# HUMAN RIGHTS TRIBUNAL OF ONTARIO

**B E T W E E N:**

**Adele Mercier**

**Applicant**

**-and-**

**Queen's University, Christine Sypnowich, Dan Bradshaw, David Bakhurst, Gordon Smith, Henry Laycock, Rahul Kumar, Deborah Knight and Sergio Sismondo**

**Respondents**

**-and-**

**Queen's University Faculty Association**

**Intervenor**

# INTERIM DECISION

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| **Adjudicator:** | Maureen Doyle |
| **Date:** | February 15, 2013 |
| **File Number:** | 2010-07587-I |
| **Citation:** | 2013 HRTO 277 |
| **Indexed as:** | **Mercier v. Queen's University** |

**WRITTEN SUBMISSIONS**

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| Adele Mercier, Applicant | ) | S. Ronald Ellis, Counsel |
| Queen's University, Christine Sypnowich, Dan Bradshaw, David Bakhurst, Gordon Smith, Henry Laycock, Rahul Kumar, Deborah Knight and Sergio Sismondo, Respondents | ) | Alan Whyte, Counsel |
| Queen's University Faculty Association, Intervenor | ) | James K. MacDonald, Counsel |

[1] This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The applicant alleges discrimination in employment on the basis of disability, sex and reprisal. She is employed as a professor in the Philosophy Department of the respondent university and alleges, among other things, that the respondent university has discriminated against her (and other women), as she has been differently treated and marginalized and that the respondent permitted a poisoned environment to exist, due to her gender. She also alleges that her complaints regarding this treatment have resulted in reprisals including discipline. By way of remedy, she seeks several public interest remedies, including for example a third party review of the university's formal complaint procedure, a third party study of the status of women at the university, training for employees in equity and human rights, several remedies she describes as "reparation", including for example an order to repair damage to her "standing, reputation and career", "public acknowledgment from the University and from the Department of Philosophy that it was right and proper to bring the discrimination complaint forward", appropriate "reward", "recognition" and "compensation" for bringing "these problems to the fore" and for counselling graduate and undergraduate women and "course credit" for courses she taught without pay, and financial compensation including compensation by way of general damages. This Interim Decision deals with the issue of whether the Application should be deferred pending the completion of related grievance proceedings.

[2] The respondents sought several orders in a Request for an Order During Proceedings (RFOP). They sought dismissal of a number the allegations on various grounds, and one of the orders they sought was deferral of certain aspects of the Application pending completion of the grievance and arbitration process.

[3] In a Case Assessment Direction (CAD) dated December 7, 2012, the Tribunal stated that its jurisprudence does not support a piecemeal approach to hearing an Application and indicated that it is therefore appropriate to consider the question of whether the Application as a whole should be deferred. Accordingly, it directed the parties to make submissions regarding deferral of the entire Application and drew their

attention to the Tribunal's jurisprudence on this issue, including *Melville v. Toronto (City),* 2012 HRTO 22 ("*Melville*").

[4] Counsel for the applicant submitted that in view of *Melville*, the applicant consents to the Tribunal deferring the whole of her Application pending the completion or earlier cessation of the grievance and arbitration proceedings.

[5] He submitted that the "commonality of factual issues between the Application and the grievances is in fact extensive". He also submitted that at the very least, the factual issues in the Application will "constitute circumstantial evidence" in relation to the issues in the grievances. Counsel also submitted that if the Tribunal were to proceed with this Application at this point, it would inevitably result in simultaneous proceedings.

[6] Further, counsel for the applicant submitted that any consideration of s. 45.1 of the *Code* or any of the respondents' other requests for dismissal of allegations on other grounds are issues which would be appropriately addressed after the completion of the arbitration proceedings.

[7] Counsel for the respondents subsequently wrote to the Tribunal, withdrawing the respondents' request for deferral of part of the Application. He made no separate submissions regarding the question of deferral of the Application in its entirety.

[8] QUFA has filed several grievances on behalf of the applicant. The first of those grievances which is related to this Application is dated May 21, 2010 and states that it is in relation to the respondent university's violations of the relevant collective agreement "in its treatment of Dr. Adèle Mercier". It makes reference to a letter dated April 7, 2010 which the applicant received from the university. It indicates that in the letter, among other things, the associate Dean offered to relieve her of some of the responsibilities in her department and the grievance indicated that she did not wish to be relieved of those responsibilities. It stated that she argued that relieving her of such service "is a retaliatory and punitive act for her having raised concerns of hostile work environment and gender discrimination within the Philosophy Department". It states that "[t]he

Faculty Office has known about her concerns regarding hostile work environment and gender discrimination for at least two years". The grievance states that QUFA claims that the respondent university violated articles of the collective agreement relating to academic responsibilities, discipline and harassment and that QUFA "reserves the right to add to the list of articles violated as this case proceeds through the grievance process". By way of remedy, it seeks "full redress", including satisfactory recognition of her extra work, "and anything else deemed fit and equitable that may become apparent in the grievance process".

[9] The second grievance, dated March 25, 2011, indicates that QUFA grieves that the university "is engaged in ongoing harassment of Dr. Mercier" and cites the collective agreement article titled "Personal/Workplace Harassment". It states that the Dean sent the applicant a letter dated October 27, 2010, indicating that tentative results of his investigation of certain activities of the applicant "were leading to the imposition of discipline". It states that on December 6, 2010, the Provost had announced that "an investigation would be taking place to review harassment and discrimination allegations in the Philosophy Department, including the possibility of systemic harassment and discrimination". It indicates that QUFA requested that discipline of the applicant be held in abeyance pending completion of the Provost's investigation, but that on February 22, 2011, the Dean imposed discipline without waiting for completion of that investigation. It states that the Dean did not wait and that the results of the investigation "should have given better information about what was happening in the Philosophy Department before targeting one member of the Department for discipline". By way of remedy, it states that QUFA seeks redress including "revocation of the discipline, cessation of the targeting of Dr. Mercier, damages for pain and suffering and anything else deemed fit and equitable that may become apparent in the grievance and arbitration process".

[10] The third grievance is dated January 3, 2012 and states that QUFA is grieving the respondent university's imposition of discipline on the applicant. It states that it is QUFA's position "that this is yet another instance of the University administration focusing on Dr. Mercier for the problems in Philosophy rather than looking into the issue

as one of a systemic nature that requires broader investigation". It indicates that the grievance "involves at least" the collective agreement articles relating to management rights, academic freedom, academic responsibilities and harassment (citing the same "personal/workplace harassment article as noted above), and states that QUFA "reserves the right to add to the list of articles breached". It stated that this grievance should be joined to the first and second grievances above "as it is part of a continuum of University behaviour". By way of remedy, QUFA seeks redress, including "revocation of the discipline; cessation of the targeting of Dr. Mercier; damages for pain and suffering; and anything else deemed fit and equitable that may become apparent in the grievance and arbitration process".

[11] The fourth grievance provided, an earlier document dated August 18, 2010, deals with the actions of the respondent university's Senior Associate (Faculty Relations) in sending an inquiry to another university about its relationship with the applicant. It states that the email was "a continuum of the alleged harassing behaviour".

[12] Counsel for QUFA submitted that the Application should not be deferred pending the completion of grievance proceedings. He submitted that though the grievances may raise some factual issues and some legal issues which overlap with factual and legal issues in the Application, the grievances do not allege discrimination on the basis of gender contrary to the *Code* or the collective agreement. He submitted that the grievances address issues of discipline, or conduct by the respondent university which QUFA contends is discipline. He also indicates that the grievances do raise issues of harassment, but submits that they "are not gender-based harassment issues", but rather are "personal workplace harassment issues". He also submits that the remedies available to the applicant at arbitration are very different from the remedies she seeks from the Tribunal. He submits that QUFA and the respondent university have held discussions regarding settlement, but they have not yet selected an arbitrator or set hearing dates. Counsel also submits that the Application contains numerous "alleged incidents" and that there are far fewer grievances than incidents alleged in the Application. He also submits that it is probable that there will be no duplication of

proceedings if the Application proceeds without deferral. With respect to the fourth of the above-noted grievances, he submits that it has been settled and the fact that the applicant continues to rely upon that particular incident in her Application is an indication that she is dissatisfied with QUFA's resolution of grievances. With respect to the May 21, 2010 grievance and the March 25, 2011 grievance, he submits that without admitting that there may be overlap, even if there is, the arbitrator could determine the merits or the parties could settle the grievance "without in any way resolving the human rights allegations allegedly associated".

[13] I note here that subsequent to the submissions provided by QUFA, counsel for both the applicant and QUFA wrote to the Tribunal regarding each other's submissions. This subsequent correspondence, which was not provided in response to a direction from the Tribunal, has not been considered for purposes of this Interim Decision.

[14] The Tribunal may defer consideration of an application, on such terms as it may determine, and on its own initiative (Rule 14.1). The Tribunal has stated that deferral is not automatically invoked simply because the parties are involved in other legal proceedings. It is a discretionary measure that the Tribunal exercises on the basis of the circumstances in each case. Absent good reason, applicants and respondents before the Tribunal are entitled to expect the Tribunal to take timely action to resolve complaints of discrimination brought before it.

[15] The Tribunal generally defers applications where there is an ongoing grievance under a collective agreement based on the same facts and human rights issues. In explaining this approach, the Tribunal has referred to the fact that the Supreme Court of Canada has affirmed that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII)).

[16] Some factors that have been identified as relevant in deciding whether to defer consideration of an application before the Tribunal are the subject matter of the other proceeding, the nature of the other proceeding, the types of remedies available in the other proceeding, and whether it would be fair overall to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them. See *Baghdasserians v. 674469 Ontario,* 2008 HRTO 404.

[17] As noted in various Tribunal decisions, there are compelling reasons why it may be unfair for parties to be required to simultaneously present their cases in multiple *fora,* particularly when the matters overlap and when the same facts or issues are in dispute and there is a potential for inconsistent findings.

[18] In this case, it is apparent that there is substantial overlap between the facts and issues covered by the Application and those referred to in the grievance. I am satisfied that the concerns the intervenor raises about the fact that the grievances cite a collective agreement article regarding "personal/workplace harassment" does not justify a departure from the Tribunal's normal approach. I agree with the applicant's counsel's submission that the "commonality of factual issues between the Application and the grievances is in fact extensive". The outstanding grievances assert that the university's actions are in retaliation for her having voiced concerns regarding harassment and gender discrimination. They assert a history of harassment, and allege that the respondent university's treatment of the applicant is retaliatory and punitive due to the fact that she raised concerns of a hostile work environment and gender discrimination. The grievances raise issues with respect to the facts surrounding the applicant's complaints of gender discrimination in the Philosophy Department and her allegations of harassment as well as what she characterizes as retaliatory disciplinary actions taken by the university, or actions she perceives as disciplinary , all of which are matters alleged in the Application. I also note that while the applicant seeks additional remedies in her Application, there is overlap between the remedies sought in the Application and in the grievances. I am persuaded that there is the potential for significant overlap between the grievance proceedings and the Application, which could very well lead to

inconsistent decisions on the facts and/or legal issues. A primary purpose of deferring an application is to avoid such potential inconsistency.

[19] Counsel for QUFA cites *Leblanc v. Toronto (City),* 2008 HRTO 960 ("*Leblanc*"), and argues that in that case, the Tribunal "found that the HRTO Application under consideration was based on different facts and different human rights issues than the facts and legal issues raised in the grievances" and decided not to defer the Application. I am not persuaded that the decision in *Leblanc* supports proceeding in this case.

[20] In the matter at hand, the grievances themselves reference the applicant's history of allegations of gender discrimination and harassment and also claim retaliation in the face of those allegations. While in *Leblanc* it was unclear how significant the factual overlap between the grievances and the Application would be at arbitration, I am persuaded that in the circumstances of this Application, the factual overlap appears significant and the importance of avoiding potential inconsistent findings supports deferral in this case.

[21] Though counsel for QUFA asserts that the matter has not yet been referred to arbitration, there are ongoing grievance proceedings and in these circumstances, the Tribunal has favoured deferral. As the Tribunal states at paragraph 8 in *Melville:*

> Deferral avoids two simultaneous proceedings that may result in conflicting determinations, ensures that the respondent need not be actively defending the same matter in two legal proceedings at the same time, and focuses the Tribunal's limited resources on cases where it is the only process being pursued. In my view, it is consistent with the Tribunal's mandate to interpret its rules in a fair, just and expeditious manner to defer a case when a grievance is ongoing, whether or not that grievance has yet been referred to arbitration. The grievance process is a stage in dispute resolution before the matter is referred to an independent third party, but that does not mean that there is no proceeding ongoing. Fairness supports avoiding the duplication of proceedings.

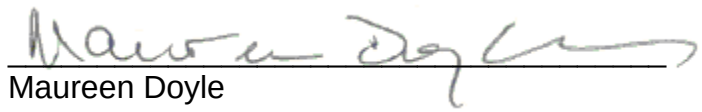
[22] The overlap between the Application and the outstanding grievance leads me to conclude that the most fair, just and expeditious approach is to defer consideration of this Application pending the conclusion of the grievance proceedings.

[23] If the parties believe, on conclusion of the process, that the human rights issues have not been adequately addressed, they may ask to have the Application brought back on before the Tribunal.

[24] The Application will therefore be deferred pending the completion of the grievance process.

[25] The Tribunal directs the parties' attention to Rules 14.3 and 14.4 which outline the procedure by which the Application may be brought back on after the conclusion of the grievance process.

Dated at Toronto, this 15th day of February, 2013.



Maureen Doyle
Vice-chair