

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, Chapter P. 8, as amended by the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, Chapter 28 (PBA) (the "Act");

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services (the "Superintendent") to Refuse to Make an Order Under Section 87 of the Act Respecting a Request by Mr. Marcel Brousseau Relating to the Electrical Industry of Ottawa Pension Plan Ontario, Registration No. 0586396 (the "Plan")

AND IN THE MATTER OF a Hearing in Accordance with Subsection 89(8) of the Act

B E T W E E N:

MARCEL BROUSSEAU

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Ms. Anne Corbett
Vice Chair of the Tribunal and Chair of the Panel

Ms. Heather Gavin
Member of the Tribunal and of the Panel

Mr. David Vincent
Member of the Tribunal and of the Panel

APPEARANCES:

Mr. Marcel Brousseau
appearing on his own behalf

For the Superintendent of Financial Services
Mr. Mark Bailey

HEARING DATE: November 29, 2002

MAJORITY REASONS FOR DECISION

Background

Mr. Brousseau is a member of the Electrical Industry of Ottawa Pension Plan (the "Plan").

This hearing results from a motion brought by the Superintendent in connection with a Notice of Proposal issued by the Superintendent on January 22, 2002 to refuse to make an Order that Mr. Brousseau receive credit for continuous service in the Plan for the period between November 1983 and August 1985.

The Plan is administered by the Board of Trustees of the Electrical Industry of Ottawa Pension Plan (the "Trustees"). The Plan covers members of the International Brotherhood of Electrical Workers, Local 586 ("IBEW, Local 586").

Mr. Brousseau originally wrote to the Pension Commission of Ontario in June 1998 with respect to his entitlement to credit for continuous service for the period from November 1983 to August 1985.

Mr. Brousseau had previously written to the plan administrator, Coughlin and Associates Limited with respect to his entitlement for credited service for the relevant period. That request was forwarded to the Trustees and by letter dated June 5, 1998 Mr. Brousseau was advised by Coughlin and Associates that the Trustees had concluded that the break in service from November 1, 1983 to August 31, 1985 was valid and that credits would not be granted for that period.

In February 2001 the Financial Services Commission of Ontario wrote to Mr. Brousseau informing him that they had concluded that the decision of the Trustees that Mr. Brousseau's pensionable service had been broken as a result of employment with a non-participating employer during the period November 1, 1983 to August 1985 was not in contravention of the requirements of the *Pension Benefits Act* and that the Trustees had not contravened the Act in exercising their discretion under the plan.

On August 31, 2001, the Trustees filed an Application in the Ontario Superior Court of Justice asking for the opinion, advice and direction of the Court whether the Trust Agreements and Pension Plan texts for the Plan should be interpreted to give members of the Plan "credited service" under the Plan for the periods before January 1, 1994 when they were not working for participating employers under the Plan for a continuous period of two years or more, or for a period of less than two years.

The parties to the Court Application were the Trustees, as applicants and Nelson Cybulski in his personal capacity and in his representative capacity as the Treasurer of the International Brotherhood of Electrical Workers Union Local 586, Electrical Contractors Association of Ottawa and the Superintendent of Financial Services as respondents.

The Court ordered that Notice of the Application be sent to all retired and non-retired plan members by express post mail and for those non-retired members whose addresses were unknown notice would be given by publication in newspaper advertisements published in the Ottawa Citizen, the National Post and Le Droit.

The Application was heard by the Court on November 7, 2001 and the Court's decision was released November 19, 2001 (the "Court Decision").

The Court found that the Trustees had established the practice prior to 1994 of giving plan members, whose employment by a participating employer was terminated, pension credits for a period of ninety (90) days following termination. If after ninety (90) days the members were still not working for a participating employer, the Trustees considered whether the member was "ready, willing and able" to work in the electrical industry and if so, exercise their discretion whether to continue to give the members credited service based on the individual circumstances in each case.

The respondent to the Court application and a number of plan members argued that the interpretation by the Trustees as to credited service did not conform with the wording of the Plan documents and argued that the restriction (that a member be "ready, willing and able to work in the electrical industry") was not justified and that credited service between the years 1974 to 1994 was not restricted. The Court identified the issue before it as follows:

... this Court is asked to determine if the Trustees have properly interpreted the Plan documents, and adequately exercised their discretion. Alternatively, should the Plan documents be interpreted as to give members of the Plan credited service under the Plan for all periods before January 1, 1994 when they had a break in service and were not working for a participating employers under the Plan?

The Court rejected the position taken by the respondents to the Court application and concluded that the interpretation and practice of the Trustees from 1974 to 1994 was the correct one.

Mr. Brousseau wrote to the Financial Services Commission in October 2001 with respect to his pension credits prior to 1985. In response to that letter the Deputy Superintendent issued a Notice of Proposal to issue an Order dated January 22, 2002 that the Trustees, in refusing to give Mr. Brousseau credited service during the lay off period from November 1983 to August 1985, had interpreted the Plan in compliance with the requirement of the *Pension Benefits Act*, the Regulations thereunder and the 1985 Plan text and 1987 Declaration of Trust.

At a prehearing conference the Superintendent raised the issue of the Tribunal's jurisdiction to hold a hearing with respect to this matter and the parties agreed that a preliminary motion would be heard by the full panel with respect to the Tribunal's jurisdiction to proceed with a hearing given the November 19, 2001 decision of the Superior Court of Justice as referred to above.

Analysis

The Superintendent argues that the Tribunal does not have jurisdiction to hear this matter because the issue that is the subject of Mr. Brousseau's request for a hearing was decided by the Ontario Superior Court of Justice. The Superintendent therefore argues that the doctrine of issue estoppel applies to this matter and precludes the Tribunal from holding a hearing. The Superintendent submits that the doctrine of issue estoppel requires that a Court or administrative tribunal should not adjudicate or hear a matter if another Court or administrative tribunal has already made a decision on the same point.

Issue estoppel is a common law doctrine. It applies to both Courts and administrative tribunals and prevents the litigation of a matter that has previously been the subject to a hearing by a Court or administrative tribunal. The doctrine of issue estoppel serves a public policy purpose that is often expressed as a twofold purpose, firstly that there be finality to litigation. The second aspect of the public policy purpose of issue estoppel serves the interest of justice between two parties – that a party should not be subject to multiple litigation with respect to the same issue.

There are however three requirements or pre-conditions that must be satisfied before a Court or an administrative tribunal may apply the doctrine of issue estoppel.

The Canadian Courts have consistently defined the requirements of issue estoppel as follows:

1. The same issue or question has been decided;
2. The judicial decision with respect to the issue is final; and
3. The parties to the initial judicial decision or their privies were the same persons as the parties or their privies to the subsequent proceedings in which the estoppel is raised.

Angle v. M.N.R. (1974), 17 O.R. (3d) 267, 112 D.L.R. 4th 683 (C.A.); *Minott v. O'Shanter Development Co.* (1999) 168, D.L.R. (4th) 270 (Ont. C.A.); *Danyluk v. Ainsworth Technologies Inc. et al* (2001) 201 D.L.R. (4th) 193 (S.C.C.);

Even where all three of the pre-conditions or requirements are satisfied, a Court or administrative tribunal retains the discretion to determine not to apply issue estoppel when to do so would cause unfairness or work an injustice. (*Minott v. O'Shanter Development Co., supra*). The exercise of discretion to refuse to give effect to issue estoppel only arises if the three pre-conditions have been satisfied.

We now turn to the application of the three requirements to the facts of this case.

1. Is The Issue That Was Before The Court The Same Issue To Be Considered By The Financial Services Tribunal?

Issue estoppel applies to issues of fact or of law or of mixed fact and law (*Danyluk v. Ainsworth Technologies Inc. et al, supra*).

The issue being considered in the subsequent litigation (in this case the issue coming before the Financial Services Tribunal) must have also been an issue decided in the earlier proceeding (ie: the Court proceeding held in November 2001). It is however not enough that the same issue be considered in both proceedings. The issue must be so fundamental to the earlier decision as to be essential to that decision. In *Minott v. O'Shanter Development Co. supra*, Laskin J.A. wrote at page 279:

Issue estoppel first requires the issue in the subsequent litigation be the same as the issue decided in the previous litigation and that "its determination must have been necessary to the result in the litigation" [Holmsted and Watson, Ontario Civil Procedure, loose leaf, Volume II at 21 213[1]]. In other words, issue estoppel covers fundamental issues determined in the first proceeding,

issues that were essential to the decisions. Issue estoppel applies to issues of fact or of law or of mixed fact and law.

In this case, the issue before the Court involved the Trustee's proper interpretation of the Plan documents and exercise of their discretion. In the decision, the issue before the Court is set out as follows:

Basically, this Court is asked to determine if the Trustees have properly interpreted the Plan documents, and adequately exercised their discretion. Alternatively, should the Plan documents be interpreted as to give members of the Plan credited service under the Plan for all periods before January 1, 1994 when they had a break in service and were not working for a participating employer[s] (sic) under the Plan?

In our opinion, the question to be decided in these proceedings is in part, but not in its entirety, the question that was decided in the earlier proceedings before the Court.

The question to be decided in this proceeding relates to Mr. Brousseau's entitlement to benefits under the Plan. That is a question of mixed fact and law. There has been no determination in the earlier proceedings of the facts that will be in issue with respect to Mr. Brousseau's entitlement.

To the extent the question in issue in these proceedings relates to the interpretation of the Plan by the Trustees it could be argued that the first condition required to determine that the doctrine of issue estoppel applies is satisfied. We do not think, however, that it is necessary to apply the doctrine of issue estoppel in order to find that the Applicant is subject to the earlier proceeding with respect to the issue of Plan interpretation. A judicial decision on a point of law by an Ontario Court creates a precedent. Accordingly, to the extent the Court's decision is applicable to the facts of Mr. Brousseau's case, it is open to the Superintendent to argue that the Court Decision is to be followed by the Tribunal when it holds the hearing with respect to this issue.

Given our finding with respect to the first requirement it is not necessary for us to determine if the second or third requirement has been met. We will however set out our analysis with respect to these two requirements.

2. Was The Judicial Decision Final?

The Superintendent submits and we accept that the second requirement, that the judicial decision which is said to create the estoppel be final, has been met.

Where the decision that gives rise to the argument that issue estoppel should apply has been made by an administrative authority there will be a number of factors that must be considered in determining if a decision is a "judicial" decision. Those factors were set by Binnie, J. in *Danyluk v. Ainsworth Technologies Inc. et al*, supra (at p. 210) as follows:

First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that is required to be made in a judicial manner? Third as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements.

An examination of these elements does not arise where, as here, the decision that gives rise to the argument that issue estoppel applies is the final decision of a Court.

We are satisfied that the second requirement is met.

Were The Parties The Same?

The third condition required to be satisfied before the doctrine of issue estoppel applies is the requirement that parties to the first proceeding be the same as the parties to the second proceeding.

Mr. Brousseau was not a party to the Court proceeding. In order for the third requirement to be met we must conclude that Mr. Brousseau was a "privy".

A person who is not a party but who has a right to participate and declines to participate can be subject to the legal doctrine of issue estoppel in the latter proceeding if the individual is found to have been a "privy" to the first proceeding. In order for there to be a privy of interest there must be a sufficient degree of identification between the party and the privy.

A review of the case law is not helpful in determining the degree of interest which is required to create privity.

Counsel for the Superintendent argued that Mr. Brousseau was a privy to the parties in the Court proceeding on that basis that:

1. Mr. Brousseau received notice of the Court proceeding.
2. He had an opportunity to be a party.
3. A number of Plan members were granted leave to intervene and were added as respondents in the Court application.
4. The respondents in the Court application included the Treasurer of International Brotherhood of Electrical Workers Union Local 586, Electrical Contractors Association of Ottawa in a representative capacity who was represented by counsel.
5. The respondents appeared before the Court and argued for alternative interpretation of the Plan.
6. Mr. Brousseau was aligned in interest with the respondents to the Court proceeding.

It is our view that there is some degree of identification between the respondent in the Court proceeding and Mr. Brousseau with respect to the issue of plan interpretation that was before the Court and is part of the issue to be considered by the Financial Services Tribunal in this case. Given our finding with respect to the first requirement, the degree of identification is not sufficient to make him a privy. Accordingly, the third requirement of issue estoppel is not met.

Exercise of Discretion

Even if we had reached the conclusion that the three requirements to establish issue estoppel had been met on all issues to come before the Financial Services Tribunal in connection with this proceeding, we are of the view that this case is an appropriate one for the exercise of the retained discretion to refuse to apply issue estoppel.

Mr. Brousseau has presented his facts to the Superintendent and has received a Notice of Proposal to issue an Order. As required by the Act, the Notice states that Mr. Brousseau is entitled to a hearing by the Tribunal.

The subject matter of the hearing in this case involves the personal circumstances of Mr. Brousseau and the correct interpretation of the Plan by the Trustees. The issue of Plan interpretation has been determined by the Court but the applicability of that interpretation to Mr. Brousseau's circumstances was not the subject of the Court application. Mr. Brousseau is entitled to a hearing with respect to his personal circumstances.

The application of the doctrine of issue estoppel involves balancing the public policy considerations that litigation be final and that parties not be subjected to multiple proceedings with the rights of a litigant to be heard. *In Minott v. O'Shanter Development Co.*, supra, Laskin J.A. wrote (at page 228-289):

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from re-litigating an issue.

We have considered the rights of the Trustees and in particular their right to not be subjected to multiple proceedings. We have balanced that right against the right of Mr. Brousseau to litigate his entitlement under the Plan. Having considered these competing interests we are of the view that, even if the doctrine of issue estoppel were to apply, it is appropriate in this case to exercise our discretion to not apply it and to proceed with a hearing on the merits.

Disposition

Issue estoppel does not apply to prevent the Tribunal from holding a hearing on this matter. The parties should contact the Registrar to schedule dates for the hearing.

DATED at Toronto this 27th day of October, 2003.

“Anne Corbett”

Anne Corbett
Chair of the Panel

“Heather Gavin”

Heather Gavin
Member of the Panel

MINORITY REASONS

I have had the benefit of reading the reasons of the majority for which I am grateful. While I am sympathetic to Mr. Brousseau's circumstances, I have decided to dissent from the conclusion reached by my colleagues and I support the Superintendent's decision to refuse to make an order that Mr. Brousseau receive credit for service in the Plan for the relevant period.

On the question of issue estoppel, the reasons given in the Court Decision suggest the specific facts in Mr. Brousseau's case were known to the Court. In paragraph 12 of the reasons of the Court Decision, there is reference to the fact that one plan member raised the issue that was the cause of the application with the Financial Services Commission of Ontario. That member was Mr. Brousseau, which suggests that the Court was aware of the specific facts in Mr. Brousseau's case.

We were also provided with a copy of an affidavit sworn by Mr. Brousseau on November 2, 2001, five days prior to the Court application. I understand this affidavit was prepared with the assistance of the independent legal counsel appointed to represent members with an interest in the outcome of the application including Mr. Brousseau. The affidavit is some six pages in length and describes in some detail the facts surrounding Mr. Brousseau's break in service.

Unfortunately, the submissions made to the Tribunal by the counsel for the Superintendent of Financial Services do not address whether Mr. Brousseau's November 2, 2001 affidavit was actually filed with the Court prior to the application being heard. No clear evidence was produced on this point during oral argument before the Tribunal. Nonetheless, it seems reasonable to presume that Mr. Brousseau's affidavit was before the Court, given the proximity of the date it was sworn to the date of the Court application and given it was prepared with the assistance of the independent legal counsel appointed to represent members in the Court application. Even if the affidavit was not filed, in my opinion it is reasonable to infer from the Court Decision that the facts of Mr. Brousseau's case were before the Court. Cognizant of those facts, the Court ruled that the Trustees had exercised their discretion fairly. It is not open to this Tribunal, nor would it be appropriate, to question that result.

For all of the above reasons, I would support the Superintendent's position and rule that the Tribunal has no jurisdiction to hear this matter.

DATED at Toronto, this 27th day of October, 2003.

"David Vincent"

David Vincent
Member of the Panel