HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Frank Paterno

Applicant

-and-

The Salvation Army, Centre of Hope, Nancy Kerr and Nancy Powers

Respondents

-and-

Ontario Human Rights Commission

Intervenor

A N D B E T W E E N:

Frank Paterno

Applicant

-and-

The Salvation Army, Centre of Hope

Respondent

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A N D B E T W E E N:

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The Salvation Army, Mary-Ellen Jacobs, William Francis and Lee Graves

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Ontario Human Rights Commission

Intervenor

INTERIM DECISION

Adjudicator: David A. Wright

Date: December 22, 2011

File Number: 2009-02495-I; 2009-03547-I; 2010-05198-I

Citation: 2011 HRTO 2298

Indexed as: **Paterno v. Salvation Army**

APPEARANCES

Frank Paterno, Applicant	)	Self-represented
The Salvation Army, Nancy Kerr, Nancy Powers, Mary-Ellen Jacobs, William Francis, and Lee Graves, Respondents	)	Elizabeth Traynor, Counsel and Erin Buchner, Student-at-Law
Ontario Human Rights Commission, Intervenor	)	Cathy Pike, Counsel (Written Submissions Only)

INTRODUCTION AND SUMMARY OF FINDINGS

[1] This case is about s. 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), which provides for the dismissal of an application, in whole or in part, "where the substance of the application has been appropriately dealt with in another proceeding". The applicant was disciplined and then dismissed from employment for misconduct. He chose to pursue a grievance under the collective agreement between his union and the employer, alleging discipline and termination without just cause. The union pursued the grievance to arbitration, and the arbitrator ruled that there was cause for discipline, modifying the penalty of termination. He also found that the employer had not violated the *Code* in the discipline it imposed on the applicant throughout his employment. The respondents ask that the Applications (described further below) be dismissed on the basis of the arbitrator's decision.

[2] Despite the fact that he had raised concerns that the discipline violated the *Code* with his employer and through Applications to the Tribunal, the applicant did not want these issues decided in the grievance process. He wanted to pursue them separately at this Tribunal. The employer asked the arbitrator to rule on whether the discipline and dismissal were discriminatory, and his decision found that there was just cause for discipline and no violation of the *Code* in any of the disciplinary measures taken by the employer. The applicant now asks to proceed with Applications at the Tribunal that allege, primarily, that the discipline and discharge violated the *Code*. He asserts that an applicant has a right to choose the forum in which human rights issues should be raised and that he can pursue a just cause argument at arbitration and then a separate *Code* argument at the Tribunal. He also raises various issues about the substance of the arbitrator's decision and the arbitration process.

[3] With the exception of two allegations unrelated to the discipline he received, these Applications are dismissed. To allow the allegations of discriminatory discipline and discharge to proceed would be to permit the relitigation of issues decided by the arbitrator, contrary to the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. First, in my view, an

arbitrator's decision finding just cause for discipline implicitly incorporates a legal finding that the discipline was not tainted by a violation of the *Code*. The application of the *Code* cannot be separated from the legal concept of just cause as the applicant wanted to do, in order to relitigate the discharge on a different basis at the Tribunal. Second, I do not agree with the applicant that the prohibition on relitigation in s. 45.1 of the *Code* applies only when it is the applicant, not the respondent, who has raised *Code* issues in another proceeding. The applicant's submissions amount to the suggestion that an applicant has an absolute right to litigate the lawfulness of a discharge in two different proceedings, even though an arbitrator has full jurisdiction to apply the *Code* and award *Code* remedies. I do not agree. The allegations of discriminatory discipline were appropriately dealt with in the arbitration.

THE APPLICATIONS

[4] The applicant is a former employee of the respondent Centre. He was represented in his employment by Service Employees International Union Local 2, Brewery, General and Professional Workers Union (the "union").

[5] Application 2009-02495-I (the "first Application") alleges discrimination with respect to employment because of sex and reprisal. It alleges that on January 14, 2009, the applicant submitted a complaint against a female employee and a different female employee submitted a complaint against the applicant. The applicant states that he was asked to leave the workplace pending investigation, while the female employees were not. Further to amendments to the Application, the applicant also alleges that his three-day suspension on September 2, 2009, and dismissal from employment on September 21, 2009, were discriminatory based on sex and reprisal.

[6] Application 2009-03547-I (the "second Application") alleges discrimination with respect to employment because of disability as a result of a previous back injury. The applicant alleges that various disciplinary consequences that he received between January and September 2009 violated the *Code*, as did his dismissal. He also alleges discrimination and harassment as a result of a comment made at a meeting and the

treatment of an absence by the employer.

[7] Application 2010-05198 (the "third Application") alleges discrimination with respect to employment because of creed and sex. The applicant alleges that discipline he received on September 2, 2009, and his dismissal on September 21, 2009, constitute discrimination with respect to employment because of creed and sex.

THE ARBITRATION HEARING AND DECISION

[8] Through his union, the applicant grieved that the September 2, 2009 discipline and the termination were without just cause. The grievances were heard by Arbitrator Frank Reilly in a mediation-arbitration pursuant to s. 50 of the *Labour Relations Act*, S.O. 1995, c. 1, Sched. A. Both the union and employer were represented by counsel.

[9] The process followed and the issues raised were described in a letter from union counsel to the Registrar prior to Arbitrator Reilly's final decision as follows:

> …The arbitration proceeding itself was conducted pursuant to section 50 of the *Labour Relations Act, 1995*, which involves a process of mediation-arbitration. Pursuant to that section of the Act, a mediator-arbitrator is given fairly wide latitude in terms of his or her conduct of the proceedings and can, in that context, take an inquisitive role and may limit the evidence to be heard.
>
> In this particular case, arbitrator Reilly took a very active and inquisitive role, with the result that much of the evidence was adduced by way of direct questioning on his part. …In addition, as a witness to the proceedings before Mr. Reilly, it is my recollection that there was also discussion with and/or questioning of the Applicant about perceived discrimination against the Applicant on the basis of gender and disability. Further, however, there was also a significant amount of documentary evidence placed before Mr. Reilly that touched upon the Applicant's concerns related to discrimination on the basis of gender and/or disability. …

[10] Arbitrator Reilly noted that there were two distinct issues in relation to the suspension and termination: whether there was just cause for the imposition of discipline, and whether the circumstances warranted the exercise of his discretion to

lessen any penalties. He stated that the onus is on the employer to demonstrate cause for both the issuance of discipline and the appropriateness of the discipline. In relation to the suspension, the arbitrator found that there was cause for discipline, based on the fact that the applicant had made inappropriate, sexist and vexatious comments about a supervisor. He noted that the applicant's comments could be seen as harassment in employment on the basis of sex contrary to the *Code*, although he saw no need to make such a finding. He noted that the comments could be characterized as having poisoned the workplace of the supervisor and that the employer had to take any and all necessary steps and that a disciplinary response was warranted and arguably required. He found that the three-day suspension was an appropriate penalty.

[11] The arbitrator also found that, following the suspension, the applicant sent further communications that were inappropriate and contrary to workplace policies. He concluded that further discipline was an appropriate response to this action and that to allow the applicant to remain in the workplace would have, in all likelihood, subjected the supervisor to further harassment and the employer to continued interference. He found that there was no reasonable expectation that the applicant would conduct himself in a reasonable manner if reinstated to active employment. He found that termination with cause was too severe a penalty and substituted termination without cause. The arbitrator ordered the payment of $13,000 in lieu of notice, an amended record of employment, and the provision of a letter of employment.

[12] Arbitrator Reilly concluded by deciding the *Code* issues related to discipline and discharge as follows:

> The evidence disclosed that the Grievor was, throughout his employment, free to exercise his religious beliefs, but only to the point, and not past the point, where the exercise or expression of those beliefs served to discriminate and/or harass others contrary to the employer's reasonable policies and, arguably, the provisions of the *Human Rights Code*. In the case at hand, I find the Grievor's insistence on expressing his views on women and their place in the workplace and society was not protected expression and I so find, in that it served to discriminate against women in the workplace, in particular, the Grievor's female Supervisor, as contrary to the Employer's reasonable workplace policies. The evidence clearly

> demonstrated the Employer's disciplinary responses were, at all times, a direct result of the Grievor's misconduct and, in no way connected to the Grievor's medical issue(s), his religious and/or political beliefs and/or his age and I so find.

THE TRIBUNAL PROCESS

[13] Following various preliminary determinations, including a decision that the first Application should not be dismissed under s. 45.1 on the basis of the union's withdrawal of a previous grievance (see 2010 HRTO 10, 2010 HRTO 337, 2010 HRTO 1388) the three Applications were scheduled for a hearing on the issue of s. 45.1 (2010 HRTO 2021).

[14] On October 7, 2010, the Tribunal issued an Interim Decision (2010 HRTO 2044) noting as follows:

> … It appears that this Application raises significant issues regarding the interpretation of s. 45.1 in the context of labour arbitration decisions. 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).
>
> 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.
>
> 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 27, 2010.

[15] The Ontario Human Rights Commission sought and was granted intervenor status and production was ordered (2010 HRTO 2397) and the hearing was held on January 7, 2011. 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. All parties did so.

THE PARTIES' SUBMISSIONS

[16] In his initial submissions, the applicant argues that the only issue submitted to arbitration was a grievance regarding discharge from employment, which "did not, at all, raise any discrimination facts or issues for arbitration". He states that Arbitrator Reilly informed the parties he was limiting evidence to issues surrounding suspension and discharge and that the union's lawyer "did not argue, submit supporting evidence or hear testimony in response or defense of Applicant's HRTO discrimination complaints at the hearing". The applicant submits that the arbitrator nevertheless ruled "that the applicant was not discriminated against in some workplace issues regarding age, political beliefs, disability, religious affiliation or beliefs according to the limited evidence and testimony before him". He notes that the arbitrator did not address his gender discrimination or reprisal complaints.

[17] The applicant argues that the subject of the first Application was a gender discrimination issue not included in the arbitration decision. In relation to the second Application, which involves discrimination on the basis of disability, he argues that the union did not submit evidence on the issue of disability discrimination because the arbitrator informed the parties that he was limiting the issues to the suspension and discharge in response to the employer's attempt to raise the discrimination issues. With regard to the third Application, the applicant argues that the Application does not relate to the same issues as were dealt with by Arbitrator Reilly. He argues that the arbitrator could not have dealt with the substance of this Application because it was not filed until after the arbitrator's decision. Finally, he argues that the arbitrator made "numerous, glaring errors" and did not have adequate knowledge of the *Code*. He states that the arbitrator's reasons were insufficient and that "it is an abuse of process to determine a human rights issue when one party (Applicant) chooses the option of not arguing the

issue". The applicant also argues that the respondent employer did not disclose documents it should have produced in the arbitration and that this leads to an abuse of process and submitted a Request for Order raising this issue. The applicant relies upon *Murphy v. Quiktemp*, 2010 HRTO 2393; *Barker v. Service Employees International Union,* 2010 HRTO 1921; and *Byaruhanga v. Toronto Police Services Board,* 2010 HRTO 2273.

[18] The applicant's submissions following *Figliola* focus on his argument that *Figliola* is different because the complainants in that case chose to have their human rights issues decided in the other forum, but he did not. He suggests that the arbitrator had no power to decide the human rights issues "[a]s a result of the Applicant and Union's choice that HRTO human rights complaints were not be brought to arbitration but remain in the HRTO jurisdiction". He argues that he is not relitigating the issues from the arbitration because he is making different arguments. He argues that the alleged withholding of documents by the respondents also distinguishes this case and asks that the Tribunal find this to be an abuse of process. The applicant urges the Tribunal to look at each Application separately in relation to the issues determined in the arbitration.

[19] The Commission submits that although there are arguments that the Ontario *Code* might be interpreted differently from the British Columbia legislation at issue in *Figliola*, the Supreme Court would likely have decided the case the same way if it came from Ontario. It is of the view that therefore the task of considering "appropriateness" does not invite the Tribunal to correct another statutory tribunal's application of *Code* principles. The Commission emphasizes, however, that this applies only to another adjudicative body, not a private or internal mechanism. It also argues that the other adjudicative process must have dealt with essentially the same legal issue of whether discrimination occurred. It argues that the policy considerations relied upon by the majority in *Figliola* do not arise unless the other adjudicative process had the jurisdiction to consider discrimination and in fact did so.

[20] The respondents' initial submissions argue that the substance of the Applications is whether discrimination because of sex, disability or creed or reprisals influenced the

imposition of discipline on the applicant or the termination of his employment. They state that the grievances related to the imposition of the three-day suspension and the subsequent termination of the applicant's employment. They note that the arbitrator was aware that the grievor believed discrimination to have been a factor in his suspension and discharge, and that he took jurisdiction over issues related to the *Code*. They state that the employer's submissions provided Arbitrator Reilly with a summary of the applicant's documented allegations of discrimination, which were also the subject of oral evidence. They argue that the arbitrator made a specific finding that there had been no discrimination contrary to the *Code* in the course of the employer's imposition of discipline on the applicant or in the termination of his employment. The respondents argue that the substance of the discrimination allegations before the arbitrator was identical to the substance of the applications before the Tribunal.

[21] In their post-*Figliola* submissions, the respondents review the analysis set out in *Figliola*. They submit that as set out at para. 37 of *Figliola*, the Tribunal must ask itself whether there was concurrent jurisdiction to decide the human rights issues, whether the issues were essentially the same as what is being raised with 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. They submit that the answers to all these questions are "yes", and that the Tribunal therefore should dismiss the Applications.

ANALYSIS

[22] It is clear that a labour arbitration is 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). It 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.

[23] The question is whether the arbitration proceeding appropriately dealt with the substance of these Applications. None of the parties disputes that although *Figliola* dealt with British Columbia legislation, it applies in Ontario, and for the reasons set out

in *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297, at paras. 22-25, I find that it does apply; see also *Gilinsky v. Peel District School Board*, 2011 HRTO 2024.

[24] The key question is whether the arbitration appropriately dealt with the substance of these Applications. In considering this question, this Tribunal may not evaluate the procedural or substantive correctness of the other proceeding: *Figliola* at para. 38. To the extent that the applicant makes arguments that the arbitrator erred in evaluating the *Code* or the evidence, these are not proper factors. Previous jurisprudence that suggested that the Tribunal should consider whether the other proceeding applied proper human rights principles is no longer applicable in light of *Figliola*.

[25] This Tribunal has emphasized throughout its jurisprudence on s. 45.1 that in applying the section, the analysis should not be technical, but should focus on the goals of preventing relitigation of the substance of issues decided elsewhere. Where the result of the other proceeding disposes, in essence, of the issues before this Tribunal, the Application must be dismissed. For example, in *Campbell v. Toronto District School Board*, 2008 HRTO 62, the Tribunal found that the analysis applied by the Special Education Tribunal in an appeal under the *Education Act*, R.S.O. 1990, c. E.2, as amended, appropriately dealt with issues under the *Code*, because the essence of the analysis was the same even if the *Code* was not directly applied. In *Qiu v. Neilson*, 2009 HRTO 2187, the Tribunal found that where the factual findings made in another proceeding preclude a finding of discrimination, an Application must be dismissed even if the other proceeding did not specifically apply the *Code*. In *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149, the Tribunal found that where a party settled a previous proceeding that included the essence of the human rights matter, the Application should be dismissed under s. 45.1. In *Cunningham v. CUPE 4400*, 2011 HRTO 658, a complainant who narrowed the allegations in the previous proceeding to exclude human rights issues was precluded from later pursuing the human rights issues at the Tribunal. If there is a legal or factual finding in a previous proceeding, whether explicit or implicit, that makes it impossible for an application or part of an application to succeed, the

application or part must be dismissed.

[26] I turn now to the application of these principles where an arbitrator has previously dealt with the issue of cause for discipline. Collective agreements in unionized workplaces generally require that discipline be for just cause. When disciplinary measures are grieved, the onus is on the employer to prove, on a balance of probabilities, that there was cause for discipline. If cause is proven, an arbitrator may substitute a different penalty unless there is a specific penalty in the collective agreement (*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 48(17)). An arbitrator has the power and the duty to interpret and apply the *Code (Labour Relations Act*, s. 48(12)(j)), and collective agreement rights and obligations must be interpreted in light of the *Code*: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42.

[27] It follows that there is no just cause for discipline or discharge imposed in contravention of the *Code*. When an arbitrator finds that an employer has proven just cause for discipline or discharge, this incorporates a finding that the discipline or discharge is consistent with the *Code*. Just cause presumes that the discipline was consistent with the employer's statutory obligations, including those under the *Code*.

[28] The applicant argues that he and the union (which was following his wishes) did not pursue the *Code* issues and restricted their arguments at the arbitration to the submission there was no cause of discipline and discharge. This argument does not reflect the interaction of the *Code* and collective agreements and is not desirable as a matter of policy. The *Code* is not separate from just cause; rather, it infuses this concept and is an important part of it. It is not analytically correct or appropriate to ask an arbitrator to ignore possible *Code* breaches in finding whether there was cause, or to allow a grievor to save for later his or her *Code* objections to the cause for discipline. This would be contrary to the policy intentions of s.45.1 in preventing duplicative litigation. A grievor who pursues a grievance that discipline is without cause should raise all the arguments for that belief in the collective agreement proceeding he or she has commenced.

[29] In my view, the essence of a holding by an arbitrator that there was just cause for discipline or discharge incorporates the conclusion that discharge did not violate the *Code*. An applicant who fails to raise alleged discrimination with his or her union or who asks the union not to raise such arguments about just cause in an arbitration will face dismissal of a subsequent application at the Tribunal regarding the discipline or dismissal. It would be an improper review of the substance of an arbitrator's decision, contrary to the principles in *Figliola*, to continue an application related to discipline or discharge where an arbitrator has found there was just cause. I need not address in this case the possible situation where the grievor wishes to raise human rights issues but the union refuses to do so.

[30] In this case, the arbitrator's finding that there was cause for discipline incorporates a finding that there was no *Code* violation in relation to the September discipline and discharge, and mandates the dismissal of these aspects of the Applications.

[31] Moreover, at the employer's request, the arbitrator also specifically ruled on whether any of the discipline, including that prior to September, violated the *Code*. The arbitrator specifically ruled on the applicant's allegations of *Code* violations. I do not agree with the applicant that s. 45.1 applies only where it is the applicant who brought the *Code* matters forward in another proceeding. There is no basis for this interpretation either in the text of s. 45.1 or in its purpose of preventing relitigation. The doctrines of abuse of process, issue estoppel and collateral attack that lie behind it apply to determinations made in another proceeding no matter which party requested the determination in the previous proceeding.

[32] The applicant suggests that *Figliola* supports his view that the applicant has an absolute entitlement to choose the forum in which his human rights issues will be decided. In support of this submission he cites para. 21, which states that both the Board and the Tribunal in that case had concurrent jurisdiction, and para. 96, which is from the minority decision and does not reflect the majority's views. *Figliola* does not support the applicant's position. The Court's point in para. 21 is that both the Board and

Tribunal had the power to deal with the dispute, as is the case here, not that it was the applicant, rather than the respondent, that brought the matter before the Board.

[33] The applicant had a choice. He could have foregone the benefits that he had as an employee under a collective agreement – including just cause protection, the grievance procedure and representation by union counsel – by not pursuing a grievance or arbitration. He then could have proceeded at the Tribunal with his human rights Applications without them being affected by the arbitrator's determination. Having chosen to take the benefits of the collective agreement and the grievance process, however, an applicant must accept the consequences of that choice for a subsequent human rights proceeding, which is that the issues may be dealt with in the grievance and arbitration process that she or he has commenced. An applicant has a choice about where to proceed, but does not have the option to require an employer to litigate the same issues twice.

[34] Applying *Figliola*, it is not this Tribunal's place to evaluate whether the arbitrator was correct in the determinations he made, whether they reflect the evidence or a proper interpretation of the *Code*. Although the arbitrator did not specifically mention the ground of sex or reprisal in his concluding paragraph, it is evident that he ruled on whether the discipline was consistent with the *Code* as a whole in finding that the employer's actions "were, at all times, a direct result of the Grievor's misconduct". Moreover, as set out above, the applicant's allegations of reprisal and sex discrimination are foreclosed by the finding of just cause for discipline.

[35] It is not this Tribunal's place to evaluate whether the arbitration process was the same as the process this Tribunal would have applied, whether the respondent was subject to the same kind of disclosure as would have been required in this Tribunal, whether the respondent withheld evidence in that process, or whether the arbitrator acted correctly in conducting a proceeding under s. 50 of the *Labour Relations Act*. An arbitration is a process in which the parties have the opportunity to know the case to be met and to have the chance to meet it (*Figliola* at paras. 37 and 49). In any event, I note that the applicant's suggestions that the arbitrator's *Code* analysis took him by surprise

or that he and the union were not expecting it are contradicted by the letter written to the Tribunal by union counsel before the arbitrator's decision was released.

[36] The arbitrator had jurisdiction to resolve the workplace dispute between the parties and did so. He had concurrent jurisdiction with this Tribunal to apply the *Code*, even over the applicant's objections, and he exercised that power. The direction of the Supreme Court is that the Tribunal must inquire no further in relation to the issues he decided, and that it should not review the substance of his analysis.

[37] The Applications relate to issues of discipline upon which the arbitrator has ruled, with the exception of the allegations in the second Application relating to alleged discriminatory comments and harassment on the basis of disability. These issues were not dealt with in the arbitrator's decision. Accordingly, the Tribunal will schedule a one-day hearing limited to these allegations.

ORDER

[38] Applications 2009-02495-I and 2010-05198-I are dismissed. All allegations in Tribunal File 2009-03547-I are dismissed, with the exception of the allegations about the events of June 10, 11 and 16, 2009. A one-day hearing will be scheduled to hear the remaining portion of Application 2009-03547-I.

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

"Signed by"

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David A. Wright
Associate Chair