Chapter 16

THE ARBITRATION OF HUMAN RIGHTS ISSUES IN CANADA

I. The Interplay Between Labour Arbitration and Proceedings at the Human Rights Tribunal of Ontario

Owen V. Gray[1]

In Ontario and elsewhere in Canada, the substantive rights and obligations created by human rights legislation are considered to be incorporated into every collective agreement, even if the collective agreement itself does not expressly do so.[2] An arbitrator appointed to resolve a workplace dispute between parties to a collective agreement has the jurisdiction to apply those rights and obligations and provide remedies for their breach. The Ontario Human Rights Code[3] ("the Code") provides for a tribunal, the Human Rights Tribunal of Ontario ("HRTO"), to adjudicate complaints about alleged breaches of its provisions. Ontario labour arbitrators and the HRTO have concurrent jurisdiction to resolve human rights disputes that arise between an employee and employer in respect of employment covered by a collective agreement.

This paper describes some implications of this concurrent jurisdiction and particularly the extent to which the HRTO has been prepared to review decisions of Ontario labour arbitrators, either by entertaining an allegation that the arbitrator breached the Code by deciding as she or he did or by permitting re-litigation before it of factual or legal issues that have been decided by an arbitrator.

---

[1]Arbitrator and Mediator, Toronto, ON.

[2]Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324, [2003] 2 SCR 157, 2003 SCC 42 (CanLII).

[3]Human Rights Code, RSO 1990, c H.19, as amended.

Prior to 2008, the Ontario Human Rights Commission decided whether a complaint under the Code would be referred to a board of inquiry. In making that decision, it could and did consider whether the complaint was one that "could or should be more appropriately dealt with" under an Act other than the Code,[4] such as legislation that provides for arbitration of disputes arising under collective agreements. The Commission generally refused to refer a complaint to a hearing if it could be dealt with in grievance arbitration.

Since 2008, however, the Code has provided that someone alleging that her or his rights under the Code have been violated can apply directly to the HRTO for a hearing. Under section 45.1 of the Code, the HRTO has the power to "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."[5] The Code does not expressly empower the Tribunal to dismiss an application if its substance "could be" dealt with at arbitration under a collective agreement. It is unclear whether the Tribunal will use its power under section 45.1 to dismiss an application if its claims could have been, but were not, raised in an arbitration proceeding.

Generally speaking, an aggrieved employee can access arbitration only through the trade union that represents her or him. The union's statutory duty to fairly represent employees in a bargaining unit it represents does not require that it refer a grievance to arbitration, or raise any particular issue at arbitration, merely because that is what the grievor wants. Grievors are sometimes at odds with the unions that represent them over what issues will be referred to arbitration on their behalf or how those issues will be presented at arbitration. An aggrieved employee may be inclined to make an application to the HRTO about circumstances that she or he sees as a breach of human rights, even though a grievance about those circumstances has been filed on the employee's behalf and may be, or has been, referred to arbitration.

An application to the HRTO must be made within one year after the incident to which the application relates or, if there was a series of incidents, within one year after the last incident in the series.[6] The Tribunal has repeatedly held that an applicant's hav-

---

[4]s. 34, Human Rights Code, RSO 1990, c H.19 (as it was prior to the amendments introduced by SO 2006, s. 5).

[5]s. 45.1, Human Rights Code, RSO 1990, c H.19, as amended.

[6]s. 34, Human Rights Code, RSO 1990, c H.19, as amended.

ing waited for grievance or arbitration proceedings to conclude before filing an application will not justify an extension of that time limit and has observed that that a timely application can be filed with the Tribunal while pursuing a grievance.[7] As a result, an informed employee concerned that the grievance and arbitration process may not satisfactorily address her or his human rights concerns may file an application with the Tribunal before her or his grievance is adjudicated at, or even referred to, arbitration.

If an application to the HRTO is filed while a grievance that raises the same factual or legal issues is being processed through the grievance procedure or has been referred to arbitration, the HRTO will entertain and even proactively invite submissions on whether it should defer consideration of the application pending completion of those other processes, pursuant to section 45 of the Code. It will generally defer consideration in those circumstances, even if the applicant opposes its doing so.[8] The Tribunal will defer even if it is unclear whether the union will raise the grievor's human rights concerns at arbitration, as long as the claims being pursued in the grievance relate to the circumstances that give rise to those concerns.[9] The potential for determination at arbitration of some of the factual or legal issues raised in an application can result in deferral of an application even if arbitration will not address all such issues.[10] Applications have not been deferred, however, when the employer was taking the position that the pending grievance was inarbitrable,[11] or the grievance was being held in abeyance or had not being processed in a timely manner,[12] or the behaviour of co-workers who had since become union officials was among the matters complained of in the application.[13]

---

[7]Cartier v. Northeast Mental Health Centre, 2009 HRTO 1670 (CanLII) at ¶23; Bisonnette v. Liquor Control Board of Ontario, 2010 HRTO 2215 (CanLII) at ¶14; Nagra v. Sheraton Gateway Hotel, 2012 HRTO 346 (CanLII) at ¶16.

[8]It may be otherwise if the employer is taking the position that the pending grievance is inarbitrable (Krieger v. Toronto Police Services Board, 2008 HRTO 183 (CanLII)) or the grievance has been held in abeyance or is not being processed in a timely manner (Monck v. Ford Motor Company of Canada, 2009 HRTO 861 (CanLII), Gomez v. Grand River Foods, 2011 HRTO 2106 (CanLII)), or perhaps if the union has an apparent conflict of interest because union officials are among those named as respondents in the application (McCann v. York University, 2012 HRTO 845 (CanLII)).

[9]Sisco v. Dale Brain Injury Services, 2012 HRTO 661 (CanLII).

[10]Lafferty v. Ford Motor Company of Canada, Limited, 2012 HRTO 695 (CanLII); Brooks v. Ottawa-Carleton District School Board, 2012 HRTO 612 (CanLII).

[11]Krieger v. Toronto Police Services Board, 2008 HRTO 183 (CanLII).

[12]Monck v. Ford Motor Company of Canada, 2009 HRTO 861 (CanLII); Gomez v. Grand River Foods, 2011 HRTO 2106 (CanLII).

[13]McCann v. York University, 2012 HRTO 845 (CanLII).

In *Melville v. City of Toronto*,[14] the HRTO rejected the argument that deferral is unfair because the grievor is not formally a party at arbitration and does not control the manner in which the matter goes forward, adding these observations:

> [8] An individual working under a collective agreement has a choice—he or she can choose not to file or proceed with a grievance and to pursue the application at the Tribunal instead. If the applicant chooses the grievance process and what comes with it, including representation by the union and the enforcement of particular rights under the collective agreement, he or she cannot also proceed with a Tribunal application at the same time. Deferral avoids two simultaneous proceedings that may result in conflicting determinations, ensures that the respondent need not be actively defending the same matter in two legal proceedings at the same time, and focuses the Tribunal's limited resources on cases where it is the only process being pursued. In my view, it is consistent with the Tribunal's mandate to interpret its rules in a fair, just and expeditious manner to defer a case when a grievance is ongoing, whether or not that grievance has yet been referred to arbitration. The grievance process is a stage in dispute resolution before the matter is referred to an independent third party, but that does not mean that there is no proceeding ongoing. Fairness supports avoiding the duplication of proceedings.

An application to the HRTO that has been deferred pending the outcome of another legal proceeding may be revived when that other proceeding comes to an end;[15] or, perhaps, if that process has been unreasonably slow or the grievor has withdrawn or attempted to withdraw the grievance entirely[16] or has simply refused to participate or continue participating in the arbitration process.[17]

Accordingly, by the time a dispute reaches an arbitration hearing, it, or some aspect of it, may also be the subject of a pending application to the HRTO that it has deferred pending completion of the arbitration proceedings. This may be so even if none of the issues referred to or raised at arbitration has been framed in human rights terms.

What if the arbitration results in an award that does not deal with the grievor's human rights concerns to the grievor's satisfaction?

---

[14] 2012 HRTO 22 (CanLII).

[15] The request to proceed must be filed within 60 days after the conclusion of the other proceeding: Human Rights Tribunal of Ontario Rules of Procedure.

[16] *Melville*, *supra* note 14, at ¶13.

[17] Crowley v. Liquor Control Board of Ontario, 2010 HRTO 2407 (CanLII).

The Arbitrator as Respondent at the HRTO

Can the grievor pursue an application to the HRTO alleging that the arbitrator breached the Code by deciding as she or he did? It seems clear that the answer is "no," although that does not mean that an arbitrator is immune to complaints that some aspect of the arbitration process breached a grievor's human rights.

The Code requires equal treatment without discrimination[18] in the social areas of "service, goods and facilities," "employment," "occupancy of accommodation," and "membership in any trade union, trade or occupational association or self-governing profession."[19] In some early decisions, the HRTO determined that "the exercise of adjudicative functions by courts and tribunals, particularly the 'content, reasons and result' of adjudicative decisions do not fall within the definition of 'services' in the Code, and are therefore not within the Tribunal's jurisdiction."[20] In response to the argument that arbitration decisions fall within the social area of "employment," the Tribunal has said that even if that is so, "judicial immunity" applies to arbitrators and other statutory tribunals, and shields them from complaints under the Code in respect of their decision making.[21]

In *Hazel v. Ainsworth Engineered*,[22] an arbitrator who had been appointed to adjudicate the applicant's return-to-work grievance was named as a respondent on the basis that by conducting a mediation that resulted in a settlement that allegedly violated the grievor's human rights, the arbitrator had breached the Code. In a preliminary ruling, the Tribunal dismissed the claim against the arbitrator on two grounds. One was that the parties' settlement agreement was not itself a "service" provided by the arbitrator when acting as mediator: "A labour mediator is not personally liable under the Code for the terms of a settlement."[23] The other was that "judicial immunity" applies also to mediators and "extends to protect the mediator from claims arising from the exercise of his

---

[18]That is, discrimination (or harassment) because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy and gender identity), sexual orientation, disability, age (18 and older, 16 and older in occupancy of accommodation), marital status (including same-sex partners), family status, receipt of public assistance (in accommodation only), and record of offences (in employment only).

[19]Human Rights Code, RSO 1990, c H.19, as amended.

[20]Cartier v. Nairn, 2009 HRTO 2008 (CanLII) at ¶10; Hazel v. Ainsworth Engineered, 2009 HRTO 2180 (CanLII) at ¶68.

[21] *Cartier, supra* note 20, at ¶20.

[22]2009 HRTO 2180 (CanLII).

[23] *Id.* at ¶67.

or her functions in assisting the parties in reaching a resolution of the dispute, and in facilitating the settlement discussions."[24] The Tribunal cautioned, however, that with the exception of the content, reasons, and result of decisions, the dispute resolutions processes of courts and tribunals, including arbitrators, are "services" within the meaning of the Code:

> [71] … I do accept that tribunals and courts provide services within the meaning of the Code. I also accept that labour arbitration is a service, though I do not find it necessary in this case to determine precisely who is responsible under the Code for providing any particular element of the service. A labour arbitration is established under the terms of a collective agreement to which the employer and the union are parties. It may be argued that the parties play a role in providing the service. For the purposes of this decision, I will assume the arbitrator or mediator has at least some responsibility in providing the service, without discrimination, in accordance with the Code.
>
> [72]The "service" is the dispute resolution process. Where an individual has a dispute, and pursuant to a statute or contract, that dispute may be referred to dispute resolution, the process is a service within the meaning of the Code. The requirement in section 1 of the Code is that every person should have a right of equal access to the dispute resolution process, and be able to participate in an effective, meaningful way, without discrimination and regardless of a proscribed ground.
>
> [73] In relation to disability, the obligation placed on the service provider may include, for example, the requirement to provide an accessible built environment or a hearing or mediation facility which is physically accessible, subject to the defence of undue hardship. The right to equality in the provision of services may also mean accommodation in the way materials (including decisions) are provided, and the proceeding is conducted, so as to enable a party, counsel or witness to effectively participate in the hearing or mediation process.
>
> …
>
> [75] The applicant has also alleged that all parties took advantage of his vulnerability, and forced him to accept an agreement to forfeit his rights. In this regard, I understand his claim to be that the mediation was conducted in a manner which did not accommodate his disability-related needs.
>
> [76] … While I am not determining what would be required to establish a claim of a failure to accommodate in any particular circumstance, in this case, there was nothing presented to the Arbitrator which supports a finding that he … failed to respond appropriately or to consider accommodation. From [the Arbitrator's] perspective, he

[24] *Id.* at ¶96.

> was dealing with a grievor who was represented by experienced counsel, and who claimed he was fully fit to return to work without restrictions. There was no accommodation request raised prior to, or at the mediation. I cannot find, even accepting [the Arbitrator] had a duty under section 1 of the Code, that [the Arbitrator] violated the applicant's rights to equal treatment in relation to services on the ground of disability.

In short, although complaints about the outcome of a dispute resolution process do not fall within the Tribunal's jurisdiction, complaints about some aspects of the process may, unless judicial immunity applies. The Tribunal was reluctant to find that this immunity applied to all decisions and actions of arbitrators or mediators, noting that

> … a labour arbitrator, in addition to adjudicating or mediating, generally performs a number of administrative tasks associated with providing the service, such as setting up hearings and sending out notices. In a tribunal or court, such functions are generally carried out by the institution, which arguably would have no claim to judicial or adjudicative immunity.
>
> [94] Courts and other public adjudicative bodies, whether because of obligations under the Code or otherwise, have recognized the necessity of ensuring that their facilities and processes are accessible and barrier-free. They have engaged in a number of initiatives, such as consultations, the development and publication of accessibility and accommodation policies, and have required training for staff and adjudicators. As institutional service providers, they have taken steps to ensure that parties, counsel and witnesses can fully and effectively participate in the dispute resolution processes, regardless of disability. Applying the principle of immunity to individual adjudicators in this context does not completely negate responsibility and accountability for accessible service provisions under the Code.[25]

This distinction is illustrated by an interim decision in *Guydos v. Workplace Safety Insurance Appeals Tribunal*.[26] The respondent is a statutory appeals tribunal that adjudicates disputes between injured workers and the Workplace Safety and Insurance Board, the statutory agency that provides workers' compensation benefits, over the benefits such workers are entitled to be paid by that agency. The application in *Guydos* alleged that the appeals tribunal had discriminated against her on the basis of disability, sex, and family status in the provision of goods, services, and facilities. The respondent appeals tribunal asked that the application be

[25] *Id.* at ¶93-94.
[26] 2011 HRTO 479 (CanLII).

dismissed on the basis that, as the HRTO had previously found, judicial immunity applied to its decision making. Most of the discrimination alleged by the applicant related to the respondent tribunal's decision making, and the HRTO did dismiss the application in those respects. It found that one allegation did fall within its jurisdiction, however: an allegation that the respondent tribunal "did not offer to pay for child care in order for the applicant to attend the hearing." Without making any finding about whether the respondent tribunal's failure to provide funding for child care for the purposes of attending a hearing violated the Code, the HRTO concluded that it "relates to a benefit or privilege and is a service within the meaning of section 1 of the Code." At the time of writing there had been no decision on the merits in this application, which had been deferred pending the result of a reconsideration hearing by the respondent tribunal.[27]

It remains to be seen what aspects of the arbitration "service" fall outside the protection of "judicial immunity," and how responsibility for Code compliance in respect of those aspects will be apportioned by and among arbitrators and the parties who engage them.

Relitigation of Issues Decided at Arbitration

Can a disappointed grievor re-litigate issues already decided at arbitration in an application to the HRTO?

An early decision of the Tribunal found that its power under section 45.1 of the Code to dismiss an application if "another proceeding has appropriately dealt with the substance of the application" did not require that it act like an appellate court or satisfy itself that it would have reached the same conclusion as had been reached in the other proceeding.[28] Some subsequent HRTO decisions, however, held that determining whether another proceeding had "appropriately dealt with" the substance of an application involved more than ascertaining whether the other decision maker had considered and decided the issue raised by the application in a process that complied with the rules of natural justice. These decisions held that the HRTO would have to examine the reasons given by the other tribunal, to determine whether "the

[27]As of March 2012, the reconsideration decision was still pending and the HRTO refused the applicant's request to reactivate the application. Guydos v. Workplace Safety and Insurance Appeals Tribunal, 2012 HRTO 529 (CanLII).

[28]Campbell v. Toronto District School Board, 2008 HRTO 62 (CanLII).

kind of analysis contemplated by the Code, and central to the Tribunal's expertise, has been undertaken where a Code issue has been raised."[29] This view was not shared by all members of the Tribunal, however,[30] and it was abandoned in the wake of the October 27, 2011, decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*.[31]

In *Figliola*, the Supreme Court of Canada considered the meaning of subsection 27(1)(f) of the British Columbia Human Rights Code, which similarly gives the British Columbia Human Rights Tribunal the power to dismiss a complaint if the substance of it has been "appropriately dealt with" in another proceeding. In that case, a decision maker under workers' compensation legislation had considered and rejected injured workers' arguments that an otherwise applicable policy of the British Columbia Workers Compensation Board was contrary to the British Columbia Human Rights Code. The injured workers could have applied for judicial review of that decision; instead, they raised the same issue in proceedings before the British Columbia Human Rights Tribunal. That tribunal rejected the respondent Board's argument that the complaints should be dismissed because their substance had been appropriately dealt with by the first decision maker. That decision was then the subject of judicial review proceedings that eventually reached the Supreme Court of Canada.

The Supreme Court was unanimous that the decision of the British Columbia Human Rights Tribunal was unreasonable because the tribunal, in determining whether the issue before it had been "appropriately dealt with" in the other proceeding, had acted on irrelevant considerations and failed to consider relevant ones. The Court was split, however, on what discretion the "appropriately dealt with" provision gave the Tribunal to permit re-litigation before it of an issue already determined by another tribunal with jurisdiction to decide it.

The majority held that the provision in question embraced the principles that underlie common law and equitable doctrines of issue estoppel, collateral attack, and abuse of process—finality, avoidance of the multiplicity of proceedings, and protection of the integrity of the administration of justice—without necessarily importing all the technical requirements of those doctrines:

---

[29]Barker v. Service Employees International Union, 2010 HRTO 1921 (CanLII).
[30]*See* Cunningham v. CUPE 4400, 2011 HRTO 658 (CanLII) at ¶42.
[31]2011 SCC 52 (CanLII), [2011] 3 SCR 422.

> [37] 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.
>
> [38] 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.

The majority stated that it was wrong for the Tribunal to assess whether it was comfortable with either the process or the result in the other proceeding, holding that that was more properly the function of the judicial review process. It concluded that a proper application of the statutory provision could only have resulted in dismissal in the circumstances and, in effect, quashed the Tribunal decision without referring the matter back to the Tribunal.

The minority in *Figliola* found that the "appropriately dealt with" provision in question gave the Tribunal a broader discretion than that contemplated by the majority. In its view, application of the discretion involved maintaining a balance between finality and fairness, as a court does in applying the equitable doctrine of issue estoppel. Accordingly, when the substance of a complaint had been addressed elsewhere, the Tribunal would then have to decide whether there was something in the circumstances that made it inappropriate to apply the general principle that the earlier resolution of the matter should be final. The minority judgment identified some considerations that might be pertinent to that question, the most important of which was whether giving the prior decision final and binding effect would work an injus-

tice: "If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits."[32] Although agreeing that the decision under review should be quashed, the minority would have remitted the matter to the Tribunal to be determined in accordance with the principles it had identified.

The HRTO subsequently confirmed that its "[p]revious 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*"[33] and 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."[34]

It seems, then, that if one of the issues raised by a union at arbitration is that alleged conduct by or on behalf of the employer amounted to a breach of a grievor's Code rights, and the arbitrator decides that issue, the HRTO will not permit the grievor to re-litigate it.

What if a grievor wants her or his union to raise at arbitration only the non-Code issues arising from a set of alleged facts, so she or he can later pursue the Code implications of the same alleged facts at the HRTO?

In *Paterno v. Salvation Army*,[35] the applications to the HRTO alleged that in disciplining and discharging the applicant, his employer had discriminated against him contrary to the Code. The discipline and discharge had been the subject of grievance arbitration, at which the union had only alleged that those actions breached the "just cause" provisions of the collective agreement, and made no reference to Code rights. The union proceeded in that way because the grievor had not wanted his Code issues decided in the arbitration, preferring to pursue them separately at the tribunal. The employer asked the arbitrator to consider those issues, however. The arbitrator found just cause for discipline, modified the penalty of discharge, and expressly found that the employer had not violated the Code.

---

[32] *Id.* at ¶95.
[33] Paterno v. Salvation Army, 2011 HRTO 2298 (CanLII) at ¶24.
[34] Gilinsky v. Peel District School Board, 2011 HRTO 2024 (CanLII) at ¶32.
[35] 2011 HRTO 2298 (CanLII).

The Tribunal then considered whether the applications should be dismissed under section 45.1 of the Code. The applicant argued that he had the right to choose the forum in which his human rights issues were determined and that he was entitled to pursue a just cause argument in arbitration and then a Code argument at the Tribunal. He took the position that section 45.1 applied only if it was the applicant who had raised the Code issues in the other proceeding.

The Tribunal rejected these arguments, observing that it did not matter who put the Code issues before the arbitrator. Referring to *Figliola*, the Tribunal said that it would not assess whether the arbitrator's conclusions were correct or whether the arbitration process that led to those conclusions was the same as the process by which the Tribunal would have addressed the issues. Except as to allegations unrelated to the disciple and discharge that had been the subject of the arbitration, the Tribunal dismissed the applications on the basis that their substance had been dealt with appropriately by the arbitrator.

The Tribunal stated that the issue of just cause could not be separated from Code issues arising out of the same circumstances and seemed to say that the result would have been the same even if the Code issues had not been raised by the employer and decided by the arbitrator:

> [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.

(emphasis added)

In *Cunningham v. CUPE 4400*,[36] one of the applications before the Tribunal alleged that the applicant's union and several of its officials had breached her Code rights. The allegations on which this claim was based also had been made in a complaint to the Ontario Labour Relations Board ("the OLRB") that the union had breached its statutory duty of fair representation ("DFR"). It appeared that at some point in those proceedings the applicant had chosen not to pursue certain of them, and the OLRB's decision had not dealt with the issues she had not pursued. The union asked the HRTO to dismiss the application against it on the basis that the OLRB had appropriately dealt with its substance. The issue became "whether the substance of this Code Application can be said to have been appropriately dealt with by the OLRB where at least some of the applicant's claims were not ultimately pursued to a decision."[37]

In that case, the Tribunal found that "section 45.1 is designed at least in part to capture the legal rules which prohibit re-litigation of issues" and that "the attempt by the applicant to re-litigate before the Tribunal issues that were raised in the DFR complaint and could have been pressed by her to a decision constitute an abuse of process."[38] After analysing the doctrine of abuse of process and other legal rules that prohibit re-litigation of issues, the Tribunal concluded:

> [55] The essential nature of the union Application is the allegations that, because the union respondents perceived her to be a person with a disability, they treated the applicant differently in their representation of her, including perhaps not filing grievances on her behalf. This is essentially the same case as was launched and pursued to a decision in the DFR proceeding.
>
> [56] What effect does the narrowing of the scope of the DFR have on the result? I agree with the respondent union's submissions on this point. The applicant chose to proceed with the DFR. The entire substance of the union Application was raised in that proceeding. The applicant made choices about what she ultimately pressed before the

[36] 2011 HRTO 658 (CanLII).
[37] *Id.* at ¶34.
[38] *Id.* at ¶38.

> OLRB for decision. I see no reason why an applicant, having chosen another forum in which to raise the same case and who then chooses to narrow its scope, should be permitted to bring the case again to the Tribunal.
>
> [57] In any event a party is normally expected to bring their entire case forward and not split it up into several pieces, adding to the cost and uncertainties associated with duplicative litigation. Such a scenario engages the underlying policy rationales for the rules against relitigation articulated by the courts above: the potential for inconsistent results, prolonged uncertainty for the parties, as well as the drain on institutional and individual resources resulting from this re-litigation of the same case. . . . That is not to say that there are not circumstances where different considerations might apply. I need not decide what might be an appropriate circumstance for splitting up a case; however, one might imagine it appropriate not to apply s. 45.1 and dismiss an application where the parties to the other proceeding expressly acknowledged that not all of the issues were to be determined there, or where the nature of the underlying issues does not afford the applicant a real choice of forum.

If the Tribunal will preclude litigation before it of issues that were raised by the applicant in another adjudicative proceeding but not pursued by the applicant to decision, it seems consistent that (as *Paterno* seems to suggest) it would preclude litigation of issues that could have been but were not raised by the applicant in another adjudicative proceeding that arose out of the same circumstances. Of course, applying this to grievance arbitration involves the complication (to which the Tribunal referred in paragraph 29 of the *Paterno* decision) that it is the union that decides whether and how issues are presented at arbitration.

Decisions of the Tribunal have considered whether an application should be dismissed under section 45.1 if another tribunal had previously rejected the factual allegations on which application was based in proceedings in which the applicant participated but did not expressly raise human rights issues.

In *Qiu v. Neilson*,[39] the applicant claimed that police officers had violated his human rights in the course of an incident in which he said they had assaulted him. The applicant had earlier complained about that incident to the Ontario Civilian Commission on Police Services, which caused the complaint to be investigated and found that there was insufficient evidence to substantiate it. The Tribunal found that the Commission's investigation and review was a "proceeding" for purposes of section 45.1. Acknow-

[39]2009 HRTO 2187 (CanLII).

ledging that the proceeding was one in which the applicant had not expressly asserted his rights under the Code, it nevertheless held that because factual findings made in the proceeding deprived the Code application of its factual underpinning, that proceeding had appropriately dealt with the substance of the application before the Tribunal.

This approach was taken in an arbitration context in *Violo v. Maple Leaf Sports & Entertainment Ltd.*[40] There, the applicant alleged that by terminating him for excessive absences his employer had discriminated against him by failing to consider that his absences arose out of surgery-related illness and that his age prevented him from recovering post-surgery as quickly as a younger person. The termination had been the subject of grievance arbitration, in which the focus had been on a collective agreement provision that an employee could be deemed terminated if the employee was "absent for more than (10) percent of his scheduled working days in a year, subject to Articles 13.01 and 14.01 or serious illness, bereavement." Articles 13.01 and 14.01 referred to types of leave that were not included in the calculation of the absence percentage, such as pregnancy leave and parental leave. The arbitrator had found that the employer had not counted the grievor's absence for surgery but had counted some pre- and post-surgery absences that the grievor claimed were related to the surgery and for which he had provided doctors' notes with which the employer had taken issue. The arbitrator had also found that even if those absences were excluded from the count, sufficient absences remained to trigger and justify the deemed termination. Although the Code issues had not been put before the arbitrator, the Tribunal found that the arbitrator's decision had appropriately dealt with the substance of the application before it:

> [40] As in *Qiu*, it does not appear that the Union advanced a claim of discrimination at the arbitration. In arriving at her determinations, the arbitrator did not consider or apply the *Code*. There is no doubt that she had the jurisdiction to consider all the matters raised by this Application, including whether the termination of the applicant was contrary to the *Code*. Regardless of whether the Code was explicitly considered, the arbitrator made findings about the factual underpinnings which form a necessary component of the applicant's ability to establish discrimination under the *Code*. In finding that absences for which there was no evidence of a disability-related need supported the

[40] 2012 HRTO 641 (CanLII).

> employer's decision to terminate, the arbitration decision is dispositive of the human rights claim made before me.
>
> …
>
> [42] In all the circumstances, I find that the arbitration proceeding has appropriately dealt with the substance of this Application.

What if another tribunal proceeding in which the applicant participated but did not raise Code issues concerned some of the facts on which her or his application to the Tribunal is based, but did not result in findings inconsistent with the factual underpinnings of the application?

In *Shi v. Holcim (Canada)*,[41] Ms. Shi's application to the Tribunal alleged "discrimination on the grounds of family status, marital status and reprisal." She alleged that the respondent, her former employer, had insisted that she work overtime despite her having said she could not do so "because of her family and marital status," and had terminated her employment as reprisal for having raised those Code concerns. She also had filed a complaint under the Ontario Employment Standards Act[42] ("the ESA") in which she alleged that the termination constituted reprisal for asserting her rights under the ESA with respect to overtime, contrary to a provision of that Act that specifically prohibited such reprisal. That complaint eventually reached the OLRB on review of an employment standards officer's refusal to issue an order for compensation. The OLRB determined that the termination had been a reprisal prohibited by the ESA and remitted the issue of remedy to the parties.[43] In those circumstances, the respondent in the HRTO proceedings then asked that the Tribunal dismiss those proceedings on the basis that their substance had been appropriately dealt with by the OLRB.

The issue before the OLRB had been whether Ms. Shi's termination was improper by reason of its having been a response to her having asserted her rights under the ESA, which included the right to refuse excessive overtime. No Code issues were raised. The issue in the application to the HRTO was whether by insisting on her working overtime the respondent had discriminated against her on the basis of family status and whether the subsequent ter-

---

[41] 2012 HRTO 416 (CanLII).
[42] Employment Standards Act, 2000, SO 2000, c 41.
[43] Shi v. Holcim (Canada), Inc., 2011 CanLII 52904 (ON LRB).

mination was a reprisal for her having asserted rights under the Code. Nothing in the OLRB's decision seems inconsistent with that allegation. Yet the Tribunal determined that the OLRB proceedings had appropriately dealt with the substance of the application before it:

> [22] Applying the principles of Figliola to the facts of this case, I find that the Application should be dismissed pursuant to section 45.1. In both the OLRB proceedings and the Application, the applicant raised concerns about the amount of overtime, where she would work that overtime and alleged that she was terminated for raising these concerns. It is clear from both the August 2011 OLRB decision and the November 2011 OLRB decision that the same facts and same issues were at play in those proceedings as raised in the Application. The OLRB heard evidence and rendered decisions which, in my view, appropriately dealt with the substance of the issues in this Application.

It remains to be seen whether this is the approach the Tribunal will take whenever an application before it is based on circumstances addressed by another tribunal, when the other tribunal's decision was not asked to and did not address the Code issues raised by the application or make findings of fact that undermine the application's factual foundation.

It also remains to be seen what the Tribunal will do under section 45.1 when, for example, an application's substance has been addressed and dismissed in a grievance arbitration but the applicant's union refuses the applicant's request that it apply for judicial review of the arbitrator's decision. The complainants in *Figliola* could have applied for judicial review of the decision they attempted to attack collaterally, but grievors generally do not have standing to apply for judicial review of an arbitrator's award.[44] Would the Tribunal permit re-litigation of the Code issues in a timely application by the grievor on the basis that her or his union denied access to that "vertical line of review?" This issue is complicated, of course, by the existence of the OLRB's exclusive jurisdiction to assess whether a union has represented a grievor in a manner that is not arbitrary, discriminatory, or in bad faith.[45] It is further complicated by Ontario court jurisprudence that a grievor will be allowed to apply for judicial review "where the

---

[44] Noël v. Société d'énergie de la Baie James, 2001 SCC 39 (CanLII), [2001] 2 SCR 207.
[45] *See, e.g.*, Zahoransky v. Hren, 1980 CanLII 871 (ON LRB).

union's representation of the employee has been so deficient that the employee should be given a right to pursue judicial review."[46]

No doubt other such issues will emerge as the HRTO assesses its role under section 45.1 in circumstances that arise in future proceedings. The complexity of the problems created by the concurrent jurisdiction of labour arbitrators and the HRTO over Code issues is perhaps an inevitable consequence of the tension between collective and individual rights and the allocation of workplace issues among different tribunals.

II. The Interplay of Arbitration and Human Rights Tribunals in Canada

Canadian arbitrators have authority to apply federal or provincial human rights legislation in grievance arbitration cases. For example, a union may allege discrimination on the grounds of disability and seek an award ordering the employer to accommodate the grievor in the workplace. Human rights tribunals also have authority over workplace human rights violations. In this session, the panel discussed questions that arise when an employee loses at arbitration and then takes the case to a human rights tribunal. Is it an abuse of process to allow re-litigation of the same case? On what grounds should a human rights tribunal reverse a decision by a labour arbitrator? The panel reviewed decisions of the Human Rights Tribunal of Ontario and other tribunals that have considered whether arbitrators have "appropriately" dealt with the substance of the human rights dispute. The panel discussed the recent Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v. Figliola*,[47] which gives precedence to the principle of finality of decision making in human rights disputes. The effect of *Figliola* on subsequent court and tribunal cases was discussed. The panel considered the relative merits of having human rights disputes decided by labour arbitrators or human rights tribunals.

---

[46]Yee v. Trent University et al. (2010), 195 L.A.C. (4th) 97, 320 D.L.R. (4th) 746 (Ont. Div. Ct.) at ¶8 (a decision that makes no reference to the jurisdiction of the OLRB).

[47]2011 SCC 52 (CanLII).