



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Anas Alahdab

Applicant

-and-

The Office Mover Ltd.

Respondent

DECISION

Adjudicator: Marla Burstyn
Date: March 8, 2023
File Number: 2018-31130-I
Citation: 2023 HRTO 316
Indexed as: **Alahdab v. The Office Mover Ltd.**

WRITTEN SUBMISSIONS

Anas Alahdab, Applicant)	Sarah Shivji, Counsel
)	
)	
)	
The Office Mover Ltd., Respondent)	Nikolay Chsherbinin, Counsel
)	
)	
)	

[1] This Decision addresses the issue of whether this Application should be dismissed under s. 34(11) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”) due to the civil proceeding commenced by the applicant.

[2] For the reasons below, the Tribunal finds that the Application is barred by s. 34(11) of the *Code* and the Application is therefore dismissed.

BACKGROUND

[3] The applicant filed an Application on January 25, 2018 alleging discrimination under the *Code* with respect to employment because of disability in relation to his termination on August 14, 2017.

[4] The applicant filed a Statement of Claim with the Ontario Superior Court, Small Claims Court, on October 10, 2019 against the respondent (the “civil proceeding”).

[5] The Application and the Statement of Claim arise from the same set of facts and include the same allegations related to the termination of the applicant’s employment. The Statement of Claim states that the applicant is seeking damages for wrongful dismissal and damages for lost wages and for injury to dignity, feelings and self respect pursuant to section 46.1 of the *Code*.

[6] The respondent was noted in default in the civil proceeding on May 26, 2021. The applicant brought a motion to assess damages against the respondent in the civil proceeding. The respondent is planning to take steps to set aside the noting in default because the applicant did not properly serve the respondent with the Statement of Claim.

[7] The respondent has requested that the Application be dismissed because it is barred under s. 34(11) of the *Code*.

[8] The applicant opposes dismissal and has requested that the Tribunal defer or adjourn the Tribunal proceeding until the civil proceeding has concluded. The applicant

is concerned that if the Application and the civil proceeding are dismissed, he will have no avenue to pursue his remedy. The respondent opposes deferral.

[9] Both parties have provided fulsome written submissions on whether the Application is barred by s. 34(11) or whether the Application should be deferred under s. 45. The applicant requested an oral hearing to determine these issues. The Tribunal routinely determines the issues raised under s. 34(11) and s. 45 in writing. It is fair, just and expeditious to proceed in writing in the circumstances of this case.

APPLICABLE CODE PROVISIONS

[10] Section 34(11) of the *Code* states:

A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

(b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

[11] Section 46.1 of the *Code* states:

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

[12] Section 45 of the *Code* states that the Tribunal may defer an application in accordance with the Tribunal's Rules.

ANALYSIS AND FINDINGS

[13] Having reviewed the Application and the Statement of Claim, I find that s. 34(11) applies to bar the Application because the Statement of Claim is a civil proceeding in which the applicant is seeking monetary compensation under s. 46.1 for loss arising out of the same alleged discrimination by his employer.

[14] The applicant submits that s. 34(11) is not applicable because at the time the Application was filed, the civil proceeding had not yet commenced. I adopt the reasoning in the Tribunal's prior decisions that s. 34(11) applies to bar an application from proceeding where a civil action has been commenced both before and after the application. See *Borden v. Toronto Grace Health Centre*, 2010 HRT0 1109 at para. 11.

[15] In the applicant's submissions, he has explained why he brought the civil proceeding after he filed the Application. He submits that he never intended to pursue double recovery; rather, he filed the civil proceeding to preserve his rights just prior to the expiration of the two-year civil limitation period. The applicant submits that the Tribunal had scheduled a hearing for September 13, 2019 which was cancelled on September 5, 2019, and although the Tribunal told the applicant's counsel on September 12, 2019 that the hearing would be rescheduled, no written confirmation was received from the Tribunal.

[16] Tribunal decisions have held that the language in s. 34(11) of the *Code* is not discretionary. See, for example, *Gemme v. Timmins and District Hospital*, 2019 HRT0 264 at para. 13 and *Najeeb v. Simish Inc.*, 2020 HRT0 653. As such, I am not satisfied that the applicant's explanation for bringing the civil proceeding in addition to the Application is a relevant consideration under s. 34(11). In any event, I have considered the applicant's explanation for bringing the civil proceeding and it does not impact my decision.

[17] The applicant characterizes the respondent's plan to take steps in the civil proceeding to set aside the noting in default as an attempt to have the claim "completely invalidated" such that he would have no recourse in the civil proceeding. I do not accept that moving to set aside the noting in default would leave the applicant with no recourse in the civil proceeding. In any event, the Tribunal has stated in prior decisions that s. 34(11) is an absolute bar to jurisdiction and an application cannot proceed regardless of the litigation strategies of the parties in the civil suit, even if the applicant were to be left with no human rights redress. See *AlSaigh v. University of Ottawa*, 2012 HRTO 655 at paras. 25 to 28.

[18] The applicant submits that the Tribunal generally exercises its power to defer an Application under s. 45 when there is an ongoing proceeding involving similar facts and issues and relies on *Humphreys v. Burrows Professional Corporation* ("*Humphreys*"), 2015 HRTO 1463. I distinguish this case from *Humphreys* because the Tribunal appears to have made no finding that s. 34(11) applied in the circumstances of that case. In my view, once a determination has been made that s. 34(11) applies, the application is barred, and the Tribunal has no discretion to defer the application instead.

[19] The applicant also relies on *Galipo v. St. George Property Management*, 2009 HRTO 1704 ("*Galipo*"). There has been no withdrawal on consent of the civil proceeding and the applicant's argument in reliance on *Galipo* has no merit.

ORDER

[20] The Application is dismissed under 34(11) of the *Code*.

Dated at Toronto, this 8th day of March, 2023.



Marla Burstyn
Member