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## Human Rights Update 2015

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# Welcome and Opening Remarks

Lauri A. Reesor

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# **Family Status Post-*Johnstone* and *Seeley* at the FCA**

Lauri A. Reesor

# What You Need to Know in 2015 About the *AODA*

Andrew N. Zabrovsky

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# Damages and Remedies at the HRTO

Dianne E. Jozefacki

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# Mental Health in the Workplace

Patty G. Murray

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# Navigating the Intersection Between the *WSIA* and Human Rights

Elizabeth Kosmidis

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# Gender Expression and Gender Identity

Michelle C. Foliott

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# Sick Leave and Use of Top-up

Julia M. Nanos

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# **Multiple Proceedings: Finality vs. Fairness in Applying s. 45.1?**

Elisha Jamieson-Davies

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## Section 45.1

- The Tribunal may dismiss an application in whole or in part, in accordance with its rules, if the Tribunal is of the opinion that:
  1. Another proceeding
  2. Has appropriately dealt with the substance of the application

# What's a "Proceeding"?

- Grievance arbitration
- WSIB adjudicative process
- Written decisions of Employment Standards Officers
- Ontario Labour Relations Board
- Special Education Tribunal

# What's a "Proceeding"?

- Registration Committee of the Royal College of Dental Surgeons
- Registration Committee of the College of Nurses
- Health Professions Appeal and Review Board
- Children and Family Services Review Board
- Law Society of Upper Canada
- Police complaint procedure under the *PSA*

## Legal Recap

*Police Services Act* ("PSA") complaint proceeding:

- Any member of the public can complain about the conduct of a police officer
- Chief of Police required to investigate every complaint
- 2 possible results: unsubstantiated OR hearing
- SPPA hearing with complainant being a party
- If unsubstantiated, right to ask OCCPS to review

# Legal Recap

## *Pre-Figliola:*

- HRTO consistently dismissed applications as having been "appropriately dealt with" through the *Police Services Act* process regardless of whether the complaint was dealt with at the initial stage (Chief of Police) or secondary stage (OCCPS)

# Legal Recap

## *Figliola*

- 2011 Supreme Court of Canada decision
- Court clarified role of human rights tribunals across the country in applying provisions such as s. 45.1
- Emphasized that human rights tribunals do NOT have exclusive jurisdiction over human rights complaints



## Legal Recap

Given concurrent jurisdiction, relevant principles:

- Finality of decision is in the public interest
- Respect for finality of a decision increases fairness and integrity
- Relitigation undermines confidence
- Method of challenging validity or correctness of a decision should be through judicial review

## Legal Recap

*Figliola* encouraged tribunals to apply principles underlying:

- Doctrine of issue estoppel
- Abuse of process
- Collateral attack

# Legal Recap

## *Figliola*

- Does it make sense to expend public and private resources on relitigation of essentially the same issue?
- Emphasis on FINALITY

## ***Penner* Decision**

- 2013 Supreme Court of Canada decision
- Plaintiff filed *PSA* complaint alleging unlawful arrest and unnecessary use of force
- Investigated, substantiated, referred to hearing
- Plaintiff participated in hearing
- Misconduct allegations dismissed
- OCCPS overturned hearing officer
- Divisional Court restored hearing officer decision

## ***Penner Decision***

- Penner filed a civil action for compensation arising from same incident
- Does issue estoppel prevent action from proceeding?
- SCC: Penner should be allowed to bring action

# ***Penner Decision***

Unfairness can manifest itself in 2 ways:

- 1) If prior proceeding was unfair; OR
- 2) If it would be unfair to use the result from prior proceedings to preclude a subsequent claim
  - This can arise if significant difference between purposes, processes or stakes involved
  - Differences must be assessed in light of objective of FINALITY

## ***Penner* Decision**

*PSA* proceedings are significantly different from civil action:

- *PSA* expressly contemplates parallel proceedings
- Reasonable expectations of parties is NOT that complainant has no access to a personal remedy
- Complainant has no financial stake in outcome

# ***Penner Decision***

Emphasis on:

- Fairness
- Reasonable expectations of parties



## The *Claybourn* Decision

- HRTO application involving *PSA* proceedings
- In light of *Penner*, respondents argued that *Figliola* should apply and not *Penner*
- OHRC asked HRTO to find that *Figliola* no longer good law
- HRTO rejected both

# The *Claybourn* Decision

Reconciling *Figliola* and *Penner*.

- *Penner* elaborates upon *Figliola* principles of issue estoppel, abuse of process and collateral attack
- Significantly different situations

# The *Claybourn* Decision

Policy considerations:

- Human rights litigants might avoid *PSA* proceedings to protect their right to a personal remedy
- Public interests of *Human Rights Code* are not served if potential human rights litigants unwittingly risk having human rights claims exhausted by filing a *PSA* complaint

# What Does it All Mean?

Possible to reconcile *Penner* and *Figliola* as distinguishable circumstances:

- *Figliola* will apply where issue is exactly the same and there is a reasonable expectation of no relitigation

vs.

- *Penner* will apply where there are different interests and no remedy/financial stake

# What Does it All Mean?

However, if the EMPHASIS has shifted FROM:

*Figliola:*

encouraging human rights tribunals to respect the **finality of decisions** and dismiss applications as **an abuse of process** even if allegations were **not specifically addressed** in the reasoning of the other decision maker  
TO ...

# What Does it All Mean?

*Penner :*

Emphasis on fairness as determined by reasonable expectations of the parties

- Then there may in fact be a substantive shift in the approach of the HRTO
- Could open the door to other proceedings being excluded from s. 45.1

# What Does it All Mean?

Could have a tremendous impact on service-based applications, especially those subject to decisions of regulatory bodies

# Procedural Expectations: The “Other” Duty to Accommodate

Michael A. Hines

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## ***ADGA Group Consultants v. Lane (2008, Ont. Div. Ct.)***

- Lane was hired as a Team Leader after concealing his bipolar depressive condition
- He revealed this shortly after hiring, advised his supervisor of warning signs
- Quickly became symptomatic
- His supervisor "investigated" bipolarity on the internet, but no other inquiries were made

## ***ADGA Group Consultants v. Lane* (2008, Ont. Div. Ct.)**

- Program Manager angry at deceit, *assumed* Lane was a security risk
- No consideration given to accommodation
- Summarily terminated
- Lane was hospitalized, off work for eight months

## ***ADGA Group Consultants v. Lane* (2008, Ont. Div. Ct.)**

- HRTO agreed that Lane's leadership role might well have given rise to undue hardship
- However, the duty of accommodation involves related but independent *procedural* and *substantive* components
- Failure to conduct a good faith, diligent, comprehensive, informed search for solutions can, itself, give rise to a liability *independent* of the substantive analysis

## ***ADGA Group Consultants v. Lane (2008, Ont. Div. Ct.)***

- ADGA failed to get adequate medical information and legal advice, and never turned its mind to the issue of accommodation
- A "rush to judgment"
- Lane was awarded \$40K for lost income, \$35K for a violation of his right to be free from discrimination and \$10K for "reckless infliction of mental anguish"
- Upheld at Divisional Court

# Takeaways

- Assertions of procedural defects and liabilities are now commonplace – the "new normal"
  - *ADGA* has been cited in 282 subsequent cases
- Intersection with damages for mental distress and violations of inherent "human rights" rights
  - double-counting
  - triple-counting
- Establishing at a hearing that no accommodation was possible or required is no defence

# Takeaways

- A premium is placed upon recordkeeping
  - brainstorm, list and analyze
  - consideration of solutions outside the bargaining unit
- Engage the union/employee in your review
- Advise the employee/union of the defects in their position
- Obtain written legal and medical advice
- Can an employee expect perfection in the process?

# **Maintaining a Workplace Free of Harassment: A Refresher on Management Responsibilities**

Jodi Gallagher Healy

# Workplace Harassment – Profile in Recent Years

- 2008: HRTO direct access model in place
- 2010: Bill 168 – workplace violence and harassment became safety issues
- 2014 (April): WSIAT mental stress decision
- 2014 (Fall): Ghomeshi allegations surfaced



# Workplace Harassment – Profile in Recent Years

- 2014 (Nov): OHRC re-launches public awareness campaign
- 2014 (Nov): political harassment allegations
- 2015 (March): "It's Never Okay" Action Plan announced by Ontario government

# "It's Never Okay..." Action Plan (March)

- *OHSA* workplace components:
  - add sexual harassment definition
  - employer obligation to make every reasonable effort to protect workers from harassment
  - employer obligation to investigate harassment

# "It's Never Okay..." Action Plan (March)

## Workplace components (cont'd):

- new Code of Practice for employers
- special enforcement team of MOL inspectors
- educational materials for employers

# Workplace Harassment – Profile in Recent Years

- 2015 (April): Rubin report released by CBC
- 2015 (April): Ontario and Federal Budgets both include legislative amendments relating to workplace sexual harassment
- Common denominator: statutory investigation obligations placed on employer

# The Time is Now...

- Ensure compliance and best practices in place
- Refresh your policy/policies
- Re-communicate and re-train
- Fine tune complaint and investigation process
- Identify and address your organization's "lost opportunities"

# Statutory and Legal Framework

- *Human Rights Code*
- *OHSA*
- Collective agreements
- Internal policies
- Case law developments

## Harassment – *Code* and *OHSA*

- Engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome
- Single significant incident may constitute harassment
- Focus on effect, not intent
- Tied to a prohibited ground [*Code*] or not [*OHSA*]
- Reprisal prohibited

# What is Harassment?

## Examples:

- Display or distribution of sexually explicit, racist or other offensive or derogatory **pictures** or **images**
- Practical **jokes** which cause awkwardness or embarrassment
- Unwelcome **invitations** or **requests**
- Unwelcome **remarks**, jokes, **innuendoes** or taunting
- **Leering** or other **gestures**
- Unnecessary **physical contact** (e.g. massages)



# Supreme Court of Canada Says:

- Employers are the only ones who can ensure a healthy work environment
- No matter what kind of workplace you own or business you operate, you have a responsibility to make sure your employees do not experience harassment

# Risks of Inaction on Harassment

- Internal complaints
- HRTTO applications
- Civil actions
- Grievances/arbitrations
- WSIB/disability claims
- Reputational risks
- Loss of productivity, low morale, high turnover

# Liability for Harassment under the Code

- Personal liability for harassers
- Vicarious liability of employer
  - directing mind
- Personal liability for managers who know of conduct and fail to take appropriate action
  - e.g. *Farris* (2012 Div. Ct.)

# Key Management Responsibilities

- Model
- Policy and program
- Train
- Investigate
- Respond
- Renew

# Model

- Model appropriate behaviour at all times
- Foster climate of respect and dignity
- Ensure managers can model "basic fluency" in harassment, discrimination, the policy and know when to involve HR (Rubin)

# Policy and Program – Pressure Points

- Clear commitment
- What is the workplace?
- Complaint process and obligation to report
- Who does it apply to – and how do they know?
- What are managers obliged to do?
- When employer will investigate on its own?

# Training (Rubin)

- Customize for employees and managers
- No one should be exempt
- Not "off the shelf"
- New hires and regular intervals
- Importance of recordkeeping

# Investigate

- Trained, competent investigators
- What triggers an investigation if no complaint
  - rumours (Arbitrator Nairn)
  - unconventional sources (Rubin)
  - cumulative information (Rubin)
- Keep and review records (quarterly? – Rubin)



# Respond

- Timely, consistent enforcement
- Fair penalty for breaches
  - termination (*PIPSC – Div. Ct.*) or not
- Prevent reprisal
  - intentional
  - reckless (*Horner v. Peelle Company Ltd.*)

# Renew

- Regularly review and update policies and process
- Is your approach working?
- Understand and respond to trends
- Be concerned about "crickets"
  - "host" culture (Rubin) – broader application?
  - lack of faith in process

# Renew – from Rubin

- Not a simple mechanical exercise
- "Fundamental shift" of the thinking, operation and importance of its own workplace rules for all of its employees
- Standards cannot "just live on a page"
  - must be "paramount" at every stage of the employment relationship

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