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HUMAN RIGHTS AND LABOUR AND EMPLOYMENT LAW

The New Gatekeeper: A Review of Recent Early Dismissal Hearings at the Human Rights Tribunal of Ontario

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The New Gatekeeper: A Review of Recent Early Dismissal Hearings at the Human Rights Tribunal of Ontario

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I. **Introduction**

Early disposition procedures are a common feature of civil law processes and procedures. The Ontario human rights system is no different in this respect. Prior to 2008, the Ontario Human Rights Commission ("OHRC") acted as the exclusive provincial gatekeeper for human rights matters. The OHRC decided, following the completion of its internal investigative procedures, what cases would and would not be referred for adjudication on the merits before the former Board of Inquiry.

The *Human Rights Code* (the "*Code*") and the *Rules of Procedure* (the "*Rules*") similarly empower the Human Rights Tribunal of Ontario (the "HRTO" or the "Tribunal") to perform a gate-keeping function. Since its inception in 2008, the Tribunal has been permitted to conduct preliminary assessments of applications with a view to removing those that do not warrant the time and expense of a hearing. These early dismissal preliminary hearings are designed to filter out cases that would not succeed at a full merit hearing for various reasons.

This paper focuses on two grounds commonly applied by the Tribunal to dismiss an application at the preliminary hearing stage: first, that another legal proceeding has already dealt with the substance of the application (under section 45.1 of the *Code*); and second, that the application has no reasonable prospect of success (a Rule 19A summary hearing). This is a discretionary exercise where the Tribunal assesses the evidence with a view to determining if the applicant can show that there is sufficient merit in the application to proceed to a hearing.

The Tribunal commonly uses Notices of Intent to Dismiss ("NOID") initiated on its own motion to flag applications at a very early stage where the application has yet to be served on the respondent. This occurs frequently in cases where the HRTO contends that their review of the application indicates that the application may not have a reasonable prospect of success under the *Code*.

While the legal tests are well established in both areas, several recent HRTO decisions have demonstrated some inconsistencies in how the existing jurisprudence is applied to

a similar factual matrix. These decisions serve as an important reminder that the Tribunal's case law is constantly evolving. They also emphasize that it is more essential than ever to be prepared at a summary hearing with a sound knowledge of the foundational case law and applicable legal tests.

II. Section 45.1

a) The Foundational Law

Under section 45.1 of the *Code*, the Tribunal has the discretion to dismiss an application when "another proceeding has appropriately dealt with the substance of the application." In applying s. 45.1, the Tribunal is guided by the Supreme Court of Canada's decisions in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola*") and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*").

Based on these two SCC decisions, the Tribunal has identified four questions that are relevant to whether an application should be dismissed under s. 45.1:

a. whether the other proceeding had concurrent jurisdiction to determine human rights issues;
b. whether the previously decided issues were the same as the issues complained of to this Tribunal;
c. whether there was an opportunity for the applicant to know the case to be met and have the chance to meet it; and
d. whether it would be unfair to use the results of the previous preceding to preclude the applicant from proceeding with the application (*Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298).

The Tribunal applies the broad principles in *Penner* and *Figliola* on a case-by-case basis, which can make it difficult to predict when an application will be dismissed by the Tribunal.

Two recent decisions demonstrate that the Tribunal can be very strict about the application of s. 45.1 of the *Code*. In both decisions, the Tribunal dismissed applications because of a prior low-level, front line administrative decision on **related,** but not identical legal issues.

This is important for applicant-side counsel to note. Many applicants choose to pursue separate administrative proceedings in order to protect their rights under other statutes such as the *Employment Standards Act* and the *Workplace Safety and Insurance Act*. Decisions under these statutes may still carry the risk of early dismissal at the HRTO even if the decision is made at the lowest administrative level and does not address the human rights arguments.

b) ***Roberts v. Trillium Health Partners*, 2020 HRTO 788 ("*Roberts*")**

In *Roberts*, the applicant argued that her employment was terminated because she refused to accept a position that she was unable to do work because of her disability. The applicant also filed a claim under the *Employment Standards Act* ("*ESA*") for termination, severance and vacation pay.

The Tribunal dismissed the application based on the decision of the Employment Standards Officer ("ESO"). Through the ESO investigation, the employer had agreed to pay the amounts owing to the applicant. In brief accompanying reasons, the ESO concluded the following:

> The employer was not able to fully establish their position that the claimant did not require accommodations as stated by the attending physician. The employer was advised that there was no evidence presented to support denial of the claim and accordingly the employer agreed to comply voluntarily and forward payment directly to the claimant (para. 11).

The Tribunal noted that the ESO's focus was on assessing the applicant's entitlement to termination, severance and vacation pay (para. 26). In doing so, the ESO "by necessity" considered the circumstances of the termination. This was sufficient, according to the Tribunal, to dismiss the applicant's allegations at the HRTO in relation to the termination of her employment. The Tribunal permitted the application to continue with respect to the employer's alleged failure to accommodate the applicant prior to her termination.

Notably, the ESO decision under review in *Roberts* did not actually determine whether the employer met its duty to accommodate the applicant. The ESO only determined that the employer "was not able to fully establish their position that the claimant did not require accommodations."

This case is arguably inconsistent with prior HRTO case law finding that an applicant is permitted to pursue termination and severance pay without limiting their ability to proceed with an application at the HRTO. In prior cases, the Tribunal would undertake some examination of whether the ESO had engaged in an analysis of the issues under the *Code*.

For example, in *Way v. BridgeCo Foods Inc.,* 2017 HRTO 1465, the Tribunal declined to dismiss an application based on an ESO decision that squarely addressed the applicant's disability. The respondent argued that the applicant was fired because he was regularly late for work. The applicant argued that he was late for work because of his learning disability. The Tribunal concluded that the only issue before the ESO was whether the applicant had engaged in "wilful misconduct" and that this was a different analysis from discrimination under the *Code*:

> The ESO only addressed the question of whether the applicant's conduct was "wilful" within the meaning of the ESA and thereby disentitled the applicant to termination and severance pay. The ESO did not address the issues raised here of whether the respondent, BridgeCo Foods Inc., failed to accommodate the applicant's disability and/or terminated the applicant on discriminatory grounds (para. 16).

Likewise, in *Herrera v. Multitech Contracting 2000 Inc.*, 2013 HRTO 1120, the Tribunal declined to dismiss an application under section 45.1 based on an ESO decision that had been appealed to the OLRB. In this case, the applicant argued at the ORLB that his employment was terminated because he required a disability-related leave of absence. The employer stated that the employee had failed to provide a timely medical note, leading to termination. Again, the Tribunal noted that the ESO had a different legal question to answer: whether the applicant's failure to provide a medical note amounted to "wilful misconduct":

> The OLRB decision is limited to analysing whether the applicant was under an obligation to provide a doctor's note immediately. It does not engage in an analysis of whether the applicant requested accommodation of his disability, whether the disability could have been accommodated up to the point of undue hardship and whether the disability was a factor in the decision to end the applicant's employment (para. 14).

If *Roberts* is correct, this would lead to the undesirable outcome that all applicants who were unfairly denied their statutory termination/severance pay would risk losing the ability to proceed at the HRTO by pursuing their rights under the *ESA*. This would perversely reward employers who decide to deny an employee termination/severance pay and would act as protection against an HRTO application if the employee chooses to pursue their rights under the *ESA*. Instead of dismissing the HRTO application, the Tribunal in *Roberts* could have simply imported the ESO's factual findings into its decision-making.

It is also interesting that the law on abuse of process and "case splitting" at the HRTO has not evolved to the same place with respect to *ESA* applications as it has with civil wrongful dismissal. In *Rinaldi v. Paragon Security*, 2017 HRTO 1370, the Tribunal clearly stated that an applicant can pursue both a civil remedy for reasonable notice and a separate application at the HRTO for discrimination:

> There is no doubt that a person is entitled to bring a civil action and also proceed with a human rights application in certain circumstances. The most common example of this occurs when a person's employment is terminated. The person can bring a civil action for wrongful dismissal seeking reasonable notice damages, and can also proceed with a human rights application alleging that discrimination was a factor in the termination of employment. These two proceedings raise

> different legal and factual issues and provide different potential remedies (paras. 12-13).[1]

The Tribunal could develop parallel case law noting that an applicant is generally permitted to pursue termination/severance pay without risking dismissal at the HRTO.

c) *Ellis v. Ontario (Solicitor General)*, 2020 HRTO 748 ("*Ellis*")

In *Ellis*, the Tribunal dismissed the application because of a previous decision by a WSIB Case Manager on the applicant's return-to-work plan. The applicant appealed the Case Manager's decision and filed an application at the HRTO arguing that the employer failed to accommodate her in the return-to-work process.

There are two notable aspects of this decision: the applicant was in the process of appealing the Case Manager's decision, and the Tribunal held that a WSIB Case Manager has the jurisdiction to apply the *Code*.

At para. 17 of the HRTO's decision, the Tribunal noted that the applicant had started the appeal process of the Case Manager's decision. Given that the WSIB proceeding was still ongoing, the Tribunal should have *deferred* the application instead of *dismissing* it. The Tribunal provides no explanation for why this was not considered.

The Tribunal has clearly held that an application should not be dismissed under section 45.1 when the other legal proceeding is under appeal. In *Sardar v. University of Ottawa*, 2016 HRTO 304 the Tribunal stated "the Tribunal ought not to dismiss a *Code* application based on a decision in another proceeding that is not final, such as where the other decision is under appeal" (para. 19).

The Tribunal in *Ellis* also determined that a WSIB Case Manager has the jurisdiction to apply the *Code* (para. 12). The Tribunal cited two decisions in support of this finding. However, these decisions state only that the WSIAT has the jurisdiction to apply the *Code*. The WSIAT is an independent adjudicative Tribunal with legal expertise. By way of contrast, the Case Manager is an administrative employee who is the first point of contact for someone making a WSIB claim.[2]

The Tribunal has previously noted the appropriate role of a Case Manager in the *WSIA* process. In *Morrison v. 2042204 Ontario Inc.*, 2019 HRTO 259, the Tribunal made the following observations about who has the jurisdiction to apply the *Code* at the WSIB:

> As an employee of the WSIB, the Case Manager is not a fully independent decision maker. However, the applicant had a right of appeal to a WSIB Appeals Resolution

[1] The Tribunal endorsed this reasoning in *Pham v. Dimpflmeier Bakery Ltd.*, 2018 HRTO 123.
[2] In another 2020 decision, the Tribunal determined that a Case Manager has the jurisdiction to apply the *Code* without citing any underlying authority. See *Rockwell v. Laminacorr Industries Inc.*, 2020 HRTO 375, at para. 19.

Officer and then to the Workplace Safety and Insurance Tribunal which is an independent decision-making body with jurisdiction to apply the *Code* (para. 27)

III. Rule 19A Summary Hearings

Rule 19A serves a purpose similar to summary judgment on a Rule 21 motion in civil proceedings under the *Rules of Civil Procedure.* Rule 19A *states:*

> The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.

Unlike its civil litigation counterpart of summary judgment, Rule 19A has become the most frequent generator of early dismissal case law at the HRTO. As such, practitioners are well advised to develop a comprehensive understanding of Rule 19A summary hearings and their foundational principles.

a) The Rule 19A test

Dabic v. Windsor Police Service[3] remains the leading authority in a Rule 19A summary hearing, regardless of whether the hearing is initiated by the HRTO or requested by a respondent:

> [7] A summary hearing is generally ordered at an early stage in the process. In some cases, the respondent may not have been required to provide a response. In others, the respondent may have responded but disclosure of all arguably relevant documents and the preparation of witness statements, which generally occur following the Notice of Hearing, will not yet have happened.
>
> [8] In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
>
> [9] In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between

[3] 2010 HRTO 1994

> an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.
>
> [10] In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a balance of probabilities, the application must be dismissed following the summary hearing.

Dabic elicits two elements of inquiry when assessing a reasonable prospect of success. First, whether there is clearly and evidently *Code*-based acts of discrimination on the face of the pleadings (the "assumption element"). Second, whether an applicant, will be able to show, on a balance of probabilities, a reasonable prospect of success based on any evidence that the applicant can point towards (the "evidence element").

b) *Dabic* - Assumption Element

The assumption element of the inquiry should be fairly straightforward - where there are no clear acts of *Code*-based discrimination, beyond an applicant's mere speculation and conjecture and/or purely subjective feelings, beliefs or opinions, an application will likely be dismissed.[4] The Tribunal does not have, in other words, the power to remedy general unfairness.[5]

The HRTO, though arguably assuming the facts of an application to all be true and requiring the applicant to point to evidence is not the same task seems, at times to conflate these elements together in assessing whether the case has a reasonable prospect of success. For example, in *Palmer v. Toronto Transit Commission,*[6] the Tribunal sets out the test for no reasonable prospect of success as "assuming the applicant's version of events is true unless there is some clear evidence to the contrary."

In that vein, the applicant's disability related allegations were dismissed but his race-based allegations could proceed. The Tribunal reasoned that, if the applicant could establish through his own testimony that white employees were given preferential

[4] *Traore v. Resolve Recruit Inc.,* 2020 HRTO 856.
[5] *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389.
[6] 2020 HRTO 977.

treatment and accommodation as compared to Black employees, then it could not be said that there was no reasonable prospect that the application would not succeed.

c) *Dabic* - Evidence Element

The evidence element appears consistently in the HRTO's no reasonable prospect of success analysis. Many cases fail because applicants are unable to point to substantial evidence that they have or that is reasonably available to them that could show a link between the adverse treatment and the ground under the *Code*, beyond an applicant's feelings or perceptions about the matter.[7]

The evidence required at this stage is not the same as at a merit hearing. Summary hearings occur well before the full disclosure of arguably relevant documents process. A summary hearing will be often be the subject of a Case Assessment Direction from the HRTO with directions about the steps the parties must taking prior to the hearing, including disclosure or witness statements.[8]

The evidence that may be ordered to be disclosed at this point will be much less than the amount required at a merit hearing after the arguably relevant disclosure has occurred. Nor is the summary hearing meant to be a substitute for a merit hearing. Findings of discrimination and an assessment of how successful an applicant will be in proving a *Code* link are not the objectives at this stage.[9]

As a practical approach, an applicant faced with a summary hearing should make it clear if there is more evidence that could be provided at a hearing. Examples include, but are not limited to:

a. evidence that is in the possession of a Respondent at the time of the summary hearing and not available to an Applicant [10];
b. evidence that will require an assessment of credibility or witnesses[11];
c. where, in employment cases, performance allegations are made which need closer analysis;[12] and/or
d. where otherwise an applicant can clearly indicate the types of evidence, they would be able to rely on at a merits hearing.[13]

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[7]See *Aboagye v. Region of Peel – Human Services Housing Operations and Management Services Peel Living*, 2016 HRTO 1442, at para. 16.
[8] Rule 19A.2.
[9] *Saunders v. Roan International Inc.*, 2020 HRTO 861, at para. 21.
[10] *Didier v. Toronto Community Housing Corporation*, 2020 HRTO 934, at para. 27.
[11] *Baral v. Mackenzie Health Richmond Hill Hospital,* 2021 HRTO 29, at para. 18.
[12] *Bankuti v. One King West Hotel and Residence,* 2020 HRTO 866.
[13] *Collins v. Movati Athletic (Group) Inc.*, 2020 HRTO 849.

IV. Two Curious Cases: *Elsin v. Juniper Networks Inc.*[14] *and Alli v. Region of Waterloo Public Health Department*[15]

Despite the above, recent summary hearing/NOID early dismissal cases have emerged that provide some cause for concern in their departure from the Tribunal's established case law. These cases emphasize the need for practitioners to be careful in clearly crafting their pleadings on behalf of clients. These cases may also indicate that a shift towards a less forgiving approach at the Tribunal for some applications.

a) Elsin – Assessment of Discrimination

Elsin, contrary to the above established principles for the purpose of a summary hearing, presents a concerning analytical approach from the HRTO. The applicant in *Elsin* was a racialized man with accented English. He had a background as a Senior Engineer with over 18 years of experience working in the technology industry. One of the respondents was a recruiter who approached the applicant on LinkedIn for a job opportunity. The applicant completed an online pre-screening for the position which was administered by a third party. It included a video screening with a predefined list of questions.

The applicant felt he had done well in answering the questions. To his surprise, however, he learned a few days later that he had been rejected for the position. The Applicant was certain his answers were correct and that he had failed only after the video screening occurred, which would have revealed his ethnicity and accent. The respondents denied this, stating that they had never asked nor were made aware of the applicant's ethnic background. They stated he was not hired because he did not have certain technical criteria related to XLT and JavaScript.

The Tribunal ordered a summary hearing. A concerning aspect of the Tribunal's approach in this case was in its treatment and assessment of the evidence adduced at the hearing. For example, the applicant argued that the video screening clearly showed his age and accent which must have in his view been the reason for the respondent's decision not to hire him. This explanation at a minimum elicits a need for further testimony. Instead, the HRTO questioned the applicant on his qualifications during the summary hearing and concluded that he did not have the requisite qualifications for the position. It went as far as saying that this would "support the respondent's position."[16]

Similarly, the HRTO seemed to make a merit hearing like finding of fact at para. 24:

> [24] I accept the personal respondent and Step by Step's position that they had no role in the decision not to hire the applicant. Step by Step recruited the applicant as a potential candidate and made the introduction to Juniper but had no role in the video screening or any selection process. The applicant could not point to any evidence that could link their

[14] 2020 HRTO 403.
[15] 2019 HRTO 1564.
[16] *Elsin,* at para. 16.

> actions and any of his *Code* grounds. It is clear that he was selected by the personal respondent and Step-by-Step despite his resume indicating his name and extensive years of experience suggesting he may be an older person of a non-dominant ethnicity.

Whether or not an application has a reasonable prospect of success is a legal test. The Tribunal may assess if the allegations are coming from belief or suspicion as outlined above. It also may assess whether there is evidence that an applicant would be able to point to. In this instance, a self-represented applicant's case appears to have been dismissed based on findings of fact in the absence of any proper disclosure or testimony.

While the applicant's allegations may have been tenuous on their face, it is also generally accepted in the HRTO case law that race-based discrimination can occur in a subtle and nuanced manner. It is therefore surprising that the Tribunal chose this approach when there may have been further evidentiary assessments necessary at a hearing.

b) Alli **– When a Sexist Slur is Not Sexual Harassment**

Elsin is a lesson for practitioners in ensuring they come to a summary hearing prepared with foundational case law on its purpose. *Alli* is a separate lesson in ensuring you are up to date with the jurisprudence involving your client's selected ground(s) of discrimination when preparing for a summary hearing.

Alli was an employment case based on race, colour, sexual harassment, family status, marital status, and reprisal. The applicant was a racialized woman with young children. She was very quickly subject to performance scrutiny after commencing her employment. One day, she became emotional in front of her coworker, who was named as an individual respondent in the application that ensued.

The individual respondent, a female manager, made an inappropriate and absurd comment in response: "*even when you are crying, you're still beautiful. Bitch.*" In time, the applicant also began receiving comments about getting her "family life organized" when she was unable to come to work due to childcare issues on two occasions. She filed an internal human rights complaint which was not investigated, and then shortly afterwards was dismissed from her position.

The corporate respondent's non-discriminatory explanation was that the applicant was dismissed because of poor performance during her probationary period. The individual respondent admitted to making the "even when you are crying" comment. They tried, however, to explain that they were quoting from a John Legend song and then added in the word "bitch" facetiously. They also admitted to the word's offensive nature.

While her race-based allegations were permitted to proceed on the basis that racial discrimination is subtle and nuanced, the applicant's marital status, family status and sexual harassment allegations were dismissed at summary hearing. In the Tribunal's

view, a single incident in which the applicant was called a "bitch", while inappropriate, was not sufficiently egregious or virulent to amount to a violation of the *Code*. The Vice Chair cited one of his previous decisions, *Gubrenko v. T.O.J. Empire Auto*, 2014 HRTO 1232, in reaching his conclusion.

This finding arguably conflicts with previous HRTO jurisprudence. The Tribunal has repeatedly found the use of the word "bitch" to be sex-based discrimination, and that a single such occurrence can constitute sexual harassment depending on the severity.[17] Moreover, *Smith v. Menzies-Chrysler*[18] makes it clear that sex-based discrimination can occur between individuals that identify as the same gender as the other – the so-called "traditional" male-female dynamic is not a pre-requisite to a finding of discrimination under this ground.

Finally, the Tribunal provided little clarity in this decision for why the comment that the applicant should get her "family life organized" was not enough to amount to family status discrimination. The Tribunal noted that while this comment was "unwelcome", it was not in itself sufficiently serious to amount to discrimination or harassment under the *Code*. Again, this is surprising since the connection to the applicant's family status is very clear in the content of the comment, and the comment came in response to requests for family status accommodation.

V. Final Thoughts: Trends and Alternatives

It appears that NOIDs continue to increase as part of the HRTO's gatekeeper function Anecdotally, applicants appear to be receiving more NOIDs than in the past. This aligns with what is available on CanLII. A comparison of Tribunal decisions on CanLII that mention "Notice of Intent to Dismiss" for January 2021, February 2021, March 2021 and April 2021, compared to the same months in 2020 revealed the following differences in the amount of total reported HRTO decisions that mentioned "Notice of Intent to Dismiss":

- 23% of reported HRTO decisions in January 2021 vs. 22% in January 2020;
- 45% of reported HRTO decisions in February 2021 vs. 12% in February 2021;
- 20% of reported HRTO decisions in March 2021 vs 15% in March 2020;
- 36% of reported HRTO decisions in April 2021 vs. 13% in April 2020.
- 2021 overall percentage for Jan-April - 32%
- 2020 overall percentage for Jan-April – 16%

In these circumstances, it must also be noted that practitioners and applicants do have a third option to advocate for beyond either the NOID process or a full merits hearing: the

[17] See *Costigane v. Nyood Restaurant & Bar,* 2015 HRTO 420 at para. 21, and see *Knox-Heldmann v. 1818224 Ontario Ltd o/a Country Style Donut,* 2015 HRTO 1376, at para. 42.
[18] 2009 HRTO 1936.

Tribunal does have the power to hold a limited merits hearing on the issue of whether a *prima facie* case of discrimination can be made.

This is appropriate where it appears that there may be some ability to link a *Code* ground to adverse treatment if allegations are proven, even if it is not a very clear link. For example, the Tribunal permitted an applicant to proceed past summary hearing and a NOID in *Grange v. Toronto (City)*[19] on the basis that her allegations were based in systemic discrimination, and that various allegations taken together revealed a pattern of discriminatory treatment embedded into the structure of the respondent's organization.

In the Tribunal's view, such cases, and any relevant procedural issues, were best left to be reviewed by a hearing adjudicator who would have the benefit of considering all of the available evidence of either party.[20] The Tribunal, in any event, has the power to hold an initial hearing on *prima facie* discrimination, which will allow it to make a procedurally fair decision with all the evidence before it – something it would not be able to do when determining whether to dismiss an application at a preliminary stage.

VI. Conclusion and Takeaways for Practitioners

As the above decisions demonstrate, the Tribunal can be unpredictable when dismissing applications at a preliminary early dismissal hearing. Counsel on both sides of the human rights process should come fully prepared with the foundational case law and analogous cases to fully assist the Tribunal's factual and legal analysis.

Applicant-side counsel should be particularly diligent when clients are considering pursuing remedies from administrative decision makers such as an ESO or a WSIB Case Manager. These administrative decisions may not provide clients with an effective *Code* analysis but may still be sufficient to dismiss a human rights application.

Furthermore, for applicant-side counsel who are filing applications at the HRTO based on subtle and/or systemic types of discrimination, it is imperative that you include all relevant information about the potential evidence you have to support these claims in an effort to avoid an unnecessary NOID or Respondent-initiated summary hearing. Constructing and articulating clear connections between the adverse treatment alleged and the stated *Code* ground(s), on the facts and law, are paramount.

Finally, it is to be noted that while, as of 2008, the human rights gatekeeping system has moved from the OHRC to the HRTO, the nature of that gate keeping function has never changed. The HRTO's early dismissal preliminary hearings are an oft-used screening mechanism designed to flag cases that are, in the HRTO's view, devoid of merit and do not warrant use of the HRTO's limited resources.

[19] 2014 HRTO 633 at para. 59, upheld on judicial review: *City of Toronto v. Grange,* 2016 ONSC 869.
[20] *Ibid* at para. 39.

However, it must be remembered that, in the context of the Rule 19A cases, the threshold is not particularly high and a case should only need to be outside the realm of speculation and conjecture in order to advance in the HRTO adjudicative process. Each case, of course, must be evaluated and assessed in its own circumstances but, as the above cases illustrate, there is concern that the HRTO's practices, procedure and decisions may be displaying a degree of jurisprudential inconsistency and incoherency, especially in light of the well-established legal tests and principles.

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Overview

- Recent decisions under s. 45.1
- Recent decisions under Rule 19A
- Discussion between panelists

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S. 45.1

- The Tribunal has the discretion to dismiss an application when "another proceeding has appropriately dealt with the substance of the application."
- This is a case-by-case assessment
- In two recent decisions, the Tribunal dismissed applications because of a low-level administrative decision on related, but not identical legal issues.

Roberts v. Trillium Health Partners, 2020 HRTO 788

- HRTO application alleged employment was terminated based on refusal to accept position she could not work due to disability
- Applicant filed an *ESA* claim for termination/severance pay
- Employer decided to voluntarily pay termination/severance
- ESO determined that the employer "was not able to fully establish their position that the claimant did not require accommodations."
- HRTO application dismissed because ESO "by necessity" considered the circumstances of termination in decision on termination/severance pay

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Commentary

- If *Roberts* is correct: all applicants denied their statutory termination/severance pay would risk losing the ability to proceed at the HRTO by pursuing their rights under the *ESA.*

5

HRLSC CAJDP

Commentary

- *Way v. BridgeCo Foods Inc.*, 2017 HRTO 1465:

  The ESO only addressed the question of whether the applicant's conduct was "wilful" within the meaning of the *ESA* and thereby disentitled the applicant to termination and severance pay. The ESO did not address the issues raised here of whether the respondent failed to accommodate the applicant's disability and/or terminated the applicant on discriminatory grounds (para. 16).

- *Rinaldi v. Paragon Security*, 2017 HRTO 1370:

  There is no doubt that a person is entitled to bring a civil action and also proceed with a human rights application in certain circumstances. The most common example of this occurs when a person's employment is terminated. The person can bring a civil action for wrongful dismissal seeking reasonable notice damages, and can also proceed with a human rights application alleging that discrimination was a factor in the termination of employment. These two proceedings raise different legal and factual issues and provide different potential remedies (paras. 12-13).

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Ellis v. Ontario (Solicitor General), 2020 HRTO 748

HRLSC CAJDP

- HRTO application dismissed because of WSIB Case Manager decision
- Applicant was in process of appealing Case Manager decision
- Tribunal determined that WSIB Case Manager has jurisdiction to apply the *Code*

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Commentary

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- *Sardar v. University of Ottawa*, 2016 HRTO 304:

  [T]he Tribunal ought not to dismiss a *Code* application based on a decision in another proceeding that is not final, such as where the other decision is under appeal" (para. 19).

- *Morrison v. 2042204 Ontario Inc.*, 2019 HRTO 259:

  As an employee of the WSIB, the Case Manager is not a fully independent decision maker. However, the applicant had a right of appeal to a WSIB Appeals Resolution Officer and then to the Workplace Safety and Insurance Tribunal which is an independent decision-making body with jurisdiction to apply the *Code* (para. 27).

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Rule 19A

- The "summary judgment" process of HRTO and frequent generator of case law
- Process for early/preliminary decision making in two ways:
  - Notice of Intent to Dismiss (NOID) – initiated early by HRTO prior to delivering Application
  - Requested by Respondent at any time when or after filing Form 2
    - Applicant would have to respond
    - HRTO then decides whether summary hearing will be scheduled or not – if yes then will issue Case Assessment Direction, if no then will issue decision denying request, reasons are not necessary
- Test: does application have "no reasonable prospect of success"?

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Leading Case: *Dabic v. Windsor Police*

[7] A summary hearing is generally ordered at an early stage in the process. In some cases, the respondent may not have been required to provide a response. In others, the respondent may have responded but disclosure of all arguably relevant documents and the preparation of witness statements, which generally occur following the Notice of Hearing, will not yet have happened.

[8] In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.

[9] In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.

[10] In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a balance of probabilities, the application must be dismissed following the summary hearing.

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Understanding *Dabic*

1. Is there on the face of the pleadings a clear *Code* violation assuming all facts as plead are true?
2. Is there some evidence that the Applicant can point to in order to prove a link between adverse treatment and *Code* ground?

Key Points

- Tribunal doesn't have power to remedy general unfairness (*Forde v. Elementary Teachers Federation*)
- Must assume that all facts set out in pleading are true unless clear evidence to the contrary (*Palmer v. Toronto Transit Commission*)
- Applicant's perceptions or genuinely held beliefs aren't enough to establish a *Code* link (*Aboyage v. Region of Peel*)
- NOT however making actual merit findings on discrimination or proving how successful an Applicant may or may not be at this stage (*Saunders v. Roan International*)
- Issues of credibility or different factual perspective might indicate merits hearing is more appropriate (*Girdharrie v. Cardinal Fasteners*)
- Evidence – not same extent as evidence in merits hearing

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Elsin v. Juniper Networks, 2020 HRTO 403

- Summary hearing dismissal of a race-based case
- Applicant (racialized man) alleged he'd been denied job opportunity after interviewer had seen his race on screen and heard his accent
- Tribunal made findings of fact that are unusual for a summary hearing
- Also made merits decisions on whether discrimination had actually occurred
- Race based discrimination subtle and nuanced (*Pieters v. Peel Law Association*) so this is a surprising approach to choose over sending the case to further evidentiary assessments

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Alli v. Region of Waterloo Public Health Department, 2019 HRTO 1564

- Race, colour, sexual harassment, family status, marital status and reprisal case
- Applicant was racialized woman with young children who received comments from female coworker such as "even when you are crying you're still beautiful. Bitch." and that she needed to get her family life organized
- Was fired shortly after filing internal human rights complaint
- At summary hearing, race based allegations were allowed to proceed
- Marital status, family status, sexual harassment were all dismissed
- "Bitch" per the Tribunal did not amount to a sexist slur, citing one of the Vice Chair's previous decisions on the same (*Gubrenko v. TOJ Empire Auto*)

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Commentary – *Alli*

- Sexual harassment finding conflicts with prior jurisprudence – *Costigane v. Nyood Restaurant & Bar*
- Sex based discrimination can occur between individuals who identify as same gender – *Smith v. Menzies Chrysler*
- Little clarity on why the "get your family life organized" comment was not enough to amount to family status discrimination

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Questions

- What should Applicant-side counsel keep in mind for clients who want to pursue other legal remedies?
- What tips do you have for counsel to anticipate a potential NOID or summary hearing?
- What tips do you have for counsel to respond to a NOID and/or prepare for a summary hearing?
- What are some of the most common kinds of cases where s. 45.1 comes up?
- If faced with a s. 45.1 dismissal notice, what are some useful cases/tips to ensure the matter can proceed?

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