HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Frank Nyitray

Applicant

-and-

Ryerson University Students' Union and Canadian Federation of Students

Respondents

INTERIM DECISION

Adjudicator: Douglas Sanderson

Date: December 13, 2012

File Number: 2010-05563-I

Citation: 2012 HRTO 2336

Indexed as: **Nyitray v. Ryerson University Students' Union**

APPEARANCES

Frank Nyitray, Applicant	)	Self-represented
Ryerson University Students' Union, Canadian Federation of Students, Denise Hammond and Toby Whitfield, Respondents	)	Michael Richards and Leslie Frattolin, Counsel

[1] This is an Application filed on April 26, 2012, under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment and with respect to goods, services and facilities because of disability, age and reprisal or threat of reprisal.

The Application

[2] The applicant is a student at Ryerson University and was an employee of the organizational respondent, Ryerson Students' Union ("RSU") between October 2008 and April 14, 2009, when the RSU terminated the applicant's employment contract. The applicant identifies himself as a person with a disability and alleges that, on several occasions during his employment, the respondents subjected him to harassment because of his disability, failed to accommodate his disability and created a poisoned work environment. The applicant alleges that he requested a meeting to address his concerns about this behaviour on several occasions and a meeting eventually occurred on June 9, 2009. However, the applicant alleges that the individual respondents stated during this meeting that "age and experience are irrelevant".

[3] In June 2009, the applicant also alleges that he was removed from the board of directors of the Continuing Education Students' Association of Ryerson ("CESAR") because he raised concerns regarding accessibility issues. The applicant states that in June of 2009 he applied for various summer positions with the RSU, but received no replies to his Applications. On June 21, 2009, the applicant asked the individual respondent Hammond about an accessible float for the Pride Week, but no accessible float was provided. Also in August 2009 and again in September 2009 the applicant stated that he requested, on behalf of a friend, that the RSU provide an accessible bus for the RSU Parade and Picnic, but received no response and no accessible bus was provided for the event.

[4] In August and September 2009, the applicant applied for three advertised "Rye Access" positions, but received no reply. The applicant asserts he was denied these

employment opportunities because he challenged RSU policies and the individual respondents did not want him hired, which he characterized as a reprisal.

[5] The Application also describes incidents in which the applicant was denied access to RSU events and premises in November and December 2009 and in January, February, March and July 2010.

Related Legal Proceedings

[6] On May 27, 2009 the applicant filed a claim with the Ministry of Labour ("MOL"), pursuant to the *Employment Standards Act, 2000*, R.S.O. 2000, c. 41, claiming unpaid wages, public holiday pay, termination pay and reprisal. An Employment Standards Officer ("ESO") conducted a fact finding meeting to consider the parties' positions and evidence. The ESO concluded that the applicant was entitled to termination pay, but found no other violation of the *Employment Standards Act, 2000*.

[7] On November 26, 2009, the applicant filed a claim in the Ontario Small Claims Court against each of the individual respondents, court file numbers SC-09-92658-00 (against Hammond) and SC-09-92657-00 (against Whitfield) ("the 2009 Small Claims Actions"). Both claims alleged that the individual respondents defamed the applicant and wrongfully terminated his employment contract. Both claims also alleged that the individual respondent subjected the applicant to harassment, bullying, discrimination and intimidation. The claim against Whitfield includes allegations that he and Hammond prevented the applicant from obtaining new employment with the RSU.

[8] On March 12, 2009, the applicant and the individual respondents settled both 2009 Small Claims Actions and the applicant executed comprehensive releases in favour of the individual respondents.

[9] On January 28, 2011 and February 8, 2011, the applicant commenced five separate actions in the Superior Court of Justice, against the RSU and four other defendants. The applicant amended these claims on March 27, 2011 and on June 26,

2011. In the amended claim against the RSU, the applicant alleged that RSU engaged in defamation and harassment and asserted that RSU banned him from “all spaces, events and facilities”. The RSU brought a motion to strike portions of the amended claim and the applicant brought a cross-motion to transfer the amended claim to Small Claims Court with leave to file fresh as amended claims. The motions were heard on December 20, 2011 and the Court ordered the transfer of the amended claim to Small Claims Court with leave to file fresh as amended claims.

[10] On April 17, 2012, the applicant commenced a fresh as amended Small Claims Court Action against the RSU, court file number SC-12-005855-00 (“the transferred claim”). The applicant also commenced fresh as amended small court claims against four other defendants. Amongst other things, the applicant alleges that the RSU had no right to ban him and defamed him through its communication of the decision to ban the applicant from RSU premises.

[11] The RSU filed a Statement of Defense to the transferred claim on May 7, 2012. In the Statement of Defense, the RSU explained its decision to ban the applicant from its premises. The RSU asserted that RSU's communications regarding the decision were not defamatory because, amongst other reasons, such communications were accurate and necessary.

[12] On or about April 18, 2011, the applicant filed claims in Small Claims Court, court file numbers SC-11-117036-00 and SC-11-117034-00, against Hammond and Whitfield, respectively (“the contravention claims”). The applicant alleged the individual respondents breached the terms of the settlements of the 2009 Small Claims Actions when they disclosed the terms of settlement and release to the Tribunal and provided copies of the Statements of Claim in those matters to the Tribunal in support of the respondents’ position that this Application was barred by the releases executed by the applicant. On April 18, 2012, the applicant amended the contravention claims with leave of the Court to remove references to the Application and the Tribunal and to add allegations that the individual respondents breached the confidentiality terms of the

settlements by referring to the settlement in Court and providing copies of the settlements to the president of the RSU.

Preliminary Issues

[13] Each of the respondents filed responses on May 4, 2011, in which they raised several preliminary issues. In light of these preliminary issues, the Tribunal issued an Interim Decision, 2012 HRTO 625, ordering a one-day preliminary hearing in person to address the following issues.

- Whether some parts of the Application are untimely, pursuant to section 34(1) of the *Code*;

- Whether Hammond and Whitfield should be removed as individual respondents;

- Whether the Tribunal should dismiss or defer the Application, pursuant to sections 34(11), 45.1 or 45 in light of the civil actions and MOL complaint initiated by the applicant; and,

- Whether the releases the applicant executed in favour of Hammond and Whitfield to resolve the 2009 Small Claims Actions bar the Application as against the individual respondents or whether allowing the Application to proceed would amount to an abuse of process.

The Tribunal directed the respondents to proceed first regarding whether the Application should be dismissed or deferred, pursuant to sections 34(11), 45 and 45.1 of the *Code* and whether the releases executed by the applicant bar this Application. The Tribunal also directed the respondents to proceed first regarding whether the individual respondents should continue as individual respondents to the Application. The Tribunal directed the applicant to proceed first regarding the timeliness issue and directed the parties to be prepared to address whether the delay was incurred in good faith and, if so, whether the delay results in substantial prejudice to the respondents. The Tribunal also directed the parties to be prepared to make submissions regarding whether the releases render the Application an abuse of process. The hearing was held on July 23, 2012.

Pertinent Statutory Provisions

[14] Section 34(1) and (2) of the *Code* state as follows:

> 34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> > (a) within one year after the incident to which the application relates; or
> >
> > (b) if there was a series of incidents, within one year after the last incident in the series.
>
> (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

Section 34(11) of the *Code* states as follows:

> A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,
>
> > (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
> >
> > (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

Section 45 of the *Code* states as follows:

> The Tribunal may defer an application in accordance with the Tribunal rules.

Section 45.1 of the *Code* states as follows:

> 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.

Submissions

The Respondents

Section 45.1

[15] The respondents noted that this Application is one of several proceedings the applicant initiated against the respondents and others. The respondents submitted that the Application raises four issues: (1) harassment in employment, (2) the applicant's attempts at reemployment with RSU, (3) the provision of services (i.e., regarding the Pride Parade and RSU Parade and Picnic), and (4) the decision to ban the applicant from RSU premises.

[16] The respondents submitted that the complaint to the MOL and Small Claims Court Actions were proceedings that appropriately dealt with the subject matter of the Application, for the purposes of section 45.1 of the *Code*. The respondents submitted that that MOL claim involved three issues: overtime, termination pay and reprisal, and the ESO found the applicant was entitled to overtime pay. The respondents submitted that the applicant identified issues related to overtime and reprisal in the MOL claim, but did not state that the termination of his employment was related to his disability. The respondents submitted that to the extent issues related to the termination of the applicant's employment are before the Tribunal, they were dealt with by the ESO's investigation. The respondents argued that the ESO's investigation amounted to a proceeding, as the officer held a meeting in which the parties, including the applicant, could present their evidence and make submissions. The respondents therefore submitted that the applicant should not be allowed to re-litigate these issues.

[17] The respondents submitted that the 2009 Small Claims Court Actions against Hammond and Whitfield alleged harassment in employment, wrongful termination of employment and reprisal regarding the respondents' refusal to consider him for job opportunities. The respondents noted that the applicant identified himself as a person with a disability. The respondents submitted that the Application contained the same allegations regarding harassment and the denial of further employment opportunities by

the respondents. The respondents noted that the applicant framed his allegations in the 2009 Small Claims Actions in terms of defamation. However the respondents submitted that this characterization did not prevent the application of section 45.1 because the facts underlying the Application and the 2009 Small Claims Actions are the same. The respondents submitted that the applicant participated in mediation with the individual respondents and settled with both of them only to file the Application about a month later. The respondents submitted that the 2009 Small Claims Actions amounted to a proceeding that they appropriately dealt with the substance of the Application because the issues were the same and the applicant knew the case he had to meet and had opportunity to do so.

Section 34(11) and Deferral

[18] The respondents submitted that the applicant's claims in the Superior Court and the transferred claims all contain the applicant's allegations that the respondents inappropriately banned him from the RSU's premises and subjected him to harassment, which allegations are also made in the Application. Accordingly, the respondents submitted that these aspects of the Application are barred pursuant to section 34(11) of the *Code*. The respondents submitted that the Tribunal's jurisprudence has established that specifically pleading section 46.1 in a civil claim is not needed for section 34(11) to apply. The respondents submitted that section 34(11) is intended to avoid duplication in litigation. In that regard, the respondents submitted that if the Application and transferred claim proceed concurrently, then both the Tribunal and the Small Claims Court shall have to determine whether the respondents were entitled to ban the applicant from RSU premises. The respondents submitted that allowing the matters to proceed concurrently creates a risk of inconsistent findings of fact and of double recovery, since the applicant seeks damages in two forums regarding the same incidents. In the alternative, the respondents submitted that the Tribunal should defer the Application until the conclusion of the transferred claim.

The Releases

[19] The respondents submitted that the releases the applicant executed in favour of the individual respondents in settlement of the 2009 Small Claims Actions bar the Application and make the Application an abuse of process. The respondents noted that the releases contained comprehensive release language in favour of the individual respondents and also contain language indicating that the applicant would not make claims against third parties who might claim contribution or indemnity from the individual respondents. The respondents submitted that the RSU would have been vicariously liable for the individual respondents' actions and could seek indemnity from them. Accordingly, the respondents submitted that the releases bar the Application.

[20] In any event, the respondents submitted this Application amounts to an abuse of process. The respondents contended that applicant settled with individual respondents then filed the Application against the respondents regarding the same incidents. The respondents argued that, accordingly, the applicant has split his case, which sections 45.1 and 34(11) are intended to prevent and constitutes an abuse of process.

Individual Respondents

[21] The respondents submitted that the Application should be dismissed as against the individual respondents in light of the release the applicant executed in favour of them as part of the settlement of the 2009 Small Claims Actions. In the alternative, the respondents referred to the factors the Tribunal considers when determining whether individual respondents should be removed, e.g., *Persaud v. Toronto District School Board*, 2008 HRTO 31 at paragraph 5. The respondents submitted that there is a corporate respondent, the RSU, which accepts vicarious responsibility for the individual respondents. The respondents submitted that there is no question of the RSU's ability to respond to the Application or effect any remedy the Tribunal may order. The respondents acknowledged that Whitfield is no longer an employee of the RSU, but stated that he remains employed by the Canadian Federation of Students ("CFS"). The respondents submitted that there is no compelling reason to continue the Application

against the individual respondents and that the applicant would suffer no prejudice if the Tribunal removes individual respondents.

The Applicant

Section 45.1

[22] The applicant submitted that the MOL claim was irrelevant to the Application. The applicant argued that the MOL complaint dealt with issues such as termination pay and overtime and did not allege any breach of the *Code*.

[23] The applicant submitted that the 2009 Small Claims Actions involved claims of libel and slander, not *Code* violations. The applicant acknowledged that he settled these claims with the respective individual respondents, but noted that the organizational respondents were not party to the settlements. The applicant submitted that the confidentiality provision in the releases binds all parties and he appeared to suggest that the respondents could not rely upon the releases as a result. The applicant submitted that the releases estop any further action regarding the allegations set out in the 2009 Small Claims Actions, but not regarding later, unconnected, incidents.

Section 34(11)

[24] The applicant submitted that his claims in Superior Court contained no reference to the Application or to *Code* violations. In any event, these actions were discontinued with costs against the applicant. The applicant also noted that some of his Superior Court claims were against parties not involved in the Application; therefore, the applicant wondered why they would be relevant.

[25] The applicant submitted that the claims he filed in Small Claims Court in 2012 alleged breaches of the settlement of the 2009 Small Claims Actions only, and made no reference to the *Code*.

Individual Respondents

[26] The applicant submitted that the individual respondents held managerial positions. Accordingly, they should be held to a higher standard and should not be able to hide behind the "corporate veil". The applicant submitted that the individual respondents engaged in "rogue" practices of their own accord, which raises a question of the RSU's deemed or vicarious liability for their conduct. In terms of the organizational respondents' ability to respond to or remedy the alleged *Code* infringements, the applicant submitted that the organizational respondent declined to address the applicant's concerns when he was employed by the RSU and, of course, the applicant is no longer an employee. The applicant submitted that Hammond no longer holds a managerial position with the organizational respondent and Whitfield is no longer employed by the RSU. Consequently, the applicant submitted that the RSU would not be able to adequately remedy the alleged breaches of the *Code*.

Delay

The Applicant

[27] The applicant submitted that there has been no delay in filing the Application. In the alternative, the applicant submitted that any delay was incurred in good faith and the respondents will suffer no prejudice if the Application proceeds. The applicant submitted that the RSU and the individual respondents terminated his employment on or about April 14, 2009 and the applicant filed the Application on April 22, 2010. Therefore, the applicant argued that there had been no delay. The applicant argued that the incidents occurring more than one year prior to the Application filing date are part of a series of incidents of which the last incident occurred within one year of the filing date. In that regard, the applicant pointed to his requests between April 16 and April 30, 2009 to meet with Hammond and Whitfield to discuss the manner in which they treated the applicant and other coworkers, but was ignored. In particular, the applicant pointed to an incident on April 16, 2009, when the applicant requested, by e-mail, a meeting with Whitfield to discuss how Hammond was treating him. The applicant stated that Whitfield asked him to provide his concerns by e-mail. The applicant replied that verbal

communication is best for him because of his communication-related disability, but Whitfield ignored this request. The applicant stated that any delay was incurred in good faith because he made several attempts after the termination of his employment to discuss his concerns with the RSU, but the RSU refused to meet with him until June 2009. The applicant also states that he sent e-mail messages to the CFS to complain about the discrimination he faced at the RSU, but never received a response. The applicant submitted that because the CFS did not respond to him there is no "start date" for the limitations period. The applicant also submitted that his academic commitments prevented him from filing the Application sooner and that he made several attempts to contact the Human Rights Legal Support Centre ("the Centre") for advice, but did not receive timely replies.

The Respondents

[28] The respondents noted that April 26, 2010 was the filing date for the Application. The respondents submitted that the RSU employed the applicant between October 2008 and April 14, 2009; therefore, all of his allegations regarding his employment with RSU are untimely and the respondents submitted that the Tribunal's jurisprudence requires more than an absence of "bad faith" and puts a fairly high onus on an applicant to provide a reasonable explanation for delay in filing an application.

[29] The respondents submitted that the applicant did not provide a good faith explanation for the delay in filing his Application and noted that the applicant would have had to file an Application by October 2009 for all of his employment-related claims to be timely. The applicant stated that he tried to meet with the RSU. However, the respondents submitted that, according to the Application, RSU personnel met with the applicant on April 16, 2009 and again on June 9, 2009. The respondents argued that the applicant provided no explanation why he could not file an Application after June 2009 and prior to October 2009. The respondents noted that the applicant also stated that he complained to the CFS about discriminatory conduct at the RSU, but never heard from it. The respondents noted that none of the employment-related allegations was attributed to the CFS.

[30] The respondents noted that the applicant is litigious and was able to file a complaint to the MOL within the six-month time limit prescribed in the *Employment Standards Act, 2000* and also issued civil claims within the limitation periods set out in the *Limitations Act*. The respondents submitted that the applicant is aware of his rights and has been diligent in pursuing them in other forums within the prescribed limitations periods. Accordingly, the respondents contended that the applicant could have filed the Application on time had he been prudent. The respondents submitted that it was significant that he did not file an Application until the MOL and small claims proceedings were resolved.

[31] The respondents submitted that if the Tribunal finds the delay to have been incurred in good faith, the respondents will nonetheless be prejudiced in their ability to respond to the Application. The respondents submitted that most of the witnesses to the incidents in question are no longer students at Ryerson University or members of the RSU. Accordingly, the respondents submitted it will be more difficult to contact them and arrange their testimony. The RSU and individual respondents also relied upon the release the applicant executed regarding his employment related claims and asserted that allowing the Application to proceed against them notwithstanding the release would be prejudicial.

[32] The respondents submitted that the untimely allegations do not form part of a series of incidents for the purposes of section 34(2) of the *Code*. The respondents submitted that the Tribunal's jurisprudence requires some connection or nexus between the incidents to form a series and that discrete or separate issues cannot amount to a series. The respondents submitted that the applicant's allegations between October 2008 and April 14, 2009 related to harassment and discrimination in employment, whereas the timely allegations, arising from June 2009 onward, are in respect of the respondents' alleged refusal to hire him, alleged failure to provide accessible transportation for the Pride Parade and RSU Parade and Picnic and the decision to ban him from RSU premises. The respondents therefore submitted that the untimely

allegations are distinct from the incidents that allegedly occurred within the one-year time limit.

Analysis and Decision

Delay

[33] Section 34(1) of the *Code* requires an applicant to file an application to the Tribunal within one year of the incident on which the application is based or within one year of the last of a series of incidents. The applicant filed the Application on April 26, 2010; therefore, any incidents occurring before April 26, 2009 are outside the one-year time limit. Accordingly, I must determine whether the incidents allegedly occurring before April 26, 2009 form part of a series of incidents in which the last incident occurred within the one-year time limit, or, if there is no series, whether the delay was incurred in good faith.

[34] The Tribunal has held that to form a series of incidents there must at least be some connection or nexus between the incidents that are alleged to form the series, and a series cannot be comprised of incidents relating to discrete and separate issues. See *Baisa v. Skills for Change*, 2010 HRTO 1621. The Tribunal has also said that incidents involving different facts and engaging different grounds under the *Code* cannot form a series of incidents for the purposes of section 34(1)(b). See *Polihronakos v. Mississauga (City)*, 2010 HRTO 1433.

[35] The applicant alleges that between October 2008 and April 16, 2009 he was subjected to harassment because of his disability and the RSU and individual respondents refused to accommodate his disability. The applicant submitted that he made requests to meet with Hammond and Whitfield between April 16 and April 30, 2009, which were declined. The applicant submitted that these refusals amounted to a timely incident or incidents connected to the incidents of harassment and discrimination he experienced while employed by the RSU.

[36] In my view, the applicant's unsuccessful attempts to meet with Hammond and Whitfield do not amount to an incident or incidents of discrimination or reprisal. The applicant acknowledges the representatives of the RSU met with him on April 16, 2009 and Hammond and Whitfield met with him on June 9, 2009. The meetings may not have occurred as soon as the applicant would have preferred, but this is not a violation of the *Code* in itself. The applicant relied upon his description of these meeting requests in his Application, which indicates that Hammond replied to the effect that they could not meet due to more pressing matters. The applicant did not appreciate this response, but there is nothing to suggest that the refusal was discriminatory. The requested meeting occurred on June 9, 2009 in any event.

[37] The applicant was not pleased with the outcome of the meeting on June 9, 2009. The applicant provided little detail about what occurred at that meeting, but alleges that the individual respondents made a comment to the effect that "age and experience are irrelevant". This statement may amount to discrimination or harassment because of age. However, the applicant's allegations pre-dating April 26, 2009 were of harassment and discrimination because of disability. As noted above, the Tribunal has found that incidents based on different grounds of discrimination cannot form series for the purposes of section 34(1)(b). The incidents occurring after June 9, 2009 relate to the respondents' decision not to hire him for new employment (which he characterized as a reprisal), his removal from the CESAR board of directors and to the provision of goods services or facilities (the Pride Parade, the RSU Parade and Picnic and banning from RSU premises). Consequently these incidents involve different facts; a different ground of discrimination (reprisal); and, in respect of the Pride Parade, RSU Parade and Picnic and banning, different social areas of discrimination than the incidents occurring before April 26, 2009. They therefore lack the requisite nexus or connection to form a series.

[38] Having found no series for the purposes of section 34(1)(b), I must consider whether the delay was incurred in good faith. The Tribunal's approach to delay is set out in *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241 at paragraphs 24 and 25:

> In my view, where an applicant seeks to establish that a delay in filing an application was "incurred" in good faith, the applicant must show something more than simply an absence of bad faith. Otherwise, there would be little meaning to the statutory limitation period. The *Code* requires a person who wishes to pursue a claim of discrimination to bring the claim forward by filing an Application within one year of the alleged incident, or where there is a series of incidents, within one year of the date of the last incident. This is a mandatory provision, subject only to section 34(2). The mandatory one-year limitation period is consistent with the policy objective, expressed elsewhere in the *Code*, that human rights claims should be dealt with expeditiously. Thus, the *Code* requires an individual to act with all due diligence, and file their application within one year, when they may seek to pursue a human rights claim.
>
> In dealing with requests that applications be considered outside the one-year limitation period, the Tribunal has set a fairly high onus on applicants to provide a reasonable explanation for the delay, while recognizing that there will be legitimate circumstances, often related to the human rights claim itself, that justifies exercising the discretion under section 34(2). For example, in *Klein v. Toronto Zionist Council*, 2009 HRTO 241 (CanLII), 2009 HRTO 241 (CanLII), the Tribunal held that an applicant cannot justify a delay on the basis that they only later discovered evidence which would assist in proving their claim. In *Lutz v. Toronto (City),* 2009 HRTO 1137 (CanLII), 2009 HRTO 1137 (CanLII), the Tribunal held, referring to a number of Court decisions, that a delay may be found not to have been incurred in good faith where a party says simply that they were not aware of their rights, and made no inquires about options for pursuing the alleged wrong.

[39] The applicant's explanation for the delay in filing the Application was that he was attempting to resolve the dispute with respondents informally, had academic commitments preventing him from filing the Application and experienced delays in communicating with the Human Rights Legal Support Centre. However, the applicant gave no indication of any attempt to resolve the dispute after June 9, 2009 and also initiated a complaint to the MOL and Small Claims Court Actions in 2009 within the prescribed time limits in those forums, notwithstanding his academic commitments. The Tribunal has in any event stated on several occasions that waiting for the outcome of other processes does not amount to a good-faith reason for delay. The applicant stated that he met with delays in speaking with the Centre, but the applicant was responsible for ensuring that he sought advice in a timely manner and, again, he was able to initiate

other legal proceedings in 2009 without legal assistance. In these circumstances, I find that the applicant has not provided a good-faith explanation for his delay in filing the Application. The allegations based on incidents allegedly occurring prior to April 26, 2009 are dismissed.

Sections 45.1 and the Releases

[40] As I have dismissed the allegations based on incidents occurring prior to April 26, 2009, it is unnecessary to consider whether these allegations should be dismissed pursuant to section 45.1 or 34(11) or whether they are barred by the releases the applicant executed in favour of the individual respondents. It is also unnecessary for me to consider whether the MOL complaint appropriately dealt with any aspect of the Application, because the MOL complaint dealt with employment related matters that arose prior to April 26, 2009.

[41] The Supreme Court of Canada recently dealt with the interpretation of section 27(1)(f) of the British Columbia Human Rights *Code* (the "*B.C. Code*") in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. Section 27(1)(f) of the *B.C. Code* is nearly identical to section 45.1 of the *Code.*

[42] The Supreme Court of Canada found that section 27(1)(f) of the *B.C. Code* is intended to ensure finality in decision making and to avoid re-litigation of issues. In assessing whether the substance of a complaint has been appropriately dealt with in another proceeding, the Court stated that a Tribunal should ask itself two questions:

> "…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 mirrored the one the Tribunal prefers or uses itself…" (at paragraph 37).

The Tribunal has found that the analysis adopted in *Figliola* applies in Ontario and binds the Tribunal. See *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297 at paragraph 25.

[43] The Tribunal has also found that settlements in other forums can be a proceeding for the purposes of section 45.1 of the *Code*. See *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 27.

[44] In my view, the settlements of the 2009 Small Claims Actions were proceedings for the purposes of section 45.1. The applicant was aware of the case he had to meet and had the opportunity to proceed to a hearing. The claim against Whitfield included allegations that the individual respondents prevented the applicant from being considered for employment opportunities with the RSU, which is an allegation repeated in the Application. In the 2009 Small Claims Action against Whitfield, the allegation is characterised in terms of defamation and in the Application in terms of reprisal. In either case, the applicant alleged that the individual respondents intentionally prevented the applicant from securing new employment with the RSU. The applicant chose to settle this issue, along with the other aspects of this claim. In these circumstances, I find that the settlement of the claim against Whitfield was a proceeding that dealt with the substance of the allegation that the respondents prevented the applicant from being hired by the RSU.

[45] The Statements of Claim that commenced the 2009 Small Claims Action do not contain any allegation regarding the applicant's alleged removal from the CESAR board of directors, regarding the provision of accessible services for the Pride Parade, the RSU Parade and Picnic or regarding the decision to ban the applicant from RSU premises. Consequently, I find that these issues have not been appropriately dealt with by the settlement of the 2009 Small Claims Actions. Similarly, I find that the releases the applicant executed in settlement of the 2009 Small Claims Actions do not bar these aspects of the Application and allowing the applicant to proceed with these allegations is not an abuse of process.

Deferral

[46] The applicant's transferred claim against the RSU concerns the RSU's decision to ban the applicant from its premises. In the transferred claim, the applicant asserts that the RSU had no right to ban him, but it purported to continue the ban. The transferred claim is framed in terms of defamation because the RSU communicated the fact that the applicant was banned at various times, which the applicant alleges amounted to libel and slander. Regardless of how the claim is characterized, the Court will inevitably have to determine whether the RSU was entitled, in the circumstances, to ban the applicant from its premises, which is also an issue in this Application. However, the transferred claim does not refer to the *Code* or human rights and claims damages for communications related to the decision to ban the applicant, not the ban itself. Crucially, the factual underpinnings of the transferred claim are different than that of the Application. Indeed, most of the facts set out in the transferred claim are alleged to have occurred after the alleged incidents described in the Application. Accordingly, I am not satisfied that the transferred claim alleges the same infringement of his rights as does the Application and I find this Application is not barred by section 34(11).

[47] However, pursuant to section 45 of the *Code* and Rule 14.1 of the Tribunal's Rules of Procedure, the Tribunal may defer consideration of an application on its own initiative or at the request of any party. Deferral of an application ensures that proceedings dealing with the same issues do not run concurrently, thereby raising the possibility of inconsistent decisions on facts or law. Some of the factors that may be relevant in deciding whether to defer consideration of an application before the Tribunal are: the subject matter of the other proceeding, the nature of the other proceeding, the type of remedies available in the other proceeding, and whether it would be fair to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them. See *Calabria v. DTZ Barnicke*, 2008 HRTO 411, and *Kaj v. Orsini Bros. Inns*, 2009 HRTO 170. In my view, deferral of the Application is appropriate given that both proceedings will address the propriety of the RSU's ban on the applicant, which raises the possibility the Court and Tribunal will make inconsistent

decisions on fact or law if the matters proceed concurrently. It also appears that the transferred claim is at a more advanced stage of its proceedings. In these circumstances, I am satisfied that the Application should be deferred until the transferred claim has been concluded or abandoned. The Tribunal's Rule 14 sets out the procedure if a party wishes to proceed with an Application that has been deferred pending the conclusion of another proceeding.

Individual Respondents Removed

[48] The respondents requested removal of the individual respondents and amendment to the style of cause accordingly. Rule 1.7(b) of the Tribunal's Rules provides that the Tribunal may add or remove a party. In *Sigrist and Carson v. London District Catholic School Board*, 2008 HRTO 14 at paragraph 42, the Tribunal set out the general principles that apply to this issue:

> The unnecessary naming of personal respondents is a practice to be discouraged, as this serves to unnecessarily add to the complexity of proceedings and can often operate as a roadblock to resolution. Pursuant to section 45(1) of the Code, a corporation is deemed to be liable for "any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent". Where there is no issue as to the ability of a corporate respondent to respond to or remedy an alleged Code infringement and no issue raised as to a corporate respondent's deemed or vicarious liability for the actions of an individual who is sought to be added as a personal respondent, then in my view the individual ought not be added as a personal respondent in the absence of some compelling juridical reason. A compelling juridical reason may exist, for example, where it is the individual conduct of a proposed personal respondent that is a central issue as opposed to actions which are more in the nature of following organizational practices or policies or where the nature of the alleged conduct of a proposed personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found.

[49] The Tribunal further expanded on these principles in *Persaud v. Toronto District School Board*, 2008 HRTO 31 at paragraph 5:

> Applying these principles to the Tribunal's power to remove a personal respondent from a proceeding, the following non-exhaustive list of factors

may be helpful in assessing whether a personal respondent should be removed:

> 1) Is there is a corporate respondent in the proceeding that also is alleged to be liable for the same conduct?
>
> 2) Is there any issue raised as to the corporate respondent's deemed or vicarious liability for the conduct of the personal respondent who sought to be removed?
>
> 3) Is there is any issue as to the ability of the corporate respondent to respond to or remedy the alleged Code infringement?
>
> 4) Does any compelling reason exist to continue the proceeding as against the personal respondent, such as where it is the individual conduct of the personal respondent that is a central issue or where the nature of the alleged conduct of the personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found?
>
> 5) Would any prejudice be caused to any party as a result of removing the personal respondent?

In considering whether any compelling reason exists to continue the proceeding against a personal respondent, one way of approaching this question is to ask whether it is necessary to involve this person as a party in order to have a fair, just and expeditious resolution of the merits of the complaint.

[50] Hammond remains an employee of the RSU and Whitfield is a former employee of the RSU. RSU is an organizational respondent to the Application and the allegations against the individual respondents arise in the context of their employment with the RSU. The applicant argued that the RSU could not remedy the alleged *Code* infringements because it ignored his concerns, he and Whitfield are no longer employed by RSU and because of turnover in the RSU executive. The issue, however, is whether the RSU is able to implement any remedy that the Tribunal may order. There is no evidence that RSU could not effect any such remedy. The applicant submitted that the individual respondents hold or held senior positions in the RSU and should be held personally responsible for their decisions and actions. However, an organization can only act through it employees and the applicant has not established that a specific remedy against the individual respondents is likely to be required.

[51] RSU would be responsible for Whitfield's actions while employed by RSU. Whitfield, however, is no longer an employee of the RSU; therefore, the RSU would be unable to implement any order requiring action of Whitfield, e.g., training. However, I have dismissed the allegations regarding the applicant's employment with the RSU, as well as the allegations that the individual respondents prevented the applicant from securing new employment with RSU. The Application contains no allegations against Whitfield regarding the applicant's removal from the CESAR board of directors or regarding providing accessible services for the Pride Parade or RSU Parade and Picnic. The applicant does implicate Whitfield regarding his allegations that the RSU's decision to ban him was a violation of the *Code*, but Whitfield is one of several individuals alleged to have acted to deny the applicant to RSU premises. On the face of the Application, the alleged actions of some of these individuals were at least as significant as Whitfield's in terms of banning the applicant from RSU premises and events, but the applicant did not name the others as individual respondents. Moreover, the applicant alleges that the decision was taken by the RSU as an organization, which it communicated to the applicant through its lawyer. Accordingly, the alleged violation of the *Code* was allegedly a policy or practice adopted by the RSU, an organizational respondent, and the RSU's officers and employees, including Whitfield, implemented that policy. In these circumstances, a remedial order against Whitfield, or Hammond for that matter, is in my view very unlikely.

[52] In my view there is no compelling juridical reason to continue the Application against these individual respondents. Consequently, the Application is dismissed against Hammond and Whitfield and the style of cause shall be amended accordingly.

Order

[53] The Tribunal orders as follows:

1. The allegations based on incidents occurring prior to April 26, 2009 are dismissed;

2. The allegations that the respondents prevented the applicant from securing new employment with the RSU are dismissed;

3. The Application shall be deferred until the transferred claim has been concluded or abandoned; and,

4. Hammond and Whitfield are removed as individual respondents and the style of cause amended accordingly.

[54] The Tribunal's Rule 14 sets out the procedure if a party wishes to proceed with an Application that has been deferred pending the conclusion of another proceeding.

Dated at Toronto, this 13th day of December, 2012.

"Signed by"

_____

Douglas Sanderson
Vice-chair