the barrier.

Issue Estoppel

[17] With this background, I turn now to a consideration of issue estoppel and whether it should be applied in this case. Three pre-conditions must be satisfied before issue estoppel applies:

(i) the same question is being decided in both proceedings;

(ii) the judicial decision said to create the estoppel is final; and

(iii) the parties or the privies are the same in both proceedings.

[18] However, even if these conditions are satisfied, a court or tribunal must decide, as a matter of discretion, whether issue estoppel should be applied in the circumstances of the particular case (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 25, 33).

[19] The third pre-condition has not been established. The parties to the Agency adjudication were Mr. Morten and Air Canada. The parties to the human rights proceeding are Mr. Morten, Air Canada and the CHRC. The parties are not the same.

[20] The CHRC cannot be considered in any way to be the privy of Mr. Morten. Section 51 of the *CHRA* makes it clear that when appearing at a hearing, the CHRC represents the public interest and not the complainant.

[21] Indeed, on this question, Air Canada simply argues that "*although the Commission has now been added as a party to the Tribunal proceedings for the purpose of representing the public interest pursuant to the Canadian Human Rights Act, it is submitted that this aspect of the test for*

issue estoppel has been met". Air Canada's submission recognizes the public interest role of the CHRC and impliedly concedes that the parties are not the same. There is nothing to its submission than that.

[22] The second step of the two step analysis, the exercise of discretion only comes into play when all of the pre-conditions are met. Because the parties are not the same in both proceedings, there is no need to consider the exercise of discretion within the issue estoppel context.

Abuse of Process

[23] The rationale for the abuse of process doctrine is to preserve the integrity of the judicial/ adjudicative process by promoting judicial economy, consistency and finality. Relitigation can have negative consequences. There is no guarantee that relitigation will produce a more accurate result than the first proceeding. It can yield contradictory results. And it may waste judicial resources and involve unnecessary expenses for the parties. (*Toronto v. CUPE*, 2003 SCC 63, at paras.37, 51)

[24] However, there may be cases where the bar to relitigation would lead to unfairness or create an injustice. In such case, this would overcome the interest in maintaining the finality of the original decision (*Toronto v. C.U.P.E.*, para. 63).

[25] There are two compelling reasons that militate against applying the doctrine of abuse of process to stay the Tribunal's proceeding. First, the CHRC is participating as a party in the Tribunal proceeding dealing with Mr. Morten's complaint. It has a statutory right to present evidence and represent the public interest in the prevention and elimination of discrimination (ss. 2 and 51 of the *CHRA*).

[26] The CHRC was not a party to the Agency proceedings and did not have the opportunity to advance the public interest that it has identified in this case. The Agency's decision was rendered without the input of the CHRC.

[27] Secondly, it is apparent from its decision that the Agency's analysis in dealing with Mr. Morten's claim falls far short of what would be required under the *Via Rail* test. Mr. Morten's services complaint under s. 5 of the *CHRA* is ongoing in nature and impugns a policy that Air Canada continues to pursue.

[28] 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.

Collateral Attack

[29] The rule against collateral attack operates to prevent a challenge in a subsequent proceeding, to the legality of a judicial order issued by a court of competent jurisdiction. This rule focuses on attacking the order itself and its legal effect (*Toronto v. CUPE*, at paras. 33, 34; *Danyluk* at para. 20). This is not the case with Mr. Morten's human rights complaint. It is not a claim which seeks to contest the legality of the Agency's decision in the proceedings before this Tribunal.

Conclusion

[30] Air Canada has not satisfied the three preconditions for issue estoppel. It is not an abuse of process to allow Mr. Morten's human rights complaint to proceed. The rule against collateral attack does not apply in this case.

[31] For these reasons, Air Canada's motion is dismissed.

"*Signed by*"

J. Grant Sinclair

OTTAWA, Ontario
October 25, 2007

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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APPEARANCES:	
Eddy Morten	For himself
Giacomo Vigna/Kevin Shaar	For the Canadian Human Rights Commission
Gerard Chouest/Tae Mee Park	For the Respondent