HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

John Gilinsky

Applicant

-and-

Peel District School Board

Respondent

DECISION

Adjudicator: Michelle Flaherty

Date: November 8, 2011

File Number: 2009-03805-I

Citation: 2011 HRTO 2024

Indexed as: **Gilinsky v. Peel District School Board**

APPEARANCES

John Gilinsky, Applicant	)	Self-Represented
Peel District School Board, Respondent	)	Roy Filion, Counsel
Ontario Secondary School Teachers' Federation, Affected Party	)	Maurice Green, Counsel

[1] The applicant filed an Application with the Tribunal alleging discrimination contrary to the *Human Rights Code,* R.S.O. 1990, c. H.19, as amended (the "*Code*"), in employment on the basis of citizenship, ethnic origin, disability, sex, sexual orientation, marital status, and association with a person identified by a prohibited ground. He also alleges reprisal or threat of reprisal.

[2] The applicant's union, the Ontario Secondary School Teachers Federation, District 19 ("OSSTF"), has been identified as an affected party.

[3] In the Application, the applicant states that he was discriminated against when the respondent suspended him from the workplace on October 17, 2008. He states that the respondent's decision to suspend him was based on a mischaracterization of his behaviour and an assumption that he had a disability that rendered him unable to work.

[4] The respondent has filed a Request for an Order During Proceedings ("Request") seeking the early dismissal of the Application pursuant to section 45.1 of the *Code*. The respondent states that another proceeding (a grievance arbitration) has appropriately dealt with the substance of the Application. The respondent has filed detailed written submissions in support of the Request. The applicant has filed detailed written submissions objecting to the Request and arguing that the Application should be allowed to proceed.

[5] Pursuant to a Case Assessment Direction ("CAD"), dated March 24, 2011, the Tribunal held a telephone conference hearing to address the respondent's Request. At the hearing, the Tribunal heard submissions from the applicant and from representatives of the respondent and the OSSTF.

[6] For the reasons that follow, the Application is dismissed. I find that the subject matter of the Application has been appropriately dealt with in another proceeding.

THE FACTS

[7] The applicant is a teacher employed by the respondent. He is also a member of OSSTF and subject to a collective agreement between the OSSTF and the respondent.

[8] In October 2008, the respondent suspended the applicant because it was concerned (based on a series of incidents) that the applicant's behaviour was inappropriate. The applicant was initially suspended with full pay and benefits.

[9] The respondent met with the applicant to discuss his behaviour and the reason he was suspended. It proposed that the applicant obtain an Independent Medical Examination ("IME") in order to determine whether the applicant's behaviour was related to a medical condition. The applicant declined.

[10] The respondent advised the applicant that, notwithstanding this, it intended to consult an occupational psychiatric consultant. The respondent wrote to the consultant summarizing the applicant's performance history and providing a description of the behaviour that had concerned the respondent. Based on the information provided, the respondent asked the occupational psychiatric consultant to, among other things, determine if the applicant was fit to work.

[11] The consultant prepared a letter to the respondent dated December 2, 2008, in which he recommended that the applicant undergo an IME. He also stated that, in the interim, the applicant should be considered as a potential safety risk to himself and others.

[12] The respondent provided a copy of the psychiatrist's letter to the applicant and advised him that, as of December 2, 2008, he would be placed on medical leave.

[13] In April 2009, OSSTF filed a grievance on the applicant's behalf, alleging that the applicant had been disciplined without just cause. The grievance was referred to

arbitration and a hearing was scheduled before arbitrator Carrier on February 9, 2010.

[14] By Interim Decision 2010 HRTO 154, this Application was deferred pending the grievance proceeding.

[15] On February 9, 2010, the grievance arbitrator issued an interim award incorporating minutes of settlement executed by the applicant and a representative of the respondent. The minutes of settlement provide that the applicant will attend an IME before a psychiatrist chosen the respondent, the OSSTF, and the applicant. The minutes set out what information would be provided to the psychiatrist for the purposes of the IME as well as a list of questions for him to answer. These questions included whether the applicant was fit to perform the essential duties of his job as a secondary school classroom teacher, with or without limitations. The psychiatrist was also asked to identify what, if any, accommodation measures were necessary. The minutes of settlement also provided that the parties would set a further hearing date before the same arbitrator once the IME became available.

[16] Dr. Glancy was chosen by the parties to conduct the IME. Among other things, Dr. Glancy interviewed the applicant and conducted psychological testing. He also interviewed two of Mr. Gilinsky's acquaintances.

[17] Dr. Glancy concluded, among other things, that the applicant is unfit to perform the essential duties of the job and that this was unlikely to change materially over time. Dr. Glancy did not identify or recommend any measures of accommodation. He stated that he did not believe any further psychological or medical testing was warranted in the circumstances.

[18] Following the psychiatric report, the parties referred the matter back to the grievance arbitrator, who conducted a further hearing on November 8, 2010. The applicant testified at the hearing and the grievance as arbitrator heard submissions from

all of the parties.

[19] The arbitral award indicates that, at the hearing, the applicant challenged the conclusions reached by Dr. Glancy and stated the IME was undertaken under protest and without “informed consent”. He also testified about his alleged behaviour that gave rise to the suspension.

[20] In a final award dated December 4, 2010, the arbitrator dismissed the grievance. He concluded that the applicant’s medical condition had and would continue to impede his ability to perform all aspects of his teaching duties. Because it is unlikely that the applicant’s behaviour or medical condition would change, he concluded that no accommodation was warranted. The arbitrator held that the employer did not err in suspending the applicant from work.

[21] On or about June 2, 2011, the applicant filed an application for judicial review of the arbitrator’s decision. As of the date of the hearing, the application for judicial review had not been perfected.

[22] In a Case Assessment Direction dated March 24, 2011, the Tribunal reactivated this Application and directed that a preliminary hearing be scheduled.

THE APPLICANT’S POSITION

[23] The applicant disputes that he has a condition that impedes his ability to return to work. He argues that the respondent discriminated against him by removing him from the workplace in 2008 and by not taking any steps since then to facilitate his return to work.

[24] In regards to the grievance, the applicant disputes that it appropriately dealt with the subject matter of the Application. He states that his circumstances give rise to a number of complex legal issues and a request to dismiss the Application is premature.

While he acknowledges that there is overlap in the Application and the grievance, he states that the arbitrator did not hear all of the evidence that he would call at a hearing on the merits of the Application. He also states that the arbitrator did not address all of the facts that gave rise to the Application. The applicant describes Dr. Glancy's report as "dubious" and "unlawfully obtained".

[25] In regards to the application for judicial review of the arbitral decision, the applicant writes:

> My pending judicial review application deals with both "settled" and "novel" areas of the law(s) including Charter (sic) Rights, human rights, natural justice and the distinct possibility of Constitutional question(s). This judicial review application is also a primary basis for the applicant's position on the continuance of his OHRT application rather than dismissal in whole or in part based on previously described legal principles supra.

DECISION

[26] Section 45.1 states:

> The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

[27] For section 45.1 to apply, the respondent must demonstrate that:

> a. the grievance is a proceeding within the meaning of the *Code;* and
>
> b. the grievance has "appropriately dealt with" the substance of the Application.

[28] The Supreme Court of Canada recently considered a similar provision from British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210: s. 27(1)(f). In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola"*), the Court underscored the importance of the finality of litigation. The Court explained that the purpose of a provision like 45.1 is to "deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of

the administration of justice, all in the name of fairness." (see para. 25). See also *Campbell v. Toronto District School Board,* 2008 HRTO 62.

[29] The Court summarized the principles that underlie provisions such as 45.1 as follows (at para. 34):

- It is in the interests of the public and the parties that the finality of a decision can be relied on;
- 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 ;
- 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;
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision; and
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.

Was there a proceeding within the meaning of section 45.1?

[30] It is clear from the Tribunal's jurisprudence that a grievance arbitration is a proceeding for the purposes of section 45.1 of the *Code.* See, for example, *Wei v. Seneca College of Applied Arts and Technology,* 2010 HRTO 2046; and *Delos Santos v. Maple Lodge Farms*, 2009 HRTO 1690.

Did the grievance arbitration appropriately deal with the substance of the Application?

[31] The Supreme Court of Canada's decision in *Figliola* provides guidance as to the appropriate interpretation of "appropriately dealt with" as it appears at section 45.1 of

the *Code*. The Court makes clear that the Tribunal's role is not to stand in appeal of other decision-makers in their determination of human rights issues. Nor is it appropriate for the Tribunal to use section 45.1 as a vehicle for a collateral attack on the merits of another decision-making process; the appropriate route for challenging this process is through an appeal or a judicial review.

[32] The Tribunal had, in some of its jurisprudence, taken the position that the principal concern in applying section 45.1 is not whether there has been related or parallel litigation, but whether the applicant has already had a full and fair opportunity to have the human rights claim considered by an adjudicator who had the jurisdiction to interpret and apply the *Code. See, for example, Campbell v. Toronto District School Board,* supra; *Delos Santos*, supra; and *Noble v. York University*, 2009 HRTO 1201. In my view, this approach is consistent with the Supreme Court of Canada's reasoning in *Figliola*; the Court's reasons suggest that an issue will have been appropriately dealt with for the purposes of section 45.1 as long as the applicant had an opportunity to raise human rights issues before a decision-maker with the jurisdiction to address them. (See paragraph 49).

[33] It is clear that the principal allegation in the grievance and in the Application is the applicant's suspension from the workplace. I find that, while the arbitrator does not make specific reference to the *Code*, he conducted the type of analysis contemplated by the *Code* and considered the reasons advanced by the applicant for his behaviour as well as the appropriateness of the suspension. He specifically considered whether any accommodation measures were warranted in the circumstances.

[34] In my view, the arbitrator has appropriately dealt with the human rights issues raised in both the grievance and the Application within the meaning of section 45.1. I am satisfied that the applicant had an opportunity to raise human rights issues before the arbitrator and that he, in turn, had the jurisdiction to apply the *Code*. See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 ; and *Wei, supra*.

[35] I reject the applicant's argument that the issue raised in the Application is materially different from what was placed before the arbitrator. As I have indicated, the central issue in both matters is the same. The applicant is seeking to re-litigate a case which has already been determined by attempting to slightly vary the arguments or the evidence. In my view, section 45.1 of the *Code* is specifically designed to capture situations such as these.

[36] Finally, I reject the applicant's argument that the Request for dismissal is premature because an application for judicial review is pending. As the Supreme Court explains in *Figliola*, to establish that the subject-matter of an Application has been appropriately dealt with in another proceeding, the applicant must have had an opportunity to "air his grievances" in that other matter. I have found that the applicant had an opportunity to and did raise human rights issues with the grievance arbitrator.

[37] The fact that the applicant has challenged the conclusions reached by the arbitrator in a judicial review proceeding does not change the fact that he had an opportunity to raise human rights issues in the grievance arbitration. As the Court further indicated, section 45.1 does not allow the Tribunal to stand in review of the arbitrator's decision. Whether or not the arbitrator's decision is challenged in judicial review does not detract from the fact that the human rights issues were addressed in the arbitral proceeding. For the purposes of section 45.1, I find that the subject matter of the Application has been appropriately addressed in the grievance proceeding.

[38] For all of these reasons, the Application is dismissed.

Dated at Toronto, this 8th day of November, 2011.

"Signed by"

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Michelle Flaherty
Vice-chair