

THE NEW HUMAN RIGHTS SYSTEM IN ONTARIO: WHERE ARE TEACHERS' HUMAN RIGHTS BEING LITIGATED?

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I. Introduction

On June 30, 2008, the *Human Rights Code Amendment Act, 2006*² came into effect and the Ontario Human Rights Commission's (The "Commission") mandate was dramatically altered. In essence, a new tribunal was established: the Human Rights Tribunal of Ontario ("HRTO"). Although, the HRTO previously existed, with the significant amendments to the *Ontario Human Rights Code* (the "Code")³, a direct access model to the HRTO was implemented and an entirely new human rights system was developed.

The creation of the new system resulted in an overhaul of the manner in which human rights complaints are investigated and enforced in Ontario. The new HRTO operates on a direct access model, whereby complaints are filed directly with the HRTO. The new system has already had, and will increasingly have, an impact on the working lives of teachers and other professionals in Ontario.

While the new HRTO is now beyond the transitional stage, and the direct access model has been in place since June 30, 2008, the HRTO is still in its early years. As a result, the full effects and impact on the working lives of teachers is not yet known. However, trends since the inception of the new HRTO, along with arbitral case law, provide insight into the future of human rights for teachers in Ontario.

This paper outlines the new Ontario human rights system and the various significant changes that have occurred. This paper also examines recent arbitral and HRTO caselaw. The caselaw highlights the most common grounds for complaints (age, disability, religion, sex, and ethnicity), provides an insight into the available options for addressing human rights issues, and demonstrates where, in fact, teachers' human rights are being litigated.

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² *2006, S.O. 2006, c. 30*

³ *Human Rights Code R.S.O., 1990, Chapter H.19*

II. The New Human Rights System

(i) Rules of Procedure

The HRTO has extensive Rules of Procedure (“Rules”)⁴ that apply to all proceedings before the HRTO under Part IV of the *Code*. The Rules set out specific rules which govern the functioning of the HRTO including the powers of the HRTO, the process for filing applications, the process for filing responses, the process for deferring applications, the dismissal of applications and the guidelines for HRTO proceedings. The purpose of the Rules is:

...to enable the Tribunal to fulfil its mandate under the Code by providing:

- 1. A fair, open and accessible process to deal with application made under the Code, and*
- 2. The opportunity for fair, just and expeditious proceedings for the resolution of application made under the Code.*⁵

The Rules provide that the Rules “...will be liberally interpreted and applied by the Tribunal to facilitate an accessible process and to ensure the fair, just and expeditious resolution of the merits of the matters before it”.⁶

(ii) How is a Complaint Launched

An individual who believes that his or her rights have been infringed must now file a complaint directly with the HRTO.⁷ A “person” is defined in the *Code* as including various organizations including trade unions.⁸ Applications can also be made by organizations filed on behalf of other persons⁹ as well as by the Commission, where the application

⁴ *Human Rights Tribunal of Ontario Rules of Procedure, Applications under the Human Rights Code Part IV R.S.O. 1990, C.H. 19 as amended*

⁵ *Ibid.*, at pg 1

⁶ *Ibid.*, at 1 - 1.1

⁷ *Human Rights Code s. 34 (1)*

⁸ *Ibid.*, at s. 46

⁹ *Ibid.*, at s. 34(5)

involves a matter of public interest.¹⁰

Prior to the establishment of the new HRTO, complaints were made to the Commission. The Commission was responsible for investigating complaints and determining whether complaints would be referred to the HRTO; in essence, performing a “gatekeeping” role.¹¹

Under the new system, applications to the HRTO must be made within one year of the incident to which the application relates.¹² Where the application relates to a series of related incidents, the time limit is within one year of the last incident in the series.¹³ The HRTO permits applications to be made outside of the one-year time limit, “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”.¹⁴

The HRTO requires that Applicants provide substantial and detailed information upon filing of an application. The requirement to provide substantial information upon filing assists in facilitating an expeditious process and further avoids applications proceeding where there is a lack of information. The Rules provide that an incomplete application may be sent back to the Applicant with an explanation as to how the application is incomplete and allowing the application to be resubmitted with the necessary revisions within twenty (20) days from the day it was sent back to the Applicant.¹⁵ The Rules also set out the HRTO’s power to dismiss applications where there is a failure to comply with the Rules.¹⁶

(iii) The Legal Support Centre

The amendments to the *Code* provided for the establishment of the Human Rights Legal Support Centre (the “Centre”) ¹⁷ The Centre was formally in place on June 30,

¹⁰ *Ibid.*, at s. 35(1)

¹¹ *Mary Cornish, Fay Faraday, Jo-Anne Pickel, Enforcing Human Rights in Ontario (Toronto: The Cartwright Group Ltd., 2009) at pg 20*

¹² *Human Rights Code*, s. 34 (1)(a)

¹³ *Human Rights Code*, s. 34 (1)(b)

¹⁴ *Human Rights Code*, s. 34 (2)

¹⁵ *Human Rights Tribunal of Ontario Rules of Procedure, Applications under the Human Rights Code Part IV R.S.O. 1990, C.H. 19 as amended at 6 - 6.4*

¹⁶ *Ibid.*, at 5 - 5.3

¹⁷ *Human Rights Code*, s. 45.11

2008.¹⁸ The Centre's role is to provide legal services to individuals across Ontario who believe they have suffered discrimination. In doing so, the Centre provides the following services:

1. *Advice and assistance, legal and otherwise, respecting the infringement of rights under Part I.*
2. *Legal services in relation to,*
 - i. *the making of applications to the Tribunal under Part IV,*
 - ii. *proceedings before the Tribunal under Part IV,*
 - iii. *applications for judicial review arising from Tribunal proceedings,*
 - iv. *stated case proceedings,*
 - v. *the enforcement of Tribunal orders.*¹⁹

The Centre has guidelines for the provision of assistance.²⁰ The following factors are considered when determining the extent of legal service that the Centre will offer the individual:

- (a) *the nature of the application;*
- (b) *the capacity of the applicant;*
- (c) *the nature of the respondent*
- (d) *the existence of any intervenor; and*
- (e) *any other additional factors the Centre may consider relevant.*²¹

The Centre functions similarly to a legal clinic specifically for unrepresented individuals pursuing human rights claims at the HRTO. As such, it has finite resources. Often, criteria (b), the capacity of the Applicant, includes finding out if the Applicant has a union or is sophisticated enough to proceed with her claim without their involvement. If the application is employment-related, and there is a union available to represent the Applicant, then the Centre will most often direct the Applicant to his or her union, rather than provide representation.

(iv) Mediation

Mediation in complaints before the HRTO is voluntary. However, the HRTO places

¹⁸ *Human Rights Legal Support Centre* <http://www.hrlsc.on.ca>

¹⁹ *Human Rights Code s. 45.13*

²⁰ <http://www.hrlsc.on.ca> - *HRLSC interim guideline: "eligibility for legal support services & case selection criteria"*

²¹ *Ibid.*

a great deal of emphasis on the use of mediation in resolving complaints. The HRTTO attempts to schedule mediation within six (6) months of when an application is determined to be complete and is processed.²²

As in other forums, there are numerous benefits to participating in mediation at the HRTTO. A significant benefit is that mediation often results in a more expeditious resolution than does the formal hearing process.

In addition, where a settlement is reached in mediation, that settlement and the details of what occurred during the mediation process remain between the parties.²³ The outcome of a mediation, and the surrounding details, are not available to the public as they are with a written decision of the HRTTO following a hearing.²⁴ Depending on the nature of the complaint and the particular parties involved, this can be a very important consideration. Again, the confidentiality possible through mediation is an important consideration, especially where school boards or principals would prefer to preserve their reputation; or where a teacher prefers that certain medical or personal information not be made public through a written decision.

Another significant consideration when contemplating mediation at the HRTTO is the ongoing relationship between the parties. Especially in cases involving teachers and complaints against school boards, it is crucial to recognize that in most instances the parties will be required to have an ongoing relationship throughout the remainder (or at least a portion) of the teacher's career. Resolution of complaints through mediation can be a less confrontational manner to remedy issues while providing a forum for the parties to raise their concerns and reach a solution.

(v) Hearings

If the parties to a human rights application before the HRTTO do not agree to participate in mediation, or if mediation is unsuccessful at resolving the complaint, the application then proceeds to a formal hearing before an HRTTO adjudicator.

An adjudicator may dismiss the application after finding that there was no violation of the *Code* or the adjudicator may find that there was a violation of the *Code* and decide the appropriate remedy.

²² *HRTTO Information Bulletin: Scheduling, Rescheduling and Adjournments, September 2008.*

²³ *Human Rights Tribunal of Ontario Rules of Procedure, Applications under the Human Rights Code Part IV R.S.O. 1990, C.H. 19 as amended at Rule 15 - 15.2 "Parties and their representatives who participate in mediation under Rule 15.1 must sign a confidentiality agreement before the mediation commences".*

Rule 15-15.4 - "All matters disclosed during mediation are confidential and may not be raised before the Tribunal or in other proceedings, except with the permission of the person who gave the information".

²⁴ *Ibid., at Rule 3 - 3.12*

Formal hearings at the HRTO are public proceedings which result in written decisions that are readily available to the public.²⁵ As such, once the parties arrive at a formal hearing it is understood that the decision, most often including the names of the parties involved and the details of the complaints and corresponding events, will be public knowledge.

(vi) Expanded Remedial Provisions

The new human rights system has expanded the remedies available where a violation is found.²⁶ The HRTO can order both monetary and non-monetary compensation. As with the prior system, there are three types of remedies that the HRTO can order: financial remedy, other specific remedy and public interest remedy.

The most notable change with respect to remedies is the removal of the \$10,000 cap for mental anguish damage awards, the removal of the requirement that the violation was wilful or reckless, and the removal of the distinction between damages for mental anguish and damages for losses stemming from the infringement of rights.²⁷

The availability of monetary awards is an important consideration when deciding whether to pursue a human rights complaint with the HRTO versus in the arbitration arena, for example. Arbitrators generally do not award monetary damages in line with the remedial powers of the HRTO.

(vii) Deferring Applications

The HRTO accepts applications where another proceeding is pending or is underway. However, where for example, the complaint is part of a grievance arbitration or a Workplace Safety and Insurance Appeals Tribunal hearing the following special rules apply:

- 1. You must attach to your Tribunal Application a copy of the document that started the other proceeding*
- 2. If the other proceeding is still going on, the Tribunal may decide to postpone or defer your Application. You or the Respondent can also request a deferral.*
- 3. If the other proceeding has dealt with the facts of your Application appropriately, the Tribunal may dismiss your Application. You will have an opportunity to explain*

²⁵ *Ibid.*, at Rule 3 - 3.10, 3.11, 3.12

²⁶ Sections 45.2 and 45.3 of the *Code* set out the Orders that the HRTO may make where a violation is found.

²⁷ Mary Cornish, Fay Faraday, Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Toronto: The Cartwright Group Ltd., 2009) at pg 128

*why you believe the other proceeding did not appropriately deal with the substance of this Application.*²⁸

As set out in #2 above, the HRTO has the explicit power to defer applications in accordance with the Rules.²⁹ The recent trends suggest that the HRTO has been making extensive use of its power to defer applications. While the HRTO has the power to defer applications, before doing so, notice of the HRTO's intent to defer will be provided to the parties and the parties will be given the opportunity to make submissions.³⁰ This guarantee that an application will not be disposed of prior to the parties having the opportunity to make oral submissions is a substantial change from the previous system. The preference for deferring to labour arbitrations is the primary reason why there are so few teacher cases currently before the HRTO and also why there are few HRTO decisions involving teachers.

II. Review of Recent Human Rights Cases Involving Teachers as Employees

Since the end of the HRTO's transition period on June 30, 2009, there have been three (3) cases of note before the HRTO involving the resolution of human rights claims by teachers working for school boards in Ontario. The human rights grounds involved in these three (3) cases include: age, ethnicity, ancestry, disability, and religion.

For somewhat older labour arbitration cases, the most common grounds for complaints are: age, disability, religion, sex, and ethnicity. Although the HRTO is generally a more favourable forum for pleading and demonstrating discrimination, the rate of success does not seem to be better than at arbitration. The benefits of opting for the HRTO instead of arbitration include faster resolution, providing the teacher with a more sensitive process and forum for his or her problems and the availability of expanded remedial awards including monetary damages. The main disadvantage is the strong likelihood that the HRTO will defer the case to the arbitration process.

(i) Arbitral Caselaw

Age often puts older, foreign-trained teachers against younger, recent graduates of Ontario schools.³¹ Age also involves retired teachers, who continue to teach on an

²⁸ HRTO Applicant's Guide at pg 5

²⁹ *Human Rights Code* s. 45

³⁰ Human Rights Tribunal of Ontario Rules of Procedure, Applications under the *Human Rights Code* Part IV R.S.O. 1990, C.H. 19 as amended at Rule 14.2

³¹ *Toronto District School Board v. Ontario Secondary School Teachers' Federation, District 12*, [2010] O.L.A.A. No. 66; *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25 (Cassells)*, [2006] O.L.A.A. No. 607.; *Dufferin-Peel Catholic District School Board v. O.E.C.T.A.*, [2008] O.L.A.A. No. 508.

occasional basis, and younger teachers, who have trouble obtaining occasional teacher hours, long-term occasional assignments, and the subsequent permanent or contract positions that may result.

Religion-based issues often involve requests by teachers for time away from duties in order to practice their faith.³² This can involve requests for prayer time or requests for “faith days” to be off from work entirely in order to honour religious holidays. Arbitrators have found that, where the school board can show good faith efforts to accommodate these requests, the human rights claims will usually be denied. Accommodation need not be ideal, but it must be made in good faith, and it must objectively satisfy the request for time off in order to satisfy the religious requirement or holiday.³³

Disability claims are the most varied. This is because the jurisprudence provides a broad definition to disability for the purposes of human rights. Disability claims have included claims for assistive devices, claims for specific cleaning products, claims of discriminatory treatment that resulted in not getting work, and claims for specific assignments based on hours, subject matter, or location.³⁴ Claims for discrimination on the basis of disability in labour law demonstrate a high success rate. This is often due to the nature of the ground - disability is medical, which is often documented, and doctors and health professionals can prescribe concrete steps that school boards can take in order to accommodate a teacher. Thus, the discrimination and the remedy are more readily identified by an arbitrator or human rights adjudicator. The results of this line of cases indicate that it is discriminatory for a school board to fail to accommodate an injured employee’s requests for an easier commute³⁵; or to use chemicals that could trigger a teacher’s illness, where there was an accommodation plan in place that dictated what kinds of chemicals should be used.³⁶ It was not discriminatory to: retain a teacher where there is no reasonable prospect of the employee returning to work in the future³⁷; refuse to pay for personal assistive devices - as

³² *York Region District School Board v. O.S.S.T.F., District 16 (Faith Day Grievance)*, [2008] O.L.A.A. No. 442; *Toronto District School Board v. Ontario Secondary School Teachers’ Federation, District 12*, [2010] O.L.A.A. No. 66.

³³ *York Region District School Board v. O.S.S.T.F., District 16 (Faith Day Grievance)*, [2008] O.L.A.A. No. 442.

³⁴ *Catholic District School Board of Eastern Ontario and O.E.C.T.A. (Elderkin)*, 176 L.A.C. (4th) 193; *Ottawa-Carleton District School Board v. O.S.S.T.F. (Rambharose)*, [2005] O.L.A.A. No. 459; *Toronto District School Board v. E.T.F.O. (Mootilal)*, [2007] O.L.A.A. No. 341; *Toronto District School Board v. O.S.S.T.F.*, [2008] O.L.A.A. No. 153.

³⁵ *Catholic District School Board of Eastern Ontario and O.E.C.T.A. (Elderkin)*, 176 L.A.C. (4th) 193.

³⁶ *Toronto District School Board v. O.S.S.T.F., District 12*, [2008] O.L.A.A. No. 450.

³⁷ *Ottawa-Carleton District School Board v. O.S.S.T.F. (Rambharose)*, [2005] O.L.A.A. No. 459.

opposed to workplace modifications - over and above the teacher's benefits provisions³⁸; or assign different subjects to a disabled teacher³⁹.

Cases involving discrimination based on sex frequently involve issues related to pregnancy. In one case, the denial of a retirement gratuity to female teachers, who had no choice but to resign during pregnancy, and then return to work later was found to have been discriminatory. The reinstatement of that gratuity was not seeking special treatment; instead it was a case of returning to them rights that were taken away because they were not accommodated by school board policies, at the time.⁴⁰ In another case, a pregnant teacher was singled out for her manner of dress. Addressing that issue was not discriminatory in itself, but the references made to her increased breast size created a discriminatory nexus between her pregnancy (sex) and the application of the dress code to her.⁴¹ In this case, the arbitrator did not order a remedy, but it is likely that the HRTO would have ordered some form of training or small amount of financial redress for loss of dignity.

Ethnicity, ancestry, and race claims often involve discrimination arising from hiring or promotions. It is rare for a school board to be accused of overt discrimination on the basis of ethnicity, ancestry and/or race against a currently employed teacher. These claims demonstrate the lowest rates of success. In hiring and promotion grievances, the arbitrator is placed in the awkward position of essentially almost second-guessing a school board's choice and assessment of candidates. Where the school board can provide a rational, non-discriminatory explanation for the hiring choices it made, then the claim of discrimination will fail. The process of hiring will also be examined for structural barriers, but it appears that absent overtly discriminatory practices, i.e. requiring teachers to speak without an accent, or conducting interviews only on a holy day - none will be found.

Reprisal is a problem for teachers and school boards. On the one hand, teachers are often wary of the potential for being "black-listed" by principals or school board administrators, who often hold much discretion in assigning posts and making hiring choices. On the other hand, school boards must be wary of taking action that has negative consequences for a teacher who has made a human rights claim. If timed closely enough, that negative action will be considered a reprisal contrary to section 8 of the *Code*, even if there were other factors that led to the action taken. If a school board has a legitimate, non-discriminatory reason for taking the negative action against a claimant, then it must be sure to demonstrate that reason through documentary evidence and testimony from decision-makers. Evidence that the decision makers had no actual knowledge of the human rights

³⁸ *Toronto District School Board v. E.T.F.O. (Mootilal)*, [2007] O.L.A.A. No. 341.

³⁹ *Toronto District School Board v. O.S.S.T.F.*, [2008] O.L.A.A. No. 153.

⁴⁰ *Dufferin Peel Catholic District School Board v. O.E.C.T.A. (Richardson)*, [2005] O.L.A.A. No. 187.

⁴¹ *Greater Essex County District School Board v. E.T.F.O. (Kruc)*, [2007] O.L.A.A. No. 224.

complaint is also helpful for preventing action from being characterized as reprisal. It is as though reprisal is an easily rebuttable presumption, provided the claimant has made a *prima facie* case for reprisal, based on timing and negative consequences.

(ii) HRTO Caselaw Since the New Code

As mentioned above, since the direct access model was implemented there have only been three (3) cases decided by the HRTO involving complaints made by teachers. The majority of the cases have been deferred to the arbitration process. Further, although the HRTO has not yet released statistics with respect to the handling of complaints to date, it can be assumed that a number of complaints have been resolved through mediation at the HRTO. Thus, not forming part of the public record and not involving written decisions.

In each of the three (3) cases summarized below, the complaints were dismissed. As a result, it is not possible to comment on the nature of the remedies being awarded by the HRTO under the new system or trends more generally with respect to the dismissal of complaints versus the finding of human rights violations.

For a unionized teacher with a human rights complaint before the HRTO, it is very likely that the HRTO will defer a hearing, where the union or school board can show that a grievance should be pursued. The teacher can later return to the HRTO if the grievance did not deal with the merits of her human rights claim. The HRTO will also consider whether or not deferring to the grievance procedure is the most fair, just, and expeditious way of dealing with the human rights application or complaint.⁴² In the context of a potential settlement at arbitration, it is important that the teacher be aware that such a settlement will likely be considered as a final resolution, which would bar the claim from being relitigated before the HRTO.

The cases below do not describe whether or not a grievance was pursued. It is possible that the teacher chose not to file a grievance, and neither the union nor the school board argued that the appropriate forum for the complaint would have been through the grievance procedure. The decisions, however, do not address this issue.

Margaret Way v. Toronto Catholic District School Board, Kevin Kobus, and William Jesty, 2010 HRTO 288

The Complainant participated in a hearing before the HRTO concerning her claim that she had been discriminated against on the basis of age, family status and marital status. The Complainant also alleged that the school board took actions of reprisal against her for having filed two previous complaints with the Commission. The discrimination claimed was

⁴²*Kopylov v. Toronto Catholic District School Board, 2009 HRTO 993 (CanLII)*, at para. 11.

that she was unsuccessful at obtaining LTO positions, permanent teaching positions and summer positions since 1982. The HRTO dismissed her complaint.

The Complainant self-identified as a divorced woman of 61 years, at the time that she filed the original complaint in 2007. She complained that the discrimination started in 1982, when she applied to be an occasional teacher with the Toronto Catholic District School Board ("TCDSB"). Years later, she found out that the interviewer from 1982, Kevin Kobus, had written in his notes that she was going through a divorce, getting an annulment, and had recently converted to Catholicism. He added a comment that because of her divorce, he would question her stability. Back in January of 1982, however, she did receive placement on the list for occasional teachers. In 1989, she had a child out of wedlock. She claimed that she suffered discrimination by her colleagues because of this family status.

The resolution of the complaint is complicated somewhat by the fact that in 1999, she entered into a settlement with the TCDSB regarding discrimination on the basis of her age and marital status, but excluding the comments of Mr. Kobus. The settlement involved the TCDSB recommending her for an LTO, which would then make her eligible for a permanent position. In January 2001, she began an LTO, but resigned the next month, prior to the LTO's completion. Subsequently, she was not considered eligible for a permanent position. In 2003, she applied for another LTO, but was unsuccessful because she did not complete the 2001 LTO. In 2005, she contacted the old Ontario Human Rights Commission, claiming that the TCDSB breached the settlement. She also claimed that she resigned because of discrimination. The Commission found that because she resigned, there was no breach of the settlement, and dismissed her complaint. The HRTO found that this settlement prevented the Complainant from relying upon certain facts that occurred between 1981 and 1999, excluding the comments of Mr. Kobus.

The HRTO dismissed allegations of continuing discrimination by the TCDSB between 1999 and 2006 because, even if true, those facts occurred outside the required one year limitation period to file a complaint. This would include her claim of resigning because of discrimination during the 2001 LTO. The complainant argued that there was a legitimate reason for the delay - that she was occupied with caring for her terminally ill mother, who died in 2003. The HRTO noted that the Commission already concluded that the delay was not reasonable, despite her mother's death, because the complainant had been able to pursue a court action against a different school board during the same period. The HRTO, therefore, ruled that the Commission already dealt with the delay; found against the Complainant, and that she could not seek to rely on facts from that time period.

The remaining period allowable for the complaint was February 2006 to December 2007. The Complainant argued that the discriminatory attitude evidenced in Mr. Kobus' notes and her colleagues' behaviour from 1989 contributed to her failure to obtain LTO, permanent or summer positions, for 2006 and 2007. The HRTO found that Mr. Kobus, although employed by the TCDSB, maintained no daily involvement with the hiring of LTO or permanent teachers. He, therefore, had no influence over that process. The TCDSB led

evidence that the reason for which she could not obtain an LTO position was the fact that she did not have a positive LTO evaluation from a principal. There was also evidence that the failure to obtain other LTOs was due, in part, to her own inaction. The Complainant, after being unsuccessful in 2003, did not apply for any further LTO positions.

The HRTO found that there was no evidence that decision-makers at the school board had accessed her personnel file to read the 1981 comments about her “instability”. It was also found that there was no evidence to establish that the fact that she had a child out of wedlock played any role in her failure to obtain positions in 2006 and 2007. Similarly, there was no evidence that the decision-makers for the LTO positions knew about her previous human rights complaint. It is worth noting that the HRTO stated: “The Applicant has convinced herself, based on the 1981 interviewer’s comments, and the alleged attitude of her colleagues about her status as a single mother in 1989 that the school board has consistently and persistently discriminated against her since 1981.”⁴³ In the end, her failures to obtain LTOs and a permanent position were attributed to her resignation in 2001, and not having a positive review from a principal.⁴⁴

With regard to the summer position in 2007, the HRTO found that the successful candidates were those who already taught in that school. Moreover, the Complainant’s own witness, from her union, explained that it would be reasonable to prefer a permanent teacher from the same school where summer teaching would take place.

Schram and Avon-Maitland District School Board and David MacLennan,
2010 HRTO 24

In this case, the teacher Complainant claimed that he was discriminated against because of his age, disability, and perceived disability. Mr. Schram claimed that he was singled out and had to endure increased scrutiny. Perceived disability can be grounds for prohibited discrimination because, as the HRTO ruled, it does not matter that the Complainant does not actually possess the disability. What matters is the negative treatment received by others, who believe that the Complainant is disabled. The HRTO dismissed his complaint.

The Complainant alleged that the discrimination began in September 2005, when he was falsely accused of having alcohol in the classroom. In 2006, he claimed that he was accused by his principal of being “too friendly” with a student, whereas other staff members had hugged students without any repercussions. He claimed that he was penalized and scrutinized for: approving a “bullying sucks” suggestion by a student, failing to supervise students when they practised their instruments in the hallway, being sarcastic to students, and not getting along with colleagues. He also claimed that after he went on medical leave

⁴³ *Margaret Way v. Toronto Catholic District School Board, Kevin Kobus, and William Jesty*, 2010 HRTO 288, at paragraph 42.

⁴⁴ *Ibid.*, at para. 43.

due to depression, his classroom was emptied of his personal effects, his name was removed from his mailbox at school, his internet access was restricted, he received an administrative transfer, and received a last minute invitation to a board retirement party. The HRTO found that there was no evidence that any of the facts as alleged were connected to his age, disability or perceived disability.

As mentioned above, his disability was his depression. Mental illness is now an undisputed form of disability for human rights purposes. His perceived disability was based on his belief that he had been branded as a paedophile by the board and by his principal, David MacLellan.⁴⁵ The school board and the principal warned the Complainant to refrain from certain types of behaviours with female students that could be perceived as “grooming” behaviour. Mr. MacLellan raised the issue with the Complainant at a meeting in September 2005. The behaviour did not stop and Mr. MacLellan imposed discipline in 2006. The HRTO noted that the Complainant remained resistant to accepting that the respondents had legitimate concerns.⁴⁶ He testified that it was his teaching style and that the candy he distributed was as a reward to successful students. The Complainant stated that he was made to feel that he could not do anything correctly.

Along with that heightened scrutiny, the Complainant claimed that his age was made an issue when Mr. MacLellan brought up the issue of his retirement on three occasions. The Complainant stated that this worsened his depression. In March 2007, he took a medical leave from work. In April 2007, the Complainant received an email from the school custodian stating that his personal effects were removed from the classroom and put into storage at the school. The email also indicated that the custodian believed that he would not be returning to the school. The Complainant stated that he felt like he was being fired, and that another teacher on leave that year did not have her things removed.

Another incident that made the Complainant feel singled out was when he was in the school with a guest in order to retrieve his belongings. This happened in April 2007. Mr. MacLellan learned of the Complainant’s presence in the school and went to ask the Complainant and his guest to register with the office, as per school rules. What resulted was an unfriendly exchange. The Complainant also claimed that his application for supply teaching was not accepted by the school board because of the problems he had with Mr. McLellan and the school board.

After weighing the evidence, the HRTO found that the Complainant’s depression did not affect his work performance, as per his own testimony. He also did not inform the school board about his illness, nor did he request accommodation.⁴⁷ His disability, therefore, was

⁴⁵ *Schram and Avon-Maitland District School Board and David MacLellan*, 2010 HRTO 24, at para. 12.

⁴⁶ *Ibid.*, at para. 14.

⁴⁷ *Ibid.*, at para. 35.

not the basis for any discrimination. In addressing the problems he experienced after going on leave, the HRTO found that - while unfortunate - the treatment he received did not amount to differential treatment under the *Human Rights Code*.⁴⁸ The school board and Mr. McLellan were able to provide, "legitimate, non-discriminatory explanation[s] for each [incident]."⁴⁹ The most effective explanation was that his belongings were removed, his mailbox removed, and his internet privileges limited because the Complainant was on an indefinite leave, with no set date for return.⁵⁰

With regard to the perceived disability claim - that of being labelled as a paedophile - the HRTO found that he was not discriminated against. The HRTO considered the school board's concerns to have been legitimate, and that Mr. McLellan raised these concerns in an appropriate manner - through a meeting, and soliciting any issues from the Complainant that he felt they should know.⁵¹ Furthermore, the HRTO found that there was no suggestion that he was actually a paedophile, or that he was engaging in - or likely to engage in - inappropriate sexual conduct with students. In fact, Mr. McLellan testified that if he believed that were the case, he would have proceeded very differently with the Complainant. He would have called children's aid and the police, and he would have removed the Complainant from teaching duties. The concerns escalated to discipline because the Complainant refused to understand the basis for the concerns, and refused to alter his behaviour. It was his own obstinance that informed the respondents' next steps, not any prejudice against him as a paedophile.⁵²

Regarding the Complainant's claim that he was discriminated against because of his age, the HRTO ruled that it was not discriminatory for a principle to enquire about an older employee's retirement plans. After the Complainant stated that he had no plans to retire after the 2006-2007 school year, the issue was not brought up again. In addition, the Complainant's complaint that his colleagues referred to his ideas as outdated was not sufficient to ground discrimination based on age. There simply was not enough evidence that his age prompted any of the treatment he received, nor that his age caused the Complainant to be placed under additional scrutiny.⁵³

Alexander Antropov v. Toronto District School Board, Kathy Owen, and Donna Fanjoy, 2010 HRTO 305

⁴⁸ *Ibid.*, at para. 36.

⁴⁹ *Ibid.*, at para. 37.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, at para. 39.

⁵² *Ibid.*, at para. 42.

⁵³ *Ibid.*, at paras. 46-47.

The Complainant alleged discrimination on the basis of age, ethnic origin, place of origin, and citizenship. The complaint centred on his inability to obtain a position as an occasional or permanent teacher. The facts pertained only to the 2006-2007 school year. The complaint was dismissed.

The Complainant was 51 years of age at the time. He is of Russian origin, and was a landed immigrant, when he applied. He applied to be an occasional teacher online. He had a Masters and PhD in mathematics from Moscow State University. He stated that his teaching experience included contract positions in Minnesota high schools, and at the University of Minnesota. At the time, he was certified to teach intermediate and senior mathematics. The complainant testified that while in teacher's college, he learned that his younger, Canadian classmates were able to receive interviews. He did not receive an interview, despite his extensive credentials and teaching experience.

The decision began by stating the requirements for establishing a *prima facie* or self-evident case of discrimination in hiring or promotion cases. The factors listed were: first, that the Complainant was qualified; second, that the Complainant was not hired; and third, that someone no better qualified, but lacking the distinguishing feature of which is the gravamen of the human rights complaint, subsequently obtained the position.⁵⁴ The HRTO found that he had established a *prima facie* case because younger, Canadian classmates of his were able to obtain interviews. The HRTO noted that he had letters of recommendation and that his experience and education were superior to other candidates.⁵⁵ Nonetheless, he was not contacted for an interview throughout that year.

The respondents supplied a rational, non-discriminatory explanation to answer his *prima facie* case. The HRTO found that the school board did not contact him for an interview because he had only one teachable subject, whereas the candidates interviewed had two. The respondents attempted to state that explanation without providing evidence. The HRTO ruled that merely stating a non-discriminatory explanation could not serve to dismiss a claim because that would create "an insurmountable barrier to establishing discrimination."⁵⁶ This statement means that the HRTO will not place all the burden of proof on the Complainant. The onus is on the employer to prove that it was not discriminatory in its choices and procedures. The HRTO relied upon the reasoning that proof would be required because it was not a statutory requirement that secondary school teachers have two teachable subjects.⁵⁷

⁵⁴ *Alexander Antropov v. Toronto District School Board, Kathy Owen, and Donna Fanjoy*, 2010 HRTO 305, at para. 17.

⁵⁵ *Ibid.*, at paras. 20-21.

⁵⁶ *Ibid.*, at para. 29.

⁵⁷ *Ibid.*, at para. 31.

The school board put forward evidence that in order to cull applications, it immediately removes the applications of teachers with only one teachable subject. This is because most assignments and teachers involve teaching more than one subject. An occasional teacher with only one teachable subject would be unable, therefore, to replace or supply for a permanent teacher's full assignment.⁵⁸ Furthermore, the school board produced documents to show that the candidates who were hired immediately after graduation from teacher's college had at least two teachable subjects.⁵⁹ The HRTO also found that the only deviation from that practice would involve a subject area with a shortage - i.e. French or technology studies. The witnesses for the school board testified that they did not believe that mathematics was a shortage area for the year in which the Complainant applied.

IV. Conclusions

Under the new Ontario human rights system, the direct access model provides a more expeditious time line for the resolution of complaints, the availability of substantial monetary and non-monetary remedies, and guarantees Complainants the opportunity to make submissions. While there are benefits, as demonstrated in the caselaw reviewed, the HRTO is not necessarily an easier route because the standard of proof for Complainants is largely the same as at arbitration. Although the caselaw reviewed in this paper is a small sample, it provides insight into the human rights issues currently being litigated. It is most likely that when human rights complaints arise from teachers' employment, they will continue to be dealt with at arbitration or through HRTO mediation rather than at the HRTO through a formal hearing. This is largely a result of the HRTO's practice of deferring to grievance and arbitration process.

⁵⁸*Alexander Antropov v. Toronto District School Board, Kathy Owen, and Donna Fanjoy*, 2010 HRTO 305, at paras. 39-40.

⁵⁹*Ibid.*, at para. 42.