HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Ariam Gomez

Applicant

-and-

Sobeys Milton Retail Support Centre

Respondent

-and-

United Food and Commercial Workers Canada, Local 175 & 633 and Ontario Human Rights Commission

Intervenors

DECISION

Adjudicator:	David A. Wright
Date:	December 22, 2011
File Number:	2010-05366-I
Citation:	2011 HRTO 2297
Indexed as:	**Gomez v. Sobeys Milton Retail Support Centre**

APPEARANCES

Ariam Gomez, Applicant	)	Self-represented
Sobeys Milton Retail Support Centre, Respondent	)	Elizabeth Kosmidis, Counsel
United Food and Commercial Workers Canada, Local 175 & 633, Intervenor	)	Marcia Barry, Counsel
Ontario Human Rights Commission, Intervenor	)	Cathy Pike, Counsel (Written Submissions Only)

[1] This is an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The applicant was an employee of the respondent who sustained a workplace injury that rendered him unable to do his previous job. After several attempts to place him in accommodated work, the respondent concluded that it could not accommodate the applicant without undue hardship and terminated his employment. The applicant argues that the respondent did not meet its duty to accommodate him to the point of undue hardship, and that its failure to provide him with various jobs and the eventual termination of his employment violated the *Code*.

[2] The applicant was represented by a union, United Food and Commercial Workers Canada, Local 175 & 633 (the "union"). Most of the issues raised in this Application were the subject of a grievance and arbitration under the collective agreement between the union and respondent. After six days of hearings that included extensive arguments on the application of the *Code*, Arbitrator William Marcotte issued a decision dismissing the grievance and finding that the respondent was not required to continue to employ the applicant following his last day of work: *Sobeys Milton Retail Support Centre v. United Food and Commercial Workers Canada Local 175*, [2010] O.L.A.A. No. 131 (QL).

[3] This Decision deals primarily with the interpretation of s. 45.1 of the *Code*, which provides that 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." On October 27, 2011, the Supreme Court of Canada issued its decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, which deals with a very similar provision to s. 45.1 in British Columbia human rights legislation.

[4] In my view, the Court's reasoning in *Figliola* applies equally to the interpretation of s. 45.1 of the Ontario *Code*, and to whether an application should be dismissed when the issues have previously been addressed in another proceeding in which the parties have had the opportunity to know the case to be met and meet it. *Figliola* instructs this

Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed on the basis that it was appropriately dealt with in the other proceeding.

BACKGROUND

[5] The respondent operates a warehouse facility in Milton. The applicant worked in the warehouse as a part-time employee in a position called “general warehouse”. He was a member of a bargaining unit represented by the union. He sustained a workplace injury to his right hand and wrist on March 18, 2005, and became entitled to workers’ compensation benefits. The applicant alleges in his Application to the Tribunal that he was unsuccessful in applying for various postings and seeking other jobs from that time forward.

[6] Effective November 22, 2006, the employer was advised by the Workplace Safety and Insurance Board (“WSIB”) that the applicant had permanent restrictions that affected his ability to work in the general warehouse position. It provided the applicant with a permanent accommodation in a different position as a repacker. In March 2007, without advising the respondent, the applicant told the WSIB that the repack job had aggravated his condition and caused new injuries.

[7] In May 2007, the applicant applied for a full-time position in the general warehouse classification. The respondent did not award the job to the applicant as it took the position that it was contrary to the applicant’s restrictions and the job could not be modified without undue hardship on the employer. On May 18, 2007, the union filed a grievance on behalf of the applicant that states as the nature of the grievance: “The company refusing to make a senior modified employee full-time (refusing to honour a posting”. It alleged the violation of the *Code* and of various sections of the collective agreement.

[8] The grievance was referred to arbitration before Arbitrator Marcotte and hearings were held on six dates between February 2008 and February 2010. In a report dated July 4, 2008, a WSIB ergonomist found that the repack job was now no longer suitable. The employer advised the applicant that it had no positions in the warehouse that could accommodate the applicant and the applicant stopped working around July 18, 2008. The respondent terminated the applicant's employment effective April 6, 2009.

THE ARBITRATOR'S CONCLUSIONS

[9] The arbitration dealt with more than just the 2007 job competition. Arbitrator Marcotte noted that in addition to events leading up to the grievance, "events subsequent to its filing… are relevant to the issue raised in the complaint and to the positions taken by the parties". The issues determined included Mr. Gomez's claim for damages on the basis of the failure of the respondent to provide him with a Record of Employment for several months following his last day of work and the question of whether the respondent was entitled to terminate the applicant's employment in 2009.

[10] Arbitrator Marcotte considered the *Code*, and found that the respondent had not violated the *Code* or the collective agreement, either in not awarding the applicant the position in 2007 or in determining that it could not continue to accommodate him past July 18, 2007. He found that the applicant could not do the essential duties of the posted position or proposed accommodated positions.

THE TRIBUNAL PROCESS

[11] The Application was filed on April 12, 2010, which was a year and five days following the termination of the applicant's employment. The Tribunal did not require a Response from the respondent. On July 9, 2010 the Registrar issued a letter scheduling a two-hour in-person hearing on the issues of delay and the application of s. 45.1 of the *Code*. On July 12, 2010, the hearing was scheduled to take place on November 15, 2010.

[12] On October 1, 2010, the Tribunal issued an Interim Decision (2010 HRTO 2015) noting as follows:

> … It appears that this Application raises significant issues regarding the interpretation of the time limits in s. 34 of the *Code* and s. 45.1. I note that the interpretation of s. 45.1, and the meaning of the word "appropriately" in that section, has been the subject of some recent decisions of the Tribunal. See, among others, *Trozzi v. College of Nurses of Ontario*, 2010 HRTO 1892 (CanLII); *Barker v. Service Employees International Union*, 2010 HRTO 1921 (CanLII); and *McNally v. OPSEU Pension Trust*, 2010 HRTO 1929 (CanLII).
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> It would be of assistance to the Tribunal if the parties filed written legal submissions on these issues two weeks in advance of the hearing, together with any cases upon which they intend to rely.
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> A copy of this Interim Decision shall be sent to the Ontario Human Rights Commission and the Ontario Labour-Management Arbitrators' Association. Should either of them, the applicant's Union, or any other organizations wish to intervene, they shall file their Request to Intervene by October 25, 2010.

[13] The Ontario Human Rights Commission and the Union sought to intervene and leave to intervene, which was unopposed, was granted at the hearing.

[14] On October 12, 2011, the Tribunal issued a Case Assessment Direction noting that *Figliola* had been heard by the Supreme Court on March 16, 2011, that no decision had yet been released, and that it was my intention to await the Court's decision in *Figliola* before making a decision in this case. When *Figliola* was released on October 27, 2011, the parties were given the opportunity to make further written submissions. The respondent and the Commission did so.

POSITIONS OF THE PARTIES

[15] The respondent argues that s. 27(1)(f) of the *Human Rights Code*, R.S.B.C. c. 210 (the "B.C. *Code*"), which was at issue in *Figliola*, is very similar to s. 45.1 of the Ontario *Code*. It submits that the Court's decision makes it clear that parties may not re-litigate the conclusions of other forums before this Tribunal. It notes that the Divisional

Court addressed a similar issue in *College of Nurses v. Trozzi*, 2011 ONSC 4614, and found that this Tribunal is "not an appellate body for other tribunals and it cannot supervise other tribunals which have exercised a public protection mandate based on their own expertise".

[16] The respondent submits that Arbitrator Marcotte considered whether the respondent had fulfilled its duty to accommodate the applicant. It argues that the appropriate forum, if one is dissatisfied with an arbitrator's decision, is to have the decision judicially reviewed. It states that the Supreme Court of Canada has made it clear that the parties are entitled to finality and that this Application seeks to have the same issues that were before Arbitrator Marcotte re-litigated before a different adjudicator in order to try and get a different result. This, it argues would represent the unnecessary prolongation and duplication of proceedings.

[17] The applicant argues that the arbitration only considered the posting of May 2007. He states that his Application also relates to "constant discrimination" from 2006 on. He states that the arbitrator only considered positions within the bargaining unit and did not deal with the suggestion by union counsel that he should be placed in a non-unionized position. He also does not agree with the arbitration decision and objects to the time that the arbitration took to conclude. He argues that Arbitrator Marcotte failed to apply an undue hardship analysis in his decision and left out various information that was provided. He notes that the cover page of the arbitration decision refers to a conference call with the parties on March 31, 2009 of which he was unaware. The applicant did not make any submissions about the application of *Figliola*.

[18] The Ontario Human Rights Commission does not take a position on the facts of the Application, but makes submissions on general principles. In relation to delay, the Commission takes the position that the Tribunal should find that an applicant's decision to await the results of a grievance arbitration before filing an Application at the Tribunal should be considered "good faith" within the meaning of s. 34 (1) of the *Code*, and that previous jurisprudence that found to the contrary should be revisited. As noted above, I

do not find it necessary to address this issue in light of the conclusion I have reached in relation to s. 45.1.

[19] As for the interpretation of s. 45.1, the Commission takes the position that *Figliola* binds the Tribunal. It notes that various arguments could be made that *Figliola* does not apply in Ontario because of differences in the respective statutory schemes, but concludes that such arguments would not have been decisive had the Ontario, rather than British Columbia, legislation been before the Court. It concludes that "the task of determining 'appropriateness' does not invite the Tribunal to correct another statutory tribunal's application of *Code* principles."

[20] The union does not take a position on the delay or s. 45.1 issues.

ANALYSIS

[21] In my view, the analysis adopted in *Figliola* applies to the interpretation of s. 45.1 of the *Code*, and mandates that an application be dismissed if another proceeding has determined the issues raised in the application. This Tribunal cannot, under s. 45.1, decide to proceed with an application based on a review of the process or substance of the other proceeding. Applicants must raise such issues in a judicial review or appeal of the other proceeding.

Figliola

[22] *Figliola* was a judicial review of a decision of the British Columbia Human Rights Tribunal ("BCHRT"). The complainants had alleged, before a Review Officer of the British Columbia Workers' Compensation Board (the "Board"), that a Board policy was discriminatory, but their arguments were rejected. They did not seek judicial review of that decision, but filed a complaint about the same policy with the BCHRT.

[23] The Board sought to have the complaints dismissed under s. 27(1)(f) of the B.C.

Code, which reads as follows:

> 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

The BCHRT did not dismiss the complaint, on the basis that the substance of the complaints had not been appropriately dealt with in the Board review process, in light of its concerns about the procedure and substance of that decision. The Supreme Court of Canada unanimously held that decision to be patently unreasonable. The majority judgment, written by Abella J., held in essence that s. 27(1)(f) required the BCHRT to dismiss an application where the same issues were decided in a different proceeding.

[24] The Court situated its discussion of s. 27(1)(f) in the context of various common law doctrines that prevent litigation of issues already decided in another proceeding: *res judicata*, issue estoppel, collateral attack and abuse of process. After reviewing these doctrines, the Court reasoned as follows, at paras. 35-38:

> These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
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> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
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> Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues;

> whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.
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> What I do *not* see s. 27(1)(f) as representing, is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

In support of its conclusion, the Court then referred to the placement of s. 27(1)(f) in the B.C. *Code* (paras. 39-41) and the legislative history of the provision (paras. 41-43).

[25] The wording of s. 45.1 of the Ontario *Code* is nearly identical to s. 27(1)(f) of the B.C. *Code*. It empowers the Tribunal to dismiss all or part of an application on the basis that the substance of the application was "appropriately dealt with in another proceeding". Indeed, British Columbia jurisprudence has been applied by this Tribunal since the beginning of its interpretation of s. 45.1 for this reason: see *Campbell v. Toronto District School Board*, 2008 HRTO 62. While s. 45.1's placement in the statute and legislative history are not identical, these were not the primary factors in the Court's reasoning, which focused on the wording of the provision and the policy goals of avoiding relitigation of matters decided in another forum. This reasoning applies equally to s. 45.1. I therefore agree with the Commission and the respondent that the analysis adopted in *Figliola* applies in Ontario and binds this Tribunal. It is not open to this

Tribunal to consider the procedural or substantive correctness of another proceeding under s. 45.1.

APPLICATION TO THIS CASE

[26] A labour arbitration is clearly a proceeding within the meaning of s.45.1. It has been recognized as such (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).

[27] The question is whether the issues raised by the applicant in this Application were dealt with in the arbitration. There is no question that they were. Arbitrator Marcotte found that the respondent acted in a manner consistent with the *Code* in its accommodation of the applicant and in its decision to terminate the applicant's employment. It is not for this Tribunal to evaluate the substance of that decision. A labour arbitration is the type of proceeding in which the parties know the case to be met and have the opportunity to meet it: *Figliola* at paras. 37 and 49.

[28] The applicant is incorrect that the arbitration decision dealt only with the 2007 job posting; in fact, it addressed all events leading up to the applicant's termination and the termination itself. Under the *Figliola* principles, it is not for this Tribunal to consider or analyze whether it was correct for the arbitrator to go beyond the grievance itself, whether the arbitrator applied a proper *Code* analysis, or whether the grievor/applicant should have or did have notice of the March conference call. The place to raise these issues would have been a judicial review of Arbitrator Marcotte's decision, not this Tribunal.

[29] To the extent the applicant suggests that his Application should not be dismissed because he raises issues prior to the 2007 job competition, which were not addressed in the arbitration, these allegations were made long outside the one-year limitation period in s. 34 of the *Code*, and were not part of a series of events that ended within the

one-year period; they were separate job competitions. There is no basis on which to find that the applicant's delay in raising issues prior to the 2007 grievance was in good faith within the meaning of the Tribunal's case law: *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241.

[30] The Application is dismissed.

Dated at Toronto, this 22nd day of December, 2011.

"Signed by"

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David A. Wright
Associate Chair