HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Elizabeth Post

Applicant

-and-

Stevens Resource Group and the Workplace Safety and Insurance Board

Respondents

DECISION

Adjudicator: Brian Cook

Date: October 2, 2014

File Number: 2010-07422-I

Citation: 2014 HRTO 1470

Indexed as: **Post v. Stevens Resources Group**

WRITTEN SUBMISSIONS

Elizabeth Post, Applicant	)	Erin Buchner, Counsel
Stevens Resource Group Inc., Respondent	)	Elizabeth Traynor, Counsel
Workplace Safety and Insurance Board, Respondent	)	Agnes Wintersinger, Representative

INTRODUCTION

[1] The issue in this case is whether the respondents discriminated against the applicant when she was given work that was physically suitable but not compatible with her personal religious views, contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The applicant was employed by Stevens Resource Group ("SRG"). SRG operates a temporary help agency. Following a work-related injury, she was offered a job that involved monitoring a Salvation Army kettle during its Christmas campaign in 2009. The applicant agreed that the position was physically suitable but refused to do the job, claiming that it did not accord with her religious beliefs. The applicant identifies as an atheist. The Workplace Safety and Insurance Board (WSIB) Claims Manager determined that the applicant had refused suitable work and that she was not entitled to loss of earnings benefits.

[3] In Interim Decision 2012 HRTO 2371, dated December 19, 2012, the Application was deferred pending a determination by a WSIB Appeals Resolution Officer of the applicant's objection to the decision of the Claims Manager.

[4] The Appeals Resolution Officer issued a decision dated March 11, 2014. It upheld the decision of the Claims Manager and found that the applicant had refused suitable work that was available and that she was not entitled to loss of earnings benefits.

[5] The applicant then filed a Request for Order During Proceedings seeking re-activation of the Application. The respondents both object to reactivation, submitting that the Application should continue to be deferred until the matter has been dealt with by the Workplace Safety and Insurance Appeals Tribunal (WSIAT). Both respondents submit that in the alternative, the Application should be dismissed under section 45.1 of the *Code* on the grounds that the WSIB has appropriately dealt with the substance of the Application.

[6] In a June 6, 2014 Case Assessment Direction the applicant was asked to clarify whether she intended to appeal the decision of the Appeals Resolution Officer to WSIAT. Counsel for the applicant responded that the applicant does not intend to file an appeal with WSIAT "should the HRTO determine that it is in fact appropriate to re-activate and proceed with the instant Application."

[7] It appears that at present there is no other proceeding to which the Application could be deferred. The request for deferral is therefore denied.

[8] This Interim Decision deals with whether the substance of the Application has been appropriately dealt with.

[9] All the parties asked that this issue be determined on the basis of the written submissions.

CLARIFICATION ABOUT THE RESPONDENTS

[10] The Application names the applicant's employer and the WSIB as respondents. As I understand the Application, the WSIB is named as a respondent only because it made a decision in effect condoning the alleged discrimination on the part of the employer. There is no suggestion that the decision of either the WSIB Claims Manager or the Appeals Resolution Officer were made in a discriminatory manner. There is also no suggestion that any of the policies of the WSIB that were applied in the adjudication of the applicant's claim for benefits were discriminatory.

[11] Leaving aside the question of whether the WSIB is properly named as a respondent in this case, it seems clear that if the Appeals Resolution Officer appropriately dealt with the substance of the Application as against the employer, he also appropriately dealt with the substance of the Application as against the WSIB.

HAS THE SUBSTANCE OF THE APPLICATION BEEN APPROPRIATELY DEALT WITH?

[12] Section 45.1 of the *Code* states:

> 45.1 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.

[13] Interpretation of this section is guided by two decisions of the Supreme Court of Canada. The first of these is *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola*") and the second is *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*"). This Tribunal has considered how these decisions impact the Tribunal's interpretation of section 45.1 in a number of cases, notably, *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298 ("*Claybourn*").

Figliola

[14] In *Figliola*, three workers who suffered from chronic pain challenged a policy of the British Columbia Workers' Compensation Board ("WCB") that limited benefits for chronic pain to 2.5% of total disability as being contrary to the B.C. *Human Rights Code*, This issue was considered by a WCB Review Officer, who conducted a written hearing. The Review Officer found that the WCB policy did not violate the British Columbia *Human Rights Code*. The workers eventually filed an Application with the British Columbia Human Rights Tribunal. In *Figliola* the Supreme Court considered whether the British Columbia Human Rights Tribunal has authority to consider the Application.

[15] The central issue dealt with the interpretation of section 27(1) of the B.C. *Code* the relevant part of which states:

> 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;

[16] This language is similar to section 45.1 of the Ontario *Code*.

[17] In *Figliola*, the Court majority summarized the interpretation of section 27(1) in the following terms at paragraphs 36-38:

> 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.
>
> 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.
>
> 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.

Penner

[18] *Penner* is a decision dealing with whether the fact that Mr. Penner had filed a complaint under the *Police Services Act,* which led to a hearing under that Act, precluded him from pursuing a civil action regarding the same facts and history that underlay the *Police Services Act* proceeding. In *Penner,* the Court discussed the application of the doctrine of issue estoppel. The Court majority held that the Mr. Penner should be permitted to proceed with his civil action.

[19] The Court majority explained that the critical question is whether application of the doctrine of issue estoppel would result in unfairness. At paragraph 39, the Court majority stated:

> Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

[20] The Court majority concluded that unfairness would result in Mr. Penner's case for a number of reasons which are summarized by the *Claybourn* Panel as follows:

> The majority held that the facts of the case before the Court fell into the latter category. The majority found that it would be unfair to use the results of the police disciplinary process to preclude Mr. Penner's civil action for the following reasons:
>
> • there were several provisions in the *PSA* that expressly contemplate parallel proceedings (paras. 50 to 52)

- the reasonable expectations of the parties would not be that a disciplinary hearing where Mr. Penner had no access to a personal remedy would preclude a civil action for substantial damages (paras. 53 to 58)

- Mr. Penner had no "financial stake" in the disciplinary hearing (paras. 59 to 61)

- there were important policy considerations at stake in these circumstances, namely the risk of adding to the complexity and length of disciplinary proceedings by attaching undue weight to their results through applying issue estoppel or the significant risk that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions (paras. 62 to 63)

- applying issue estoppel against Mr. Penner would have the effect of permitting the chief of police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the chief and his police service from civil liability, which the majority regarded as a serious affront to basic principles of fairness (paras. 64 to 68).

[21] *Claybourn*, like *Penner*, involved the question of whether a police complaint proceeding removed the right to another proceeding – in *Penner*, a civil action and in *Claybourn*, an Application under the *Code*. In *Claybourn*, the Panel applied the *Penner* principles and found that the police complaint proceeding was not a proceeding that appropriately dealt with the substance of the Application for the purpose of section 45.1 of the *Code*.

The Decision of the Appeals Resolution Officer

[22] The Appeals Resolution Officer held an oral hearing. The applicant appeared with counsel as did the employer respondent. The Appeals Resolution Officer heard evidence from the applicant and a witness from the employer. The parties filed extensive post-hearing written submissions. The decision indicates that the only issue before the Appeals Resolution Officer was whether the Salvation Army position was suitable work. If the Appeals Resolution Officer had found that the work was not suitable, the applicant would have been entitled to loss of earnings benefits for the

period from November 20, 2009, when she refused the position, to January 4, 2010, when she was offered a different position which she accepted.

[23] The applicant's position with respect to the Salvation Army kettle job was described as follows:

> The worker declined the modified work offered by the accident employer stating non-religious convictions. The worker adopted the position that she should not be required to accept the modified work offered by the accident employer as it conflicts with the her system of core beliefs.

[24] There was no dispute that the position was physically suitable for the applicant having regard to her disability.

[25] The decision indicates that the applicant testified that she identifies as an atheist. The applicant further explained that she felt uncomfortable and hypocritical and embarrassed by the assignment. In addition to a conflict with her own beliefs, she was required to wear a pin that suggested that she was a Salvation Army volunteer, which was not the case as she was on a paid assignment by her employer.

[26] The submissions made to the Appeals Resolution Officer on behalf of the applicant included reference to the *Code* and human rights jurisprudence dealing with issues related to employment and religion.

[27] The Appeals Resolution Officer started his analysis with reference to the WSIB Operational Policy Manual Document 19-02-01 which discusses principles to be applied when determining whether work is suitable for the purposes of the *Workplace Safety and Insurance Appeals Act*. As quoted by the Appeals Resolution Officer, the policy reads in part:

> The workplace parties should strive to return the worker to work that he/she has the skills to perform, is consistent with the worker's functional abilities, and that, to the extent possible, restores the worker's pre-injury earnings. Ideally, the worker will return to the pre-injury work.

> Accommodation means any modification to the work or the workplace, including but not limited to reduced hours, reduced productivity requirements, and/or the provision of assistive devices, that results in work becoming available that is consistent with the worker's functional abilities and that respects applicable human rights legislation.

[28] In his discussion of the applicability of the *Code* to the case before him, the Appeals Resolution Officer commented:

> WSIB policy establishes that employers, in the [work reintegration] process may have accommodation requirements on a number of grounds other than disability.
>
> While it is also important to confirm that the WSIB does not administer the OHR Code, or make findings of discrimination as the OHR Commission would, it is also the case that the WSIB in evaluating the [work-reintegration] process can neither ignore the OHR Code accommodation question.

[29] The Appeals Resolution Officer considered whether the applicant had been pressured to adopt the religious views of the Salvation Army and concluded that she had not:

> Notwithstanding the religious overtones of the placement organization there is little in the way of factual evidence that the worker was forced or coerced in any manner to accept the organizational philosophy of the SA or even take on any active role in the workplace cultural practices.

[30] The Appeals Resolution Officer accepted that the applicant's refusal of the kettle job was a "principled decision". He found however, that:

> [T]he worker chose not to accept the position for personal reasons that do not result in the job becoming unsuitable in the context of the accommodation requirements coming out of the Ontario Human Rights Code.

[31] On that basis, the Appeals Resolution Officer denied the applicant's objection and concluded that she was not entitled to loss of earnings benefits for the period November 20, 2009 to January 4, 2010.

ANALYSIS

[32] The first question is whether the Appeals Resolution Officer hearing and decision was a "proceeding" within the meaning of section 45.1. It appears to me that it was. The parties were both present, had a full opportunity to call evidence and make submissions to an adjudicator who had the authority to decide the matter before him.

[33] I start my analysis of whether the Appeals Resolution Officer appropriately dealt with the substance of the Application with the observation that the WSIB, and the Appeals Resolution Officer in particular, had jurisdiction to apply the *Code* to the facts of this case.

[34] This was explicitly recognized by the Appeals Resolution Officer in his decision and is clear as well from the Board's policy Operational Policy Manual document No. 19-02-01, quoted by the Appeals Resolution Officer. I note that policy in turn refers to Operational Policy Manual 19-02-02 which discusses the duty to accommodate in respect of the return to work process in more detail:

> All employers have a duty to modify the work or the workplace to accommodate the needs of the worker to the extent of undue hardship. This duty arises through the obligation to re-employ set out in the Act or the associated Construction Regulation, and/or the *Ontario Human Rights Code* (the Code) or the *Canadian Human Rights Act*.
>
> If a job becomes available that can be made suitable through accommodation, and the accommodation does not cause the employer undue hardship, the employer must provide the accommodation. A worker's accommodation requirements may be temporary or permanent.
>
> During the WR process, employers and, when relevant, unions and workers are expected to comply with human rights legislation and associated policies.
>
> The Code guarantees equal access to employment opportunities to any person with a disability, whether such disability is work or non-work-related. Pursuant to the Code, if a person with a disability requires accommodation to perform the essential duties of a job, the employer

must provide accommodation unless to do so would cause the employer undue hardship.

To assist in determining undue hardship, the WSIB refers to the Ontario Human Rights Commission's (OHRC) *Policy and Guidelines on Disability and the Duty to Accommodate*. Since relevant human rights legislation also protects workers from discrimination on a number of grounds including disability, sex (pregnancy, gender identity), creed, ethnicity, family status and age, employers may have accommodation requirements during the WR process in addition to those related to the work related-impairment.

[35] The fact that the WSIB has jurisdiction to apply the *Code* in its adjudication of claims for benefits is also clear from the jurisprudence of the Supreme Court of Canada. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, the Court considered whether the Social Benefits Tribunal (SBT) had jurisdiction to consider and apply the *Code* when determining an applicant's entitlement to benefits. At paragraphs 40 – 42, the Court said:

I therefore conclude that the SBT has jurisdiction to consider the *Code*. The *ODSPA* and *OWA* confirm that the SBT can decide questions of law. It follows that the SBT is presumed to have the jurisdiction to consider the whole law. More specifically, when it decides whether an applicant is eligible for income support, the SBT is presumed able to consider any legal source that might influence its decision on eligibility. In the present appeal, the *Code* is one such source.

There is no indication that the legislature has sought to rebut this presumption. To the contrary, the legislature has announced the primacy of the *Code* and has given itself clear directions for how this primacy can be eliminated in particular circumstances. The legislature has indeed prohibited the SBT from considering the constitutional validity of enactments, or the *vires* of regulations, but it did nothing to suggest that the SBT could not consider the *Code*. I cannot impute to the legislature the intention that the SBT ignore the *Code* when the legislature did not even follow its own instructions for yielding this result.

The *ODSPA* and *OWA* do evince a legislative intent to prevent the SBT from looking behind the statutory and regulatory scheme enacted by the legislature and its delegated actors. However, consideration of the *Code* is not analogous. Far from being used to look behind the legislative

> scheme, the *Code* forms part of the legislative scheme. It would be contrary to legislative intention to that the SBT ignore it.

[36] The Court further found that in fact the SBT was required to consider the *Code* when it arose in a particular case. At paragraph 46, the Court noted:

> Since the SBT has not been granted the authority to decline jurisdiction, it cannot avoid considering the *Code* issues in the appellants' appeals.

[37] From the Appeals Resolution Officer's decision in this case, it is apparent that he was well aware that he had an obligation to consider the applicant's *Code*-related arguments and that he did in fact consider them. Whether there was concurrent jurisdiction to decide the human rights issues is the first question that must be determined under the test set out in *Figliola* and *Penner*. Based on my observations and findings above it is apparent the Appeals Resolution Officer did have concurrent jurisdiction to decide the human rights issues.

[38] According to *Figliola* and *Penner,* once it has been confirmed that concurrent jurisdiction exists to decide the human rights issues, there are three primary questions to consider in order to determine if another proceeding has appropriately dealt with the substance of the Application. These are:

> 1. 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;
>
> 2. whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and
>
> 3. Would it be unfair to apply the doctrine of issue estoppel in the particular circumstances of the case?

[39] On the facts of the case before me, the first of these points has been met. The parties before the Appeals Resolution Officer clearly understood the case including the human rights issues, and had a full opportunity to present evidence and make submissions concerning those issues. I note that this is not always the case in matters decided by an Appeals Resolution Officer. For various reasons, an employer may

decide not to participate in a hearing before an Appeals Resolution Officer and many decisions are made on the basis of the written record without presentation of evidence.

[40] The question of whether the issue decided by the Appeals Resolution Officer is essentially the same as what is being complained of to the Tribunal depends on how the issue is framed.

[41] While a WSIB Appeals Resolution Officer has concurrent jurisdiction to apply the *Code* in adjudicating an objection, as the Appeals Resolution Officer correctly noted, the WSIB does not have the same jurisdiction with respect to the *Code* as the Human Rights Tribunal of Ontario. The WSIB does not, for example have the jurisdiction to make a finding under the *Code* that an employer failed to accommodate a worker's disability. Or, in regard to the present case, that an employer failed to accommodate a worker's religious views. The WSIB also does not have the same remedial powers that the HRTO has. It cannot, for example, direct an employer who has discriminated against a worker to pay financial compensation for losses including compensation for injury to dignity, feelings, and self-respect.

[42] The instruction from the Court in *Figliola* is to consider "whether the previously decided legal issue was "essentially the same" as what is being complained of to the Tribunal. Similarly, section 45.1 itself speaks to the "substance of the Application.

[43] In this case, it appears to me that the substance of the Application is the allegation that the respondent employer failed to accommodate the applicant's religious beliefs. The issue dealt with by the Appeals Resolution Officer was whether the job that the respondent employer offered the applicant was not suitable because it was not compatible with the applicant's religious beliefs.

[44] It appears to me that in this case, the substance of the issues dealt with by the Appeals Resolution Officer is the same or essentially the same as the issues in the Application before the HRTO.

[45] As the Appeals Resolution Officer stated, he did not have jurisdiction to determine if the employer discriminated against the applicant. However, he did have the jurisdiction to determine if the work that was assigned was not suitable because of the applicant's creed. It seems clear that if he had found that the job was not suitable because of the applicant's creed, the applicant would have been entitled to loss of earnings benefits. The fact that the Appeals Resolution Officer did not have jurisdiction to make a finding that the employer discriminated against the employer under the *Code* or to award the same damages that this Tribunal would have the power to award if discrimination were found, does not, in my view, alter the fact that the substance of the Application and the substance of the issue before the Appeals Resolution Officer are essentially the same. While the Appeals Resolution Officer did not have jurisdiction to award compensation for injury to dignity, feelings, and self-respect as this Tribunal could, the Appeals Resolution Officer did have jurisdiction to award the applicant loss of earnings benefits if he had found that the job was not suitable because of the applicant's religious beliefs.

[46] *Penner* is clear that in addition to these considerations, it is also necessary to consider whether it would be unfair for the proceeding before the Appeals Resolution Officer to preclude the applicant from bringing the Application to this Tribunal.

[47] It appears to me that none of the indicators of unfairness identified by the Court in *Penner* applies here.

[48] The *Penner* Court majority introduced this issue in the following terms at paragraph 42:

> The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted

> fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context.

[49] The Court went on to discuss factors that would suggest that it would be unfair to preclude a subsequent civil proceeding on the basis of an earlier proceeding.

[50] An important consideration in *Penner* was the different purpose of the two proceedings and the reasonable expectations of the parties about those proceedings. The police discipline proceeding in *Penner* concerned whether the police officers had engaged in unprofessional behaviour. The Court found that there is an important public interest in such proceedings and this is distinct from the question of the impact of the alleged behaviour on the individual.

[51] In the present case, it appears to me that the expectation of the parties was that the Appeals Resolution Officer was going to determine if the job in question was not suitable because of the applicant's religious belief and that this determination was going to include an analysis of the applicant's *Code* protected rights. This was the only issue before the Appeals Resolution Officer and the issue that the parties made submissions about.

[52] Another factor in *Penner* is whether the applicant had a financial stake in the outcome of the other proceeding. In *Penner*, Mr. Penner did not. In the case before me, the applicant did have a financial stake in the proceeding before the Appeals Resolution Officer. If the applicant had succeeded in establishing that the job offered was not suitable because it infringed her *Code*-protected rights, she would have been entitled to loss of earnings benefits.

[53] As already noted, the financial stake was not identical as the stake might be at this Tribunal. However, as stated by the Court in *Penner* the differences between the proceedings must be "significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context."

[54] Another factor in *Penner* was the independence of the other proceeding:

> Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.
>
> It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account in assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims.

[55] To the extent that the applicant had any concerns about the independence of the Appeals Resolution Officer, the *WSIA* establishes the Workplace Safety and Insurance Appeals Tribunal (WSIAT) as an independent appeal body. There is no issue that the applicant had a right to appeal the decision of the Appeals Resolution Officer to WSIAT. It is clear that the HRTO should not put itself in a position of hearing appeals of decisions of the WSIB when there is a robust objection and appeal process available in the workers' compensation system. As the Court stated in *Figliola* (at paragraph 38):

> 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.

[56] On this point, I note that the time limit for filing an appeal with WSIAT under the *WSIA* has elapsed. I also note that the applicant confirmed in June, 2014 that she did not intend to file an appeal with WSIAT if the HRTO was prepared to deal with the Application, suggesting that she would appeal to WSIAT if HRTO was not prepared to

deal with the Application. I confirm that any delay in resolving this issue in the interim relates to the delay at this Tribunal and not to any delay on the applicant's part.

[57] I note that the fairness issues discussed in *Penner* arose in the context of the facts of a case concerning whether it would be fair to take away a person's right to bring a civil action because of a proceeding under the *Police Services Act*. In other contexts, there may be other factors that need to be considered to determine if it would be unfair to dismiss an Application under section 45.1 on the basis of another proceeding. In the present case, it does not appear to me that it is unfair to find that the applicant cannot relitigate an issue that is essentially the same as the only issue decided by the Appeals Resolution Officer.

CONCLUSION

[58] In my view, in this case, the substance of the Application was appropriately dealt with by the Appeals Resolution Officer. The substance of the Application was the only issue before the Appeals Resolution Officer. The Appeals Resolution Officer explicitly identified the *Code*-related issues, heard submissions and evidence on those issues, and came to decision. In my view, none of the concerns identified by the Court in *Penner* apply here to suggest that it would be unfair to prevent the applicant from bringing the Application.

[59] For these reasons, the Application is dismissed under section 45.1 on the basis that the substance of the Application was appropriately dealt with.

Dated at Toronto, this 2nd day of October, 2014.
"Signed by"

_____
Brian Cook
Vice-chair