HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Amanda Kerr

Applicant

-and-

Global TeleSales of Canada Inc.

Respondent

DECISION

Adjudicator: Eric Whist

Date: October 9, 2012

File Number: 2011-09375-I

Citation: 2012 HRTO 1896

Indexed as: **Kerr v. Global TeleSales of Canada Inc.**

APPEARANCES

Amanda Kerr, Applicant	)	Garth Dee, Counsel
Global TeleSales of Canada Inc., Respondent	)	Holly Reid, Counsel

[1] The Application was filed on July 13, 2011 under section 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the *"Code*). The Application alleges discrimination in employment on the basis of sex and family status. The Application alleges that after the respondent learned that the applicant was pregnant it terminated the applicant's employment without giving further consideration to redeploying her.

[2] The purpose of this Decision is to determine whether the Tribunal should dismiss the applicant's Application on a preliminary basis pursuant to s. 45.1 of the *Code*. Section 45.1 allows the Tribunal to dismiss an application if another proceeding has already appropriately dealt with the substance of the application.

[3] The applicant made a prior claim to the Ministry of Labour under the *Employment Standards Act, 2000* S.O. 2000 c.41 ("the *ESA*") in relation to the termination of her employment. This claim was dismissed by an Employment Standards Officer ("ESO") on May 10, 2011. The respondent submits in its Response to the Application that the Application should be dismissed because the proceeding before the ESO appropriately dealt with the substance of the Application.

[4] The applicant filed a Reply to the Response opposing the respondent's request to dismiss. The Tribunal subsequently ordered that a hearing be held by teleconference to consider the respondent's request to dismiss.

[5] The hearing was held on April 16, 2012. I heard submissions from counsel for the respondent and applicant. I had before me the ESO decision as well as the Ministry of Labour records relating to the ESO's investigation and subsequent decision. I had written submissions from both parties (the applicant's being contained in her Reply). Both parties relied on some of the same cases, in particular, the Supreme Court of Canada decision in *British Columbia (Workers Compensation Board) v. Figliola*, 2011 SCC 52. In *Figliola, supra,* the Supreme Court dealt with a provision in the British Columbia *Human Rights Code*, R.S.B.C.1996, c.210 as amended ("the BC *Code*") that is similar to section 45.1 of the *Code*. In *Gomez v Sobeys Milton Retail Centre Support*

Centre, 2011 HRTO 2297, the Tribunal determined that the analysis adopted in *Figliola, supra,* applies to the interpretation of s. 45.1 of the *Code*.

BACKGROUND

[6] This background information is based on the documents before me that were provided by the parties. These documents were submitted for the truth of their contents and as such, I will attribute the appropriate weight to this evidence as I deem appropriate. There was no oral testimony adduced at the hearing.

[7] The applicant applied to work in the respondent's airline call centre in October 2010. She was assigned to work in the newly created baggage department which was intended to respond to telephone enquiries from airline passengers who had lost baggage. The respondent operated two other relevant departments - the cargo department and the general reservations department.

[8] The applicant began in the baggage claims department on October 18, 2010 along with six other new employees. These employees, including the applicant, were subject to an ongoing assessment of their performance. One of these new employees was fired on October 25, 2010 for poor performance.

[9] On October 28, 2010 the applicant learned from her doctor that she was pregnant. On November 2, 2010 she told the respondent that she was pregnant. On November 5, 2010 the respondent told the applicant that the baggage department was being closed down and her services were no longer required. On November 5, 2010 the respondent informed three other staff in the baggage department that their employment was also terminated because of the closure of the baggage department. The respondent transferred the two remaining new employees in the baggage department to the cargo department. The respondent claims that the staff were retained because they were considered the two top performers in the baggage department.

[10] The applicant alleges that her performance was good or excellent and was comparable to the performance of the two employees who were kept by the respondent. The respondent disputes this and contends its evaluations confirm that the two employees it kept had stronger job performances than the applicant.

[11] The applicant alleges that after she was told by the respondent that her employment was being terminated that she asked to be transferred to the respondent's cargo unit but was told there were no other positions available. The applicant alleges that she also asked to be trained for a position in the general reservations department but was told that employees had already been selected for these positions and were in the process of being trained. The respondent maintains that the training program for the general reservations department was full, that the persons being trained had been specifically hired for the general reservations department and had already accepted formal offers of employment.

[12] The applicant alleges that the respondent advertised vacant positions in both its cargo and general reservations departments in February and March 2011. The respondent acknowledges that this was the case. It submits that all of the employees including the applicant whose employment was terminated in October 2010 were invited to resubmit applications when jobs became available in the respondent's cargo and general reservations departments. The respondent submits that several did re-apply at later dates and that one of these employees was rehired. It submits the applicant never re-applied for an advertised position.

[13] On March 3, 2010, the applicant filed her *ESA* claim alleging, in part, that she was wrongfully dismissed for being pregnant and not considered for a transfer to another position. The *ESA* includes pregnancy and parental leave provisions that state that an employee's employment cannot be terminated because of her pregnancy or her intention to take pregnancy and parental leave.

[14] On May 10, 2010, the ESO issued his decision denying the applicant's claim. The ESO accepted the respondent's contention that the decision to terminate the

applicant and three other employees from the baggage department without cause was made before the respondent was aware the applicant was pregnant and that the two employees the respondent did choose to transfer to another job function were stronger performers than the applicant based on their productivity results and their customer service skills. The ESO was satisfied that the respondent's decisions did not violate the relevant sections of the *ESA.*

[15] The ESO's letter to the applicant that accompanied his decision indicated that if the applicant wished to challenge his decision, she could apply for a review of the decision to the Ontario Labour Relations Board ("OLRB") within 30 days in accordance with ss.115 – 120 of the *ESA* . The applicant did not apply for a review.

POSITIONS

Respondent's Position

[16] The respondent submits that the applicant is attempting to relitigate an unfavourable decision in one forum even though it was appropriately dealt with in another. It argues that s. 45.1 is intended to prevent this type of forum shopping and that the applicant's proper recourse if she did not like the ESO's decision was to appeal the decision to the OLRB.

[17] The respondent submits that the process before the ESO was a proceeding within the meaning of s. 45.1. The respondent submits that the substance of the Application was addressed in the applicant's *ESA* complaint given that the issues raised in the applicant's complaint and in her Application are identical and that the principle issue determined by the ESO, namely whether the applicant was terminated because she was pregnant is the same issue that the Tribunal would determine if the Application was allowed to proceed. The respondent submits that the further allegation that the applicant was not considered for a re-assignment when her employment was terminated is also raised in both the complaint and the Application and was clearly addressed by the ESO in his decision.

[18] The respondent submits that the allegations of discrimination raised in the Application were appropriately dealt with in her proceeding before the ESO. The respondent submits that the provisions in the *ESA* that protect women from having their employment terminated because of pregnancy are anti-discriminatory provisions and are substantially the same as the provisions in the *Code* and that the heads of damages available under the *ESA* are analogous to those under the *Code*.

[19] The respondent submits that it is not open to the Tribunal to look at the procedural protections afforded the applicant in her proceeding before the ESO, that the proper forum for the applicant to challenge any procedural concerns is before the OLRB. The respondent submits that, nonetheless, the applicant did have an opportunity to fully participate in her proceeding before the ESO. The applicant had the opportunity to present a written claim, to respond to questions of clarification from the ESO regarding her claim based on the materials provided by both parties. The respondent submits, that consistent with the *ESA,* the ESO is not obliged to hold a hearing as part of a proceeding before an ESO.

Applicant's Position

[20] The applicant submits that it is important to note that the Tribunal's authority to apply s. 45.1 is discretionary. The applicant submits that in order to use its discretionary authority to dismiss the Application the Tribunal must be satisfied that the proceeding before the ESO appropriately dealt with the substance of the Application. The applicant submits the Tribunal cannot be so satisfied because the ESO process was procedurally and substantially flawed.

[21] The applicant submits that the Supreme Court in *Figliola, supra,* states that a concurrent decision maker may inquire into whether the parties in a prior proceeding had notice of the case to be met and were given an opportunity to respond. The applicant submits that the ESO did not appropriately involve the applicant and her counsel in the process before him and, as a consequence, the applicant did not know

the case she had to meet and did not have the opportunity to respond to the case against her.

[22] The applicant referred to the ESO's officer's file as accessed by the applicant to support this submission. The applicant raised a number of procedural concerns about the ESO process including the fact that she never received from the ESO written materials the ESO obtained from the respondent. This included the respondent's "Employer Information Form" prepared by the respondent in response to the applicant's claim and an internal email provided by the respondent to the ESO dated October 20, 2010 that the applicant submits suggested that the respondent was considering keeping all of the staff from the baggage department not just the two alleged stronger performers it eventually did keep. The applicant submits that this lack of disclosure resulted in her not knowing the case she had to meet.

[23] The applicant submits that there was never a hearing or a meeting between the ESO and the applicant and her counsel and that all communication between the ESO and the applicant and her counsel took place by telephone or voicemail. She submits that her counsel was not appropriately involved in the process including in the conversations she did have with the ESO. She submits that in this process she was effectively never given the chance to present her case and to respond to the respondent's case.

[24] The applicant submits that the ESO was biased in favour of the respondent in that the ESO quickly made up his mind on the merits of the case before the applicant (or her counsel) had a chance to make submissions in response and hence without due consideration of the applicant's position. The applicant submits that this bias is revealed by a review of the ESO's contact with the applicant and the nature of their interchange as recorded in the ESO's notes that the applicant disclosed for the hearing.

[25] The applicant further argues that the ESO made a substantive error in the decision he issued on May 10, 2010. The decision states that the "employer states they were not made aware of the pregnancy until after the termination took place." The

applicant submits that this statement is clearly wrong given that it was accepted that the applicant told the respondents that she was pregnant on November 2, 2010 and that her employment was terminated on November 5, 2010.

[26] The applicant submits that the ESA's statutory scheme to address issues related to the treatment of pregnancy and pregnancy leave is not necessarily as broad as the Tribunal's authority to address issues of discrimination faced by pregnant women under the *Code,* relying on *Vonetta v, Blake Jarrett* 2011 HRTO 113. The applicant submits that the substance of her Application is more clearly based on her pregnancy rather than the fact that she might eventually take pregnancy leave. Furthermore, the applicant submits that the ESO did not consider issues related to redeploying the applicant that were raised in the Application.

[27] The applicant submits that the argument that the applicant ought to have appealed the ESO decision to the OLRB instead of filing an Application with the Tribunal has no bearing on the Tribunal's determination as to whether the applicant's claim before the ESO was appropriately dealt with and subject to s. 45.1.

[28] The applicants counsel also submits that the ESO was aware that the applicant intended to pursue an Application with the Tribunal. Yet the applicant was never informed that if she was intending to pursue an Application she should withdraw her claim under the *ESA* given the possibility that she could not pursue both complaints.

[29] The applicant made further submissions in relation to the common law doctrines of abuse of process, collateral attack and issue estoppel that I do not need to detail for the purpose of my decision.

ANALYSIS AND DECISION

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

> 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

Was there a "proceeding" for the purposes of section 45.1?

[31] The Tribunal has repeatedly held that a complaint determined by an ESO constitutes a proceeding within the meaning of s. 45.1. See, for example, *Little v. TeleTech Canada*, 2009 HRTO 1763; and *Poirier v. MacLean Engineering & Marketing*, 2010 HRTO 1672. This issue was not in dispute as between the parties.

Did the proceeding appropriately deal with the substance of the Application?

[32] As stated earlier, the Supreme Court of Canada considered a provision similar to s. 45.1 in *Figliola, supra*. In *Figliola, supra,* the court considered what authority the British Columbia Human Rights Tribunal had, pursuant to s. 27(1) of the BC *Code*, to review the processes and decisions of other tribunals. In assessing whether the substance of a complaint has been dealt with in another proceeding the court stated in *Figliola, supra* at para. 37 that a Tribunal should ask itself the following questions:

> 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.

Importantly, the court went on to state at para. 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.

[33] I am satisfied the legal issue decided by the ESO was essentially the same as what is being complained of to the Tribunal. The proceeding before the ESO dealt with the substance of the Application in that it dealt with allegations of discriminatory treatment related to the applicant's pregnancy including issues related to her redeployment. The fact that these allegations were considered under the *ESA* rather than the *Code* does not take away from this determination. As the Tribunal stated in *Chen v Harris Rebar* 2009 HRTO 227 (at para 13):

> The pregnancy and parental leave provisions together with section 74 of the *Employment Standards Act* are in the nature of anti-discrimination enactments. The language of these provisions is broadly drafted to provide protection to women in the workplace who are, or may become, pregnant. Employment standards officers are given broad remedial powers to employ where a violation of these provisions is found. The heads of damages available are analogous to those available under the *Code*, including damages for lost wages, loss of reasonable expectation of ongoing employment and damages for mental distress, as well as the power to reinstate an employee to their employment in appropriate circumstances.

[34] I agree with the Tribunal's decision in *Vonetta, supra* that there can be circumstances where the *Code's* anti-discrimination provisions may differ from the protections offered under the *ESA.* However, the fact is that in this case the ESO clearly considered whether the applicant was terminated because of her pregnancy

which would be the same issue the Tribunal would consider under the *Code* if the Application was to proceed.

[35] I am also of the view that the ESO did consider the applicant's allegations that she was not properly considered for redeployment, an issue raised in the Application. The ESO accepted the respondent's submissions that it was unable to place the applicant in another position because it only had two positions available. I am satisfied that the substance of the Application does not essentially differ from the claim before the ESO.

[36] The applicant submits that the ESO made a substantive error when he stated in his decision that the respondent was unaware that the applicant was pregnant at the time of termination and, as a consequence, the ESO cannot be said to have appropriately dealt with the applicant's complaint.

[37] The respondent acknowledges that the statement in the ESO's decision that the respondent did not know the applicant was pregnant at the time of her termination is inaccurate. However, the respondent submits that in reading the ESO's decision in its totality it is evident that the ESO accepted the respondent's position that the respondent was unaware that the applicant was pregnant at the time it made its decision to terminate the applicant's employment.

[38] I agree with the respondent that the ESO's decision, read in its entirety, makes clear that the ESO determined that the respondent's decision to terminate the applicant's employment was based on factors other than her pregnancy. However, whether the ESO's decision contains inconsistencies or inaccuracies or is even rightly determined is ultimately not an issue that I may appropriately consider; *Figliola*, *supra* at para. 38.

[39] The applicant's principle argument is that the ESO did not provide an opportunity for the applicant to know the case to be met and have the chance to meet it and that, pursuant to *Figliola supra*, the Tribunal must consider this issue of procedural fairness

when determining whether the applicant's proceeding before the ESO has appropriately dealt with the substance of the Application.

[40] I agree that *Figliola, supra,* requires the Tribunal to inquire into whether the applicant has had an opportunity to know the case to be met and a chance to meet it. However, I disagree with the applicant in relation to what this inquiry requires.

[41] In my view the applicant's proceeding before the ESO did allow the applicant to know the case to be met and the chance to meet it in that the applicant participated in a process in which both parties were provided with information about the other parties' claims and both parties had the opportunity to provide information to a decision-maker mandated under the *ESA* to determine the applicant's claim. According to the information before me, the ESO, after obtaining the respondent's response to the applicant's claim, did communicate with the applicant and questioned her about the respondent's position. The applicant and her counsel were both in contact with the ESO while the applicant's claim was being considered and had opportunities to put forward the applicant's case. There is no requirement in the *ESA* that a hearing or an in-person meeting must be held.

[42] The applicant submits that the information initially provided by the ESO to the applicant was insufficient (no disclosure of written documents) for her to know the case against her and that she did not have the opportunity to participate with counsel in a manner that allowed her to appropriately present her case. In my view, the applicant's arguments go beyond the requirements required by *Figliola, supra,* to review a prior proceeding for procedural fairness. They invite the Tribunal to review in considerable detail the procedural requirements of a concurrent proceeding and how these requirements were applied. The applicant's submissions would require evidence and findings as to what the ESO and applicant may have specifically discussed in order to determine whether the applicant knew the case to be met and had an opportunity to do so. This level of inquiry is, in my view, inappropriate. The mechanism for addressing such procedural issues would have been to seek a review of the ESO's decision to the OLRB which is statutorily mandated to review such decisions. This determination is

consistent with the Tribunal's decision in *U.N. v. Tarion Warranty Corporation*, 2012 HRTO 211 (para 64).

[43] I am of the view that the guiding principles and directions set out in *Figliola, supra* make clear that the Tribunal's role is not to review decisions of a previous proceeding in the manner advocated by the applicant. In *Figliola, supra* the court summarized the principles that underlie section 27(1)(f) of the BC *Code* as follows (in para 34) :

> • It is in the interests of the public and the parties that the finality of a decision can be relied on;
>
> • Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings;
>
> • The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature;
>
> • Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision; and
>
> • Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.

[44] The Court further stated at para. 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.*** (emphasis added)

[45] It is not appropriate for the Tribunal sit as an appeal court or to use s. 45.1 as a vehicle for a collateral attack on the merits of another decision-making process. I agree with the Tribunal in *Gomez, supra* when it states:

> The Tribunal cannot, under s. 45.1, decide to proceed with an application based on a review of the process or substance of the other proceeding. Applicants must raise such issues in a judicial review or appeal of the other proceeding.

[46] The applicant submits that I should not consider the fact that the applicant had an appeal right to the OLRB in determining, pursuant to the provisions of s. 45.1, that her proceeding before the ESO appropriately dealt with the substance of her Application. I would note that I have made a clear determination that the ESO proceeding has appropriately dealt with the substance of the Application, pursuant to the direction provided by *Figliola, supra*. I am satisfied that the legal issue decided by the ESO was essentially the same as what is being complained of to the Tribunal and that the applicant was provided with an opportunity to know the case to be met and have the chance to meet it. However, it is highly relevant to note, as I have in this decsion, that *Figliola, supra* has concluded that parties should challenge the validity or correctness of a judicial or administrative decision through the appeal or judicial review mechanisms that are intended by the legislature.

[47] The applicant submits that the ESO was biased in his dealings with the applicant, in that he arrived at a decision before giving due consideration to her position. In this particular case the allegation of bias is closely aligned with the allegation that the applicant was not given the opportunity to respond to the case against her. However, again, I am of the view that the issue of whether the applicant was given as full an opportunity to participate in the proceeding before the ESO, as she believed was warranted, is not grounds for circumventing the statutory appeal contained in the *ESA*..

[48] The applicant submitted that the ESO ought to have informed her that proceeding with her claim under the *ESA* may affect her application before the Tribunal. I do not agree. The ESO is a statutory decision-maker. There is no statutory requirement for the ESO to perform this role and the failure to do so do is not an issue for consideration under s. 45.1.

[49] The applicant submits that whether she appealed her ESO claim to the OLRB or pursued an Application before the Tribunal both would involve a relitigation and as such her choice to come to the Tribunal does not unduly tax the administrative tribunal system. I do not agree. This argument fails to distinguish between pursuing further litigation by means of a legislatively mandated review process and seeking to relitigate before a Tribunal with a concurrent mandate a decided issue. *Figliola*,*supra* makes abundantly clear that this is not appropriate under the applicant's circumstances.

[50] For all these reasons the Application is dismissed.

Dated at Toronto, this 9th day of October, 2012.

"signed by"

_____

Eric Whist
Vice-chair