Federal Court  Cour fédérale

Date: 20140321

Docket: T-2034-12

Citation: 2014 FC 278

Ottawa, Ontario, March 21, 2014

PRESENT: The Honourable Mr Justice de Montigny

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHRIS HUGHES AND CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Canadian Human Rights Tribunal ("CHRT" or "Tribunal") issued on October 11, 2012 by Member Wallace G. Craig. The Tribunal found discrimination in relation to complaints filed by Mr Chris Hughes (The "Respondent") against Human Resources and Skills Development Canada ("HRSDC"). The alleged discrimination was related to HRSDC's inability to accommodate his disability (depression) by deploying him to permanent employment within HRSDC or transferring him to another position.

[2] The Respondent had also filed complaints before the Public Service Labour Relations Board ("PSLRB" or "Board") surrounding his inability to maintain permanent employment with HRSDC. These complaints were heard and dismissed prior to the CHRT's hearing and decision. Mr Hughes did not challenge the PSLRB decision.

[3] For the reasons that follow, this application for judicial review is dismissed. The issues raised before the CHRT had not been decided by the PSLRB, and the doctrine of *res judicata* therefore does not apply. Moreover, the decision of the CHRT was entirely reasonable, on the basis of the record that was before it.

1. Facts

[4] From 1995 to 2005, Mr Chris Hughes was employed as a term employee by the Canada Customs and Revenue Agency, the predecessor to the Canada Revenue Agency ("CRA"), and the Canada Border Services Agency ("CBSA"). While working at the CRA, Mr Hughes, who only had a high school diploma when hired, augmented his education with level-one financial accounting courses and various training at the CRA and CBSA.

[5] In his initial years of employment, Mr Hughes publicly disclosed an incident in which a taxpayer was subjected to improper attachment proceeding by other employees of the CRA. Mr Hughes had engaged in litigation with the CRA resulting in a confidential settlement. Mr Hughes said that this has caused him severe anxiety and stress requiring medical leaves of absence from work and labelled him a whistleblower.

[6] In the spring of 2006, Mr Hughes applied as an external candidate for a position of CR-05 Service Delivery Agent 2 at HRSDC in Victoria, British Columbia. He was accepted in a staffing pool in the summer of 2006. He was later asked for references, which he had difficulty providing because of having been a whistleblower in his previous job at CRA. He did, however, provide good performance reviews in lieu of references. He was not initially offered a job.

[7] The CR-05 Service Delivery Agent 2 position included a Statement of Merit Criteria. At the time, this position was advertised to the public with the requirement, under the category of Education, of a secondary school diploma or an alternative approved by the Public Service Commission. On June 25, 2006, employees at HRSDC received an e-mail with the subject line: "Message re: Reclassification from CR05 to PM01" indicating that the Service Delivery Agent 2 position would be reclassified from the CR-05 group and level to the PM-01 group and level effective September 14, 2006. The reclassification of the CR-05 Service Delivery Agent 2 position to the PM-01 Payment Service Agent led to a revised Statement of Merit Criteria which required two years post secondary education for all external candidates. Since this was a national reclassification, the local office in Victoria was required to adhere to this Revised Statement of Merit Criteria which meant it could no longer assess a candidate against the previous CR-05 Statement of Merit Criteria.

[8] Mr Hughes acknowledged that the change in the requirement for the CR-05 pool rendered him "technically unqualified as a CR-05 candidate for employment". However, he testified that he could have been offered equivalent positions such as PM-02, PM-01 and CR-04, and provided examples of six people in the CR-05 pool who obtain employment in other equivalent positions. He

also provided examples of four persons hired via a non-advertised process as PM-01, for which the job qualifications were almost identical to the CR-05 pool he was in, and one hired from a CR-05 pool for a PM-02 position.

[9] Mr Hughes continued to apply and was eventually hired for a CR-04 position with HRSDC in the late summer of 2007 as Service Delivery Agent 1 - "Insurance Processing CEP (Common Experience Payment) Processing Centre-SCC Victoria". This first position was for the period between September 13, 2007 and March 7, 2008, and was later extended first to March 28, 2008 and then later to June 27, 2008.

[10] The Common Experience Payment Processing Centre dealt with assessing claims as part of the Indian Residential Schools Settlement Agreement. Mr Hughes had the responsibility of processing applications, determining eligibility and expediting a one-time payment to former students of the Indian Residential Schools. It is important to note that a significant part of Mr Hughes' work was receiving phone calls from applicants who often spoke of their trauma which caused Mr Hughes increasing levels of distress due to his own disability (depression).

[11] Mr Hughes worked extensive hours at his job, processed the most CEP applications and was highly praised by his managers for his "excellent productivity" and his "hard work".

[12] Aware that his CEP term employment would come to an end, Mr Hughes spoke with his team leader, Ms Jacky Smith on January 8, 2008 asking her advice on requesting work as an acting PM-02 or PM-01 in the CPP/OAS area. Ms Smith was very supportive and thought of Mr Hughes

as "reliable, productive and pro-active member of this team". She mentioned that she would not have a problem if he wanted to give her name as a reference. On January 30, 2008, Mr Hughes e-mailed Ms Bergh, the Director of CPP/OAS, copying Mr Quinn, Service Delivery Manager, Processing and Payment Services at Service Canada, requesting deployment.

[13] In early February 2008, an incident occurred that soured the relationship between Mr Hughes and Ms Smith. A co-worker embarrassed Mr Hughes before other employees by heatedly and falsely accusing him of incorrectly processing certain CEP applications. Mr Hughes tried to complain directly to the team leader, Ms Smith, but in her absence, he went to seek union assistance. Ms Smith expressed discontent that Mr Hughes went to seek union assistance before speaking with her and thereafter, Ms Smith became reluctant to endorse Mr Hughes for further employment. Ms Smith later provided lukewarm references for Mr Hughes' continued employment.

[14] At the same time, Mr Hughes was starting to re-experience depressive episodes due to the nature of his job dealing with individuals that were hit by trauma. On February 18, 2008, Mr Hughes received a medical memo from his doctor requesting that Mr Hughes be exposed to less client calls as Mr Hughes had been "somewhat stressed and depressed". Mr Hughes submitted this note to Ms Smith and she accommodated him by changing his duties.

[15] On April 14, 2008, Mr Hughes made another request to Ms Smith for the same reason. He wanted to be transferred to an equivalent CR-04 position with Guaranteed Income Supplement Renewal where he knew there was great demand. This request was forwarded to Mr Quinn, who then forwarded the request to Human Resources Consultant Caleigh Miller. Ms Miller replied

immediately requesting that further inquiries be sent to Mr Hughes' doctor demanding additional information on his medical condition. No follow-up by Ms Smith or Mr Quinn was undertaken and five weeks after the April 14, 2008 request for accommodation due to his depression, Mr Hughes received a termination letter effective June 27, 2008.

[16] Mr Hughes filed four complaints with the PSLRB between April 30, 2008 and October 1, 2009, grounded on allegations that HRSDC committed unfair labour practices in violation of subparagraphs 186(2)(a)(i)-(iv) of the *Public Service Labour Relations Act*, SC 2003, c 22 ("*PSLRA*"). The relevant provisions of this Act provide as follows:

Complaints	Plaintes à la Commission
190. (1) The Board must examine and inquire into any complaint made to it that	190. (1) La Commission instruit toute plainte dont elle est saisie et selon laquelle :
[…]	[…]
(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.	g) l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 185.
Meaning of "unfair labour practice"	Définition de « pratiques déloyales »
185. In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).	185. Dans la présente section, « pratiques déloyales » s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).
Unfair labour practices — employer	Pratiques déloyales par l'employeur
186. (2) Neither the employer	186. (2) Il est interdit à

nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall

l'employeur, à la personne qui agit pour le compte de celui-ci et au titulaire d'un poste de direction ou de confiance, que ce dernier agisse ou non pour le compte de l'employeur :

(a) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person

a) de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,

(i) elle adhère à une organisation syndicale ou en est un dirigeant ou représentant — ou se propose de le faire ou de le devenir, ou incite une autre personne à le faire ou à le devenir —, ou contribue à la formation, la promotion ou l'administration d'une telle organisation,

(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,

(ii) elle a participé, à titre de témoin ou autrement, à toute procédure prévue par la présente partie ou la partie 2, ou pourrait le faire,

(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or

(iii) elle a soit présenté une demande ou déposé une plainte sous le régime de la présente partie, soit déposé un grief sous le régime de la partie 2,

(iv) has exercised any right under this Part or Part 2;

(iv) elle a exercé tout droit prévu par la présente partie ou la partie 2;

[17] In a lengthy decision rendered on January 5, 2012 (2012 PSLRB 2), the Board went through a careful review of the arguments and of the evidence put forward by both parties. The following paragraphs of the decision helpfully summarize Mr Hughes' complaints before the Board:

> [369] The complainant in the complaints before me and in his testimony referred to many unfair labour practices committed by the respondent since he was appointed in September 2007. However, I believe that the main form of retaliation that he alleged in the complaints before me was the respondent's failure to transfer or deploy the (*sic*) him to another work site as he requested, its failure to continue to employ him when his term appointment ended, and its failure to offer a new term or indeterminate appointment.
>
> [370] The complainant was in two external pre-qualified staffing pools, one for CR-04 service delivery agent positions, and one for CR-03 clerical support positions from some time in summer 2007 until the pools were expired in 2009. The complainant applied for many positions with the respondent between the end of his term appointment until the pools expired but was not successful.
>
> [371] The complainant argued that he was qualified, that he was a productive worker with no discipline record and that there were lots of positions available with the respondent. The fact that he was not appointed means for him that misconduct occurred on the part of the respondent. He argued that the respondent selected candidates with lower marks and less experience than him, who were not union activists. He does not believe the respondent's explanation that the other candidates were a better fit than him for the many positions filled at the CR-03 and CR-04 levels during the contested period.
>
> [372] The complainant alleged that the respondent's staffing decisions showed a pattern of refusal to employ him because of his history as a known whistle-blower and an alleged troublemaker, an individual with in-depth knowledge of labour law and human rights law, and someone with the ability and willingness to successfully use that information against employers.

[18] The Board noted that most of Mr Hughes' documented recourse actions are not listed within the protections enumerated in subparagraphs 186(2)(a)(i) to (iv) of the *PSLRA*, and involve the Respondent personally in furtherance of his employment situation and career goals and not general

union activities. The Board also indicated that Mr Hughes identified eleven staffing decisions that were made by different managers of the Respondent that he challenged, although he stated that there were only probably four or five that were suspect and that the rest were probably just staffing decisions, without identifying the four or five.

[19] The Board found credible and persuasive the evidence presented by the Applicant's witnesses regarding their reasons for denying the Respondent's transfer request, for not extending his term's appointment a third time and for offering appointments to other candidates even if they ranked lower on some competencies than did the Respondent. According to the Board, the Applicant met its burden to establish that, on a balance of probabilities, not transferring or deploying the Respondent, not extending his term and not offering him a new appointment, was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not in retaliation for his expressed desire to become a union executive member or because he had filed the abandoned complaint.

[20] The Board also dismissed on similar grounds the Respondent's complaint that he was subject to differential treatment and retaliation during his job searches when Human Resources did not accept a reference letter from his former acting team leader and insisted on a reference from his CEP team leader, and his further complaint that the early expiry of the two pre-qualified staffing pools for CR-03 and CR-04 positions that he was part of was motivated by anti-union *animus* towards him.

[21] Mr Hughes filed a discrimination complaint with the Canadian Human Rights Commission ("CHRC") against HRSDC on August 14, 2007. That complaint alleged discrimination on the basis of disability (depression) in relation to an application for appointment to the position of CR-05 Service Delivery Agent 2 in Victoria, British Columbia. He alleged that he could have been used to staff equivalent positions at the PM-02, PM-01 or CR-04 level through an external non-advertised competition or from the CR-05 pool he was in. Mr Hughes subsequently withdrew this complaint after he was offered the CR-04 position with HRSDC.

[22] In January 2008 and June 2009, Mr Hughes filed two other human rights complaint with the CHRC. In the first complaint, Mr Hughes claimed that, between March 2006 and January 2008, he was subjected to a discriminatory practice contrary to section 7 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 ("*CHRA*"). Mr Hughes claimed that HRSDC refused to employ him because he suffered from the disability of depression. In his second complaint, Mr Hughes alleged that he had been subjected to retaliation since early 2008 contrary to section 14.1 of the *CHRA*, and also that discrimination under section 7 was ongoing. That complaint also alleged discrimination on the basis of depression, and added the further ground of retaliation by HRSDC for filing a human rights complaint. Those complaints were initially dismissed on December 23, 2009. The Respondent then successfully judicially reviewed the Commission's dismissal before this Court, and the matter was sent back for redetermination by the Commission: *Hughes v Canada (Attorney General)*, 2010 FC 837.

[23] Subsequently, the CHRC investigated the complaints and referred them to the CHRT for inquiry on June 24, 2011. Member Wallace Craig conducted an inquiry into the complaints in

Victoria, B.C., from May 23 to 25, May 28 to June 1 and on June 13 and 14, 2012. A decision was rendered on October 11, 2012.

2. Decision under review

[24] The Tribunal first started by identifying the evidentiary burden of proof. Mr Hughes must initially present a *prima facie* case of contravention by HRSDC of sections 7 and 14.1 of the *CHRA*. If a *prima facie* case is made out by the complainant, then the evidentiary burden shifts to the respondent to establish that the conduct complained of either didn't occur or doesn't constitute a discriminatory practice.

[25] Based on Mr Hughes' *viva voce* testimony and pertinent documentary evidence, the Tribunal found that Mr Hughes had established a *prima facie* case of a discriminatory practice contrary to section 7 of the *CHRA* which HRSDC engaged in when it refused to continue Mr Hughes' employment while he was disabled. Considering the same evidence, the Tribunal concluded, however, that it fell short of establishing a *prima facie* case of retaliation arising from and related to his complaint of discrimination contrary to section 14.1 of the *CHRA*.

[26] Since the *onus* then shifted, the Tribunal went to examine HRSDC's evidence as to whether there was a reasonable explanation that the discrimination did not occur when Mr Hughes was terminated shortly after requesting a second accommodation in April 2008. As the Tribunal put it, "…the Respondent must demonstrate that it did not terminate the Complainant's employment on the basis that he was disabled or that accommodating the Complainant would have amounted to undue hardship" (Decision, at para 54).

[27] The Tribunal then reviewed and considered the evidence HRSDC submitted to provide a reasonable explanation for the termination of term employment or the non-extension of employment. The Tribunal notably reviewed carefully the evidence of Kenneth Cambpell, James Quinn and Anne Milne, the hierarchical superiors of Mr Hughes.

[28] Mr Campbell allegedly had a conversation with Paul Thomas, a training officer from Ottawa, who knew Mr Hughes and had negative information to share about him, which was not communicated to Mr Hughes but kept on file as HRSDC "may want a record of this". The Tribunal was reluctant to give any credibility to Mr Campbell's testimony as, on one occasion, he attributed some very inflammatory comments to Ms Smith with respect to her supposed fear from Mr Hughes due to his depression (Ms Smith died one year following termination of Mr Hughes's employment) and on another occasion, failed to clarify a negative comment made by Ms Smith about Mr Hughes, pretending that he had no knowledge of it.

[29] When Mr Hughes applied for employment as a Program and Service Delivery Clerk at the CR-04 level, Mr Campbell was the Service Delivery Manager. Mr Campbell requested references from Mr Hughes which did not satisfy him and hence informed Mr Hughes that his "qualifications do not meet the requirements of this position". Mr Hughes responded the same day with an e-mail containing a firestorm of accusations and a threat of media attention and protestation in front of Mr Campbell's office. The Tribunal, after hearing Mr Campbell's testimony, concluded that "Mr Campbell was deeply troubled by Mr. Hughes' hostility towards him, that it negatively affected his testimony to the point that he became noticeably reticent in answering questions put to him in cross-examination". The Tribunal concluded as well that there is an undercurrent of antipathy towards Mr

Hughes and that Mr Campbell's testimony did not provide a dispassionate and objective recounting of his dealings with Mr Hughes.

[30] The Tribunal heard as well from Mr Quinn who was responsible since 2006 of the processing of the unexpected high volume of CEP applications. Mr Quinn found suitable accommodations for an anticipated staff of at least 100 processors and support staff at the CR-03 and CR-04 levels. Staffing pools were established and approximately 200 were hired as term employees. Mr Quinn testified that Mr Hughes was hired from the CR-04 pool and that in fact he had ranked fifth on a list of eighty-eight potentially qualified candidates. On December 14, 2007, Mr Quinn e-mailed HRSDC senior managers, including Ms Milne, Senior Executive Director, HRSDC Western Canada, and Ms Bergh in regard to upcoming CR-04 OAS-CPP Processing Centre Staffing activities. The e-mail states that there will be a great need of CR-04 positions to fill vacancies in their Processing centre and that OAS-CPP Processing Centre Managers have requested additional reference information to be provided in relation to current CR-04 CEP employees "as those employed with CEP have had the opportunity to demonstrate the Abilities & Skills and Personal Suitability competencies required for positions responsible for processing applications". The Tribunal concluded from Mr Quinn's evidence that HRSDC's intention was to offer continuing employment to CEP employees. This e-mail occurred shortly before Mr Hughes' request to be deployed to a CR-04 position with CPP/OAS due to his disability.

[31] The Tribunal concluded that Mr Quinn, being central to any management decision related to CEP employees' employment after the year-long processing of CEP applications come to an end, could have persuaded other HRSDC management to accept the deployment of Mr Hughes into a job

that would accommodate his disability. However, Mr Quinn, as the Tribunal puts it, was "the linchpin in a managerial intrigue that was heedless of the rigours of depression which beset Mr Hughes, and disdainful of s. 7 of the *CHRA*".

[32] The Tribunal also heard evidence from Ms Milne who denied refusing Mr Hughes' deployment and indicated that it was Mr Quinn's decision not to deploy Mr Hughes. Ms Milne demonstrated repeatedly uncertainty in her answers; she could not recall why she signed the termination letter of Mr Hughes, or when she became aware of Mr Hughes' human rights complaint. She recalls being briefed that Mr Hughes needed accommodation but referred only to stress and not to depression. Ms Milne could not recall whose decision it was to terminate Mr Hughes' employment and when asked why she signed Mr Hughes' letter and not two other termination letters, she could not provide a satisfactory explanation. The Tribunal concluded that Ms Milne's participation in this management action is particularly questionable because it was contrary to a human resources consultant's opinion regarding Mr Hughes' depression and its treatment and ignored the magnitude of that advice as well as the seriousness of Mr Hughes' disability. The Tribunal concluded that management had a "wilful zeal to get rid of [Mr Hughes]".

[33] The Tribunal came to the following overall conclusion:

> [79] HRSDC's witnesses rationalized the fact that Mr. Hughes was not granted a third extension of his CEP employment, or deployment to another department, by asserting that it was a reasonable exercise of managerial authority with its quintessence of the imprimatur, the "right fit". I conclude that an HRSDC management determination whether a qualified applicant for employment or deployment is the "right fit," or not, is an intangible process, subjective rather than objective, and may be coloured by feelings or opinions.

> [80] The *CHRA* requires that an employer must continue to employ a worker who becomes disabled. Once a disability is identified, an employer must engage in continuing attempts to accommodate the employee with work that he/she is able to perform while in a disabled state, to a point at which the employer experiences undue hardship. It is only then that employment may be appropriately terminated.
>
> [81] With full knowledge that Mr. Hughes was disabled by depression and that he had requested work that would accommodate his episodic depression, and scornful of their duties under the *CHRA* to continue his employment, at least until the full extent of his disability was determined, HRSDC's management wilfully disregarded their duty under the *CHRA* and summarily terminated Mr. Hughes' employment.
>
> [82] Considering the entirety of the evidence presented by HRSDC, I conclude that it did not rebut the complainant's *prima facie* case.

[34] Having found that HRSDC had wilfully refused to continue to employ Mr Hughes contrary to subsection 7(a) of the *CHRA*, the Tribunal ordered HRSDC to pay the maximum of $20,000 pursuant to subsection 53(2) of the *CHRA* for the pain and suffering that Mr Hughes experienced as a victim of the discriminatory practice. The Tribunal also ordered HRSDC to pay a further $10,000 in special compensation to Mr Hughes, pursuant to subsection 53(3) of the *CHRA*, because it engaged in the discriminatory practice wilfully or recklessly. Finally, it ordered the payment of special interest on both of these amounts pursuant to subsection 53(4) of the *CHRA*.

3. Issues

[35] The following issues arise in this case:

- What is the appropriate standard of review?
- Are the doctrines of *res judicata*, *issue estoppel* and abuse of process applicable in the case before the Court?

- Is the Tribunal decision reasonable?
- Did the Tribunal breach procedural fairness by making a determination on remedy?

4. Analysis

- Standard of review

[36] A standard of review analysis involves two steps. First, the Court must determine whether the jurisprudence has already established, in a satisfactory manner, the degree of deference to be afforded to a particular category of question. Second, where the first inquiry proves unfruitful, the Court must proceed to an analysis of factors making it possible to identify the proper standard of review: *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339; *Smith v Alliance Pipeline Ltd*, [2011] 1 SCR 160.

[37] The Supreme Court of Canada recently reiterated, in the context of an application for judicial review to determine whether the Tribunal had the authority to order costs pursuant to paragraphs 53(2)(c) and (d), that the standard of reasonableness will generally apply if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2011] 3 SCR 471, at para 24. That decision has been followed by the Federal Court of Appeal in *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2013 FCA 75; see also *Canadian Transportation Agency v Morten*, 2010 FC 1008. Therefore, the applicable standard of review for the two substantive questions is undoubtedly that of reasonableness. Applying that standard, the Court will only intervene if the Tribunal's finding falls outside the range of possible and acceptable solutions.

[38] Issues of procedural fairness do not attract a standard of review analysis. As the Supreme Court stated in *Canadian Union of Public Employees v Ontario (Minister of Labour)*, [2003] 1 SCR 539, at para 102, "[t]he content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations". Accordingly, this Court must determine whether the requirements of procedural fairness were met or not. No deference is due when reviewing such questions, since the decision-maker has either complied with the duty of fairness or has breached this duty: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, at para 53.

- ***Res judicata, issue estoppel* and abuse of process**

[39] It is well established that finality is a cardinal virtue of a justice system and is one of the hallmarks of the rule of law. Judicial decisions should therefore generally be conclusive of the issues decided unless and until reversed on appeal: *Angle v MNR*, [1975] 2 SCR 248 [*Angle*]; *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460 [*Danyluk*]. A number of techniques have been developed to prevent abuse of the decision-making process, including *res judicata*, *issue estoppel*, collateral attack and abuse of process. While these doctrines somewhat differ in their genesis and their application, they all share in their underlying principles which the Supreme Court summarized as follows:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results

> and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
>
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
>
> *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, at para 34 [*Figliola*].

[40] There is no dispute between the parties as to the test to be applied in order to determine whether *issue estoppel* applies. Three preconditions must be met: 1) whether the same question has been decided; 2) whether the earlier decision was final; and 3) whether the parties, or their privies, were the same in both proceedings. As the Supreme Court stated in *Danyluk* ,at para 33, "[t]he underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case".

[41] Writing for the Court in *Danyluk*, Justice Binnie insisted that the rules governing *issue estoppel* not be mechanically applied. Bearing in mind the balancing purpose of this doctrine, he stressed that the analysis does not stop at verifying if the preconditions are met. Even if the preconditions apply, the Court must still determine whether, as a matter of discretion, *issue estoppel* ought to be applied: *Danyluk*, at p 481.

[42] The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by ensuring that a party who wants to challenge the validity of a decision take the designated appellate or judicial review procedure. Finally, the doctrine of abuse of process can be triggered when *res judicata* is not strictly available, in cases where relitigation would be a waste of judicial resources and could undermine the integrity of the administration of justice: *Toronto (City) v CUPE, Local 79*, [2003] 3 SCR 77, at para 51; *R v Mahalingan*, [2008] 3 SCR 316, at para 106.

[43] Counsel for the Applicant submitted that *issue estoppel* applies not only to those issues that were already raised but also to those issues that could have been raised. Counsel referred to *Canada v Chevron Canada Resources Ltd*, [1999] 1 FC 349, in which the Federal Court of Appeal cited the following statement on this subject from *Henderson v Henderson* (1843), 3 Hare 100 (at p 115):

> …[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[44] I note, however, that the Supreme Court has adopted a more rigorous test in *Danyluk*, stressing that the issues subject to *estoppel* must have been directly and finally determined by a court of competent jurisdiction. Referring to the majority decision of Dickson J. in *Angle*, Justice Binnie wrote in *Danyluk*, at para 24:

> Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if no explicitly) determined in the earlier proceedings.

[45] There is no doubt that tribunals other than human rights tribunals have concurrent jurisdiction to hear human rights legislation, absent legislative intent to the contrary. In the case at bar, Parliament has explicitly provided that the PSLRB can interpret and apply the *CHRA*. Paragraphs 226(1)(g) and (h) of the *PSLRA* state as follows:

Powers	Pouvoirs
226. (1) An adjudicator may, in relation to any matter referred to adjudication, […]	226. (1) Pour instruire toute affaire dont il est saisi, l'arbitre de grief peut : […]
(g) interpret and apply the Canadian Human Rights Act and any other Act of Parliament relating to employment matters, other than the provisions of the Canadian Human Rights Act related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;	g) interpréter et appliquer la Loi canadienne sur les droits de la personne, sauf les dispositions de celle-ci sur le droit à la parité salariale pour l'exécution de fonctions équivalentes, ainsi que toute autre loi fédérale relative à l'emploi, même si la loi en cause entre en conflit avec une convention collective;
(h) give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act;	h) rendre les ordonnances prévues à l'alinéa 53(2)e) et au paragraphe 53(3) de la Loi canadienne sur les droits de la personne;

[46] Correlatively, the *CHRA* is expressly built on a model of concurrent jurisdiction. Paragraphs 41(1)(b) and 44(2)(b) of the *CHRA* specifically give the Commission a discretion to refer complaints to alternate redress, if it appears to the Commission that another statutory scheme could "more appropriately" deal with the complaint. This is a clear and deliberate indication from Parliament that the Commission and the ultimate statutory decision-makers share concurrent jurisdiction over human rights issues. Therefore, the PSLRB could have addressed an allegation of discrimination; alternatively, the CHRT could also deal with that same issue if it has not been tackled by the PSLRB.

Commission to deal with complaint	Irrecevabilité
41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
[…]	[…]
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
Action on receipt of report	Suite à donner au rapport
44. (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	44. (2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
[…]	[…]

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
it shall refer the complainant to the appropriate authority.	

[47] The question to be determined, therefore, is whether the issues raised before the CHRT had indeed been decided by the PSLRB. If not, the doctrine of *res judicata* does not apply. If, on the other hand, the issues were the same before both tribunals, the three requirements of the test for *issue estoppel* would clearly be met, as the PSLRB decision was final (*PSLRA*, subsection 51(1)) and the parties (Mr Hughes and HRSDC) are the same in each of the proceedings before the Board and the Tribunal. The fact that the CHRC was also involved before the CHRT is of no consequence, as the interest of the CHRC in the remedies that may be granted by the CHRT were minimal: see *Nova Scotia (Human Rights Commission) v Dural*, [2003] NSJ No 418, at para 40 (NSCA).

[48] Counsel for the Applicant submitted that five common issues were raised both in the hearings before the Board and the Tribunal: 1) failure to transfer or deploy Mr Hughes to a different location; 2) denial of term appointment extension; 3) unfair or incomplete reference and request of reference from his then current team leader; 4) early expiry of pre-qualified staffing pools; and 5) failure to re-appoint Mr Hughes. As previously mentioned, the PSLRB found that HRSDC had met its burden to establish that, on a balance of probabilities, its decisions were a reasonable exercise of managerial authority based on perceived operational requirements. The Tribunal addressed the same issues but could not agree with the PSLRB that the decision not to reappoint Mr Hughes constituted

a reasonable exercise of managerial authority. The Applicant alleges that this is precisely the kind of inconsistency that the Supreme Court suggested must be avoided.

[49] I disagree. A careful reading of both decisions reveals some factual overlap, but this is clearly not sufficient to meet the requirement of identicalness of questions in the *issue estoppel* test. Even if the facts considered were the same, to a large extent, they were not looked at through the same lens. Nor should have they been. The Applicant himself concedes in his *factum* that the "[a]llegations of discrimination on the basis of disability were not otherwise addressed in the PSLRB Complaint forms by Mr Hughes and they were not addressed by the Board". While the issue of discrimination due to disability was the focus of the CHRT, it was not raised by Mr Hughes before the PSLRB. As such, it cannot be said that the same question was decided by the Board and the Tribunal.

[50] It is true that some of the same witnesses were heard both by the PSLRB and the CHRT. But their testimonies were examined by the PSLRB with a view to determine whether HRSDC committed unfair labour practices contrary to sections 185 to 190 of the *PSLRA*, whereas the CHRT dealt exclusively with human rights issues and examined what positions could have been offered to accommodate Mr Hughes' disability. To that extent, there is no inconsistency between the two decisions. The PSLRB could come to the conclusion that HRSDC's decisions were a reasonable exercise of managerial authority, but that decision could not bind the CHRT. Once notified of a disability, an employer cannot meet its duty to accommodate simply by invoking a reasonable exercise of managerial authority. The *CHRA* is more stringent, since it commands that a duty to accommodate must be satisfied by an employer unless to do so would constitute undue hardship.

[51] The situation would have been entirely different had the PSLRB been asked to determine the same human rights issue as the CHRT, as was the case in *Canada (Human Rights Commission) v Canadian Transportation Agency*, 2011 FCA 332 and in *Figliola*. In the case at bar, however, the PSLRB examined the decisions of HRSDC not from the perspective of accommodation for a person with a disability, but with a view to determine whether those decisions were made in retaliation for Mr Hughes' expressed desire to become a union executive member or because he had filed unfair labour practice complaints.

[52] Even if I were prepared to assume that the preconditions to the operation of *issue estoppel* are met, the Court would still have to determine whether, as a matter of discretion, *issue estoppel* ought to be applied. As the Supreme Court stated in *Danyluk*, at para 67, « [t]he objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." See also: *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, at paras 30-31.

[53] There is no question that the hearing before the PSLRB was fair and that Mr Hughes had a fair opportunity to put forward his case. He had a full hearing over seven days in which documentary evidence was tendered and five witnesses were called with an opportunity for cross-examination. Moreover, the expertise of the decision-maker in that proceeding has not been called into question.

[54] That being said, it would be unfair to use the result of that decision to preclude the proceedings before the CHRT. An adjudication of the human rights issues raised by Mr Hughes

ought to be made, and the Tribunal was the only forum before which these issues were indeed examined. Preventing Mr Hughes to litigate these issues before the CHRT would work a significant injustice.

[55] Counsel for the Applicant submitted that Mr Hughes' disability and the duty to accommodate could have been raised before the PSLRB. This is no doubt correct, but I do not think Mr Hughes should be faulted for not having done so. The PSLRB's core mandate is to provide adjudication services and mediation services in accordance with the *PSLRA* (see section 13 of that Act), which is in turn focused on labour management relations, collective bargaining and the fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment (see Preamble of the Act). That being the case, Mr Hughes could legitimately opt to raise his human rights issue before a specialized tribunal even if the PSLRB does have jurisdiction to apply the *CHRA*. The *CHRA* is expressly built on a model of concurrent jurisdiction, and it can be taken that Parliament intended to give somebody in the situation of Mr Hughes a choice of forum to raise human rights issue.

[56] I also note that HRSDC did not challenge the Commission's referral to the Tribunal for inquiry by way of judicial review. If Mr Hughes should only be entitled to have one bite at the cherry, to use the language of Justice Binnie in *Danyluk* (at para 18), the same is also true for HRSDC. If the Applicant was of the view that the CHRT was estopped from looking at Mr Hughes' complaints or that such a proceeding was a collateral attack on the decision of the PSLRB, it should have made an application to judicially review the referral to the Tribunal for inquiry rather than

proceed to a hearing and then raise this argument after the Tribunal had rendered an unfavourable decision.

[57] For those reasons, I am therefore of the view that, as a matter of discretion, that *issue estoppel* should not be applied to prevent Mr Hughes from raising the failure of HRSDC to accommodate his disability before the CHRT, even if the preconditions for the application of that doctrine were met.

- **Is the Tribunal decision reasonable?**

[58] Counsel for the Applicant submitted that the Tribunal decision is unreasonable for a number of reasons.

[59] First, the Applicant argues that the Tribunal was unreasonable in finding that a refusal or neglect on the part of HRSDC to recognize the qualifications of Mr Hughes, and failure to re-hire him from a CR-05 pool while aware that he was disabled, is a discriminatory practice. According to the Applicant, there is no evidence that HRSDC failed to recognize Mr Hughes' qualifications; it was the change in the educational requirement for the CR-05 pool that rendered Mr Hughes unqualified. In addition, HRSDC was not aware of Mr Hughes' disability as the only evidence before it was the "Reference check" list which refers to Mr Hughes' past medical condition and nothing more. Furthermore, the Applicant alleges that, given that the requirements for the CR-05 pool have changed and Mr Hughes could no longer qualify, being an external candidate that did not meet the requirements for the PM-01 and PM-02 pools, he could not be hired out of the CR-05 pool. The Applicant claims that

> [T]he Tribunal is effectively telling HRSDC that it had to determine that Mr. Hughes had a current disability based upon a reference to a past medical condition regarding reference checks. It then had to provide accommodation that was not requested in terms of selection for a position out of the CR-05 pool to a new position for which he failed to meet the national educational requirements.

[60] Second, the Applicant submits that the Tribunal's decision unreasonably determined that the duty to accommodate Mr Hughes to the point of undue hardship included offering him permanent employment. Yet, the letter of employment signed by Mr Hughes when he accepted his employment clearly stated that "…the requirement for your services may be for a shorter period depending upon the availability of work and the continuance of the duties to be performed, and nothing in this agreement should be construed as an offer of indeterminate employment…". The Applicant further argues that the duty to accommodate has been held not to produce an obligation for the employer to dismiss one employee in order to offer the work to a disabled employee, or to create a job where there is no work.

[61] Third, the Applicant argues that it was unreasonable for the Tribunal to award damages for willful and reckless conduct under subsection 53(3) of the *CHRA*. Even if one accepts that HRSDC did not wilfully extend the term employment of Mr Hughes indefinitely or make him a permanent employee, there is no evidence that this was done recklessly. A lack of any finding of recklessness by the Tribunal makes it unreasonable for it to conclude that special compensation should be awarded under subsection 53(3) of the *CHRA*.

[62] Finally, the Applicant alleges that the Tribunal's decision failed to deal with critical evidence. Counsel submits that the *PSLRA* complaints, the PSLRB decision, Ms Porter's testimony

as well as Ms Moulay's testimony (Human Resources) were not considered by the CHRT. Both Ms Porter and Ms Moulay could explain why HRSDC could not hire Mr Hughes from the CR-05 pool and why Mr Hughes was unable to obtain permanent employment.

[63] The Applicant is essentially asking this Court to reweigh the evidence. When reviewing a decision on the standard of reasonableness, the Court must show deference to the decision-maker's reasoning process and is not to undertake its own analysis of the question. As stated by the Supreme Court in *Dunsmuir*, at para 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[64] Contrary to the Applicant's submission, the CHRT did not tell HRSDC that it had to determine that Mr Hughes had a current disability based upon a reference to a past medical condition in his reference check. On February 18, 2008, Mr Hughes made a first request for accommodation due to his disability and presented to Ms Smith a note from his doctor dated the same day stating explicitly that he had a history of depression and "has been somewhat stressed and depressed for the past month". On that basis, Ms Smith changed his duties. On April 14, 2008, Mr Hughes made another request for accommodation with Ms Smith due to his disability. Despite a human resource consultant's comments informing HRSDC management of the seriousness of the depression gripping Mr Hughes, this second request was not acted upon and a letter was sent to him five weeks later announcing that his term employment would be terminated on June 27, 2008. In

those circumstances, it cannot seriously be contended that HRSDC did not know of Mr Hughes disability, or that the Tribunal decision is unreasonable.

[65] Moreover, it cannot reasonably be said that the Tribunal found that an employer must continue to employ a term worker beyond the expiry of his term of employment where the worker is, or becomes, disabled. First of all, it is worth bearing in mind that there was a demand to hire CPP/OAS processing agents (CR-04/CR-03 positions), and as a result it could not seriously be argued that hiring Mr Hughes would be tantamount to creating a job for him or taking someone else's job. Moreover, the Tribunal made it clear that the thrust of Mr Hughes' evidence revealed the incorrect assumption that acceptance into a staffing pool carried with it a guarantee of employment. Yet the CHRT maintained that "(a) a refusal or neglect on the part of HRSDC to recognize Mr Hughes' qualifications, and (b) failure to re-hire him from the CR-05 pool while aware that Mr Hughes was disabled, is a discriminatory practice". This finding is bolstered by the December 14, 2007 email letter of Mr Quinn, that it was the intention of HRSDC to offer continuing employment to CEP employees who had an ability to demonstrate the required competencies for positions responsible for processing applications. In those circumstances, the Tribunal could reasonably find that HRSDC's management wilfully disregarded their duty under the *CHRA*. It must not be forgotten that discrimination does not have to be the sole or primary reason for a decision by an employer to refuse to hire a person with a disability.

[66] As for the compensation of $10,000 awarded to Mr Hughes for wilful and reckless misconduct under subsection 53(3) of the *CHRA*, the Tribunal could certainly find that the discrimination was intentional. There is much similarity between this case and the decision of this

Court in *Canada (Attorney General) v Johnstone*, 2013 FC 113 [*Johsntone*]. At paragraph 155 of that decision, Justice Mandamin wrote:

> In making an order for special compensation under subsection 53(3) of the *Act*, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[67] In both instances, the CHRT's award of special compensation is due to the fact that HRSDC in the case at hand and CBSA in *Johnstone* did not have regard to the central question of accommodating the complainants for their legitimate grounds of discrimination (disability here and family status in *Johnstone*). The Tribunal is a specialized human rights tribunal whose decision in its area of expertise are due deference, and this Court should refrain from reweighing the evidence.

[68] Lastly, it cannot be said that the Tribunal's reasons were inadequate because it ignored the evidence of the PSLRB complaints and the PSLRB decision, and of two key witnesses. As stated earlier, the complaints submitted by Mr Hughes pursuant to the *PSLRA* do not relate to discrimination due to disability, and as such these complaints and the PSLRB decision do not constitute relevant evidence to be considered in deciding the discrimination issue before the CHRT.

[69] As for the testimony of Ms Porter and Ms Moulay, the CHRT's decision described clearly the basis of Mr Hughes' complaints of discrimination and retaliation at pages 4 to 6, and it is supported by the evidence submitted by both Ms Porter and Ms Moulay in their testimonies. There

is no additional information in Ms Porter or Ms Moulay's testimonies in chief and cross-examinations that could have had any impact on the decision as it currently stands.

- **Did the Tribunal breach procedural fairness by making a determination on remedy?**

[70] The Applicant submits that the Tribunal breached procedural fairness when it informed the parties that it was going to deal with the issue of liability at the hearing and hold a separate hearing to deal with remedy, but then proceeded to provide a remedy in the decision without providing either party with a chance to be heard on the issue. The CHRC took no position on that issue, as it did not participate at the hearing of the complaint. As for Mr Hughes, he did not appear before this Court.

[71] After having reviewed the transcript, I agree with the Applicant that no opportunity was provided to make submissions on remedy, as the Tribunal member explicitly stated that the hearing on liability and the hearing on remedies would be bifurcated. In those circumstances, the best course of action is to send back the issue of remedies to the Tribunal for redetermination.

5. Conclusion

[72] In light of the foregoing, this Application for judicial review is dismissed. The matter shall be returned to the Tribunal for the only purpose of redetermining the remedies. The Commission did not seek costs, in light of its public interest mandate, and none will be ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. The matter shall be sent back to the Tribunal for the only purpose or redetermining the remedies. No costs are ordered.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2034-12
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v CHRIS HUGHES AND CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 2, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	DE MONTIGNY J.
DATED:	MARCH 21, 2014

APPEARANCES:

Malcolm Palmer Kevin Staska	FOR THE APPLICANT
Giacomo Vigna	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Canadian Human Rights Commission Litigation Services Division Ottawa, Ontario	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION