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Re: **Taylor-Baptiste v. Ontario Public Service Employees Union**
HRTO File Number: 2009-04368-I

Please find enclosed a reconsideration decision of the Tribunal in this matter, dated February 1, 2013.

26 pages including this cover sheet.

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Mariann Taylor-Baptiste

Applicant

-and-

Ontario Public Service Employees Union and Jeff Dvorak

Respondents

-and-

Ontario Human Rights Commission

Intervenor

RECONSIDERATION DECISION

Adjudicator:	David A. Wright
Date:	February 1, 2013
File Number:	2009-04368-I
Citation:	2013 HRTO 180
Indexed as:	**Taylor-Baptiste v. Ontario Public Service Employees Union**

WRITTEN SUBMISSIONS

Mariann Taylor-Baptiste, Applicant	Selwyn A. Pieters, Counsel
Ontario Public Service Employees Union and Jeff Dvorak, Respondents	Danny Kastner, Counsel
Ontario Human Rights Commission, Intervenor	Margaret Flynn and Sunil Gurmukh, Counsel

INTRODUCTION

[1] The applicant seeks reconsideration of the Decision, 2012 HRTO 1393, dismissing her Application against the union representing workers she supervises and its President. In a blog about union issues, the individual respondent criticized the applicant in language that drew upon sexist stereotypes. The facts of this case engage competing rights: the applicant's right to freedom from discrimination because of sex, and the individual respondent's and the union's rights to freedom of expression and association, in particular in criticizing the employer about the management of the workplace. The applicant and the intervenor Ontario Human Rights Commission argue that the Tribunal made fundamental errors in its analysis that justify the exceptional remedy of reconsideration. The applicant also argues that the Tribunal denied her procedural fairness and that the Tribunal's Decision violates her *Charter* rights. For the reasons that follow, the Request for Reconsideration is dismissed.

REQUEST FOR RECONSIDERATION AND INTERVENTION

[2] After the Request for Reconsideration was filed, the Tribunal sought written submissions from all parties. The Ontario Human Rights Commission then filed a Notice of Commission Intervention pursuant to s. 37(2) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), that reads as follows: "The Commission may intervene as a party to an application under section 34 if the person or organization who made the application consents to the intervention as a party." The respondents did not object to the filing of the notice at the reconsideration stage, and I will therefore assume, without deciding, that the Commission is entitled to intervene as of right pursuant to s. 37(2) on a reconsideration.

[3] All parties made written submissions, and the applicant and the Commission made further written submissions following the release of the Supreme Court of Canada's decision in *R. v. N.S.*, 2012 SCC 72, on December 20, 2012.

RECONSIDERATION

[4] The applicant brings this request pursuant to Rule 26.5 (c) and (d), which read as follows:

> 26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:
>
> ...
>
> c) the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
>
> d) other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

[5] The applicant argues for a broad scope for reconsideration, which would necessitate revisiting the Tribunal's caselaw in this regard. She relies upon Court jurisprudence about the need to exhaust internal remedies prior to seeking judicial review, and suggests that it follows from such jurisprudence that reconsideration be similar to a judicial review. She cites *Re Commercial Union Assurance v. Ontario Human Rights Commission* (1988), 47 DLR (4th) 477 (Ont CA), a case under the old human rights system, in which the Court held:

> We do not agree with counsel for the appellants that the broad power of reconsideration which results in a final decision requires that new facts be established: see *Re Merrens and Municipality of Metropolitan Toronto*, [1973] 2 O.R. 265, 33 D.L.R. (3d) 513 (Div. Ct.). The power is important and may be the only way to correct errors where no right of appeal is provided, or to allow for adjustments even if circumstances remain unchanged. That is the meaning to be given to the maintenance of the integrity of the administrative process.

[6] The applicant sees this case as one that has considerable importance. She submits that there is a broad significance to the equality rights and human rights issues and law at stake because, in her counsel's words, "the Tribunal issued a decision that takes us back to the 1930s". She submits that "a meaningful process of reconsideration

would require that this matter be heard by the Tribunal by a panel of no less than five vice-chairs/members and in an oral hearing as opposed to one in writing."

[7] The Commission argues that there are two overarching objectives that apply to the authority to reconsider: finality, economy and fairness in the legal process and a broad, purposive, and liberal interpretation of human rights legislation. The Commission submits that where there are "significant questions regarding" such an interpretation, reconsideration should be granted. The Commission submits that the Tribunal should consider whether a decision is in conflict with established jurisprudence, whether it raises issues of general or public importance, whether it reveals a breach of natural justice, and whether it is consistent with Ontario Human Rights Commission policies.

[8] The Tribunal's approach to reconsideration is well-established. Reconsideration is not an appeal, and is granted only in exceptional cases. As the Tribunal stated in *Sigrist and Carson v. London District Catholic School Board*, 2008 HRTO 34 at paras. 56-57:

> As is evident from the Rules and made explicit in Practice Direction #4, reconsideration is not an appeal. It is not an opportunity to re-argue a case. Once the parties to a case have had the opportunity to present their evidence and arguments to the Tribunal, and the Tribunal has made a decision disposing of the issues, parties are entitled to treat the matter as closed, subject to limited exceptions.
>
> Secondly, assertions of a "conflict" must be analyzed with care and have due regard to the realities and nature of decision-making. Even where there is well-established jurisprudence or procedures, each decision on apparently similar issues is made within its own factual, legislative and policy context. A finding that there is a "conflict" can only be made taking into consideration the full context of the decisions.

[9] In *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955, the Tribunal recently affirmed these principles. At para. 15, it held:

> Reconsideration is not an appeal or an opportunity for a party to repair deficiencies in the presentation of its case. In this regard, it is helpful to

consider the Tribunal's Practice Direction on Reconsideration, which states, in part:

> Decisions of the Tribunal are generally considered final and are not subject to appeal. However, parties may request that the Tribunal reconsider a final decision it has made. Reconsideration is a discretionary remedy; there is no right to have a decision reconsidered by the Tribunal. Generally, the Tribunal will only reconsider a decision where it finds that there are compelling and extraordinary circumstances for doing so and where these circumstances outweigh the public interest in the finality of orders and decisions.

[10] At paras. 23 and 24, the Tribunal held:

> There is a clear rationale for and obvious benefit to the Tribunal having the power to reconsider its own decisions. As the Tribunal explained in *Sigrist and Carson v. London District Catholic School Board et. al.,* 2008 HRTO 34, the legitimacy of the Tribunal is enhanced by its ability and willingness to undo an unfair result or process, or correct a wrong.
>
> Importantly, however, the Tribunal must exercise this reconsideration power with care. As the Tribunal explained in *Taranco,* [2009 HRTO 1439], at para. 15, the public interest in the finality of Tribunal decisions is important. It ensures that parties can consider Tribunal decisions final when they are made and that the Tribunal's resources are used wisely and in a way that fulfills its mandate under the *Code*. It also ensures that the Tribunal's decisions are not in a constant state of flux and can serve as an effective guide for members of the community as to their obligations under the *Code*.

[11] The applicant's and Commission's arguments for a different approach to reconsideration are not only contrary to the Tribunal's jurisprudence, but to a recent decision of the Divisional Court. In *Landau v. Ontario (Minister of Finance)*, 2012 ONSC 6926, the Court held, at para. 17:

> A reconsideration is not an appeal or a hearing de novo. More importantly perhaps, there is no right to have a decision reconsidered. Under s.45.7(2) of the *Code* "the Tribunal may reconsider its decision" but is not bound to do so.

[12] As set out in the Tribunal's Practice Direction on Reconsideration, the Reconsideration Decision is typically made by the member who made the original decision. As noted by the Divisional Court in *Landau* at para. 17, this flows from the fact that "the original decision maker may be in the best place to know whether a reconsideration request raises new issues or submissions". Reconsideration is not a chance for a second analysis by a different person of the applicant's particular circumstances, but a remedy granted in exceptional circumstances, such as where the adjudicator did not have before him or her key information that was filed (*Mason v. Peel Heating Service Experts*, 2011 HRTO 1530), or there is a clear inconsistency with the law or an established line of jurisprudence (*Ornelas v. Casimici Restaurant*, 2011 HRTO 1531; *Britton v. General Motors of Canada*, 2012 HRTO 2080). Panels have been appointed in rare circumstances such as where there appeared to be a need to reconcile conflicting or inconsistent lines of Tribunal jurisprudence (*Ball v. Ontario (Community and Social Services)*, 2010 HRTO 1990; *Garrie,* above). As analyzed in more detail below, this case certainly involved a novel set of facts that required the analysis of different principles of law and the balancing of rights, but neither the applicant nor the Commission has pointed to any established jurisprudence about such circumstances with which the Tribunal's analysis conflicts. There is no reason to depart from the Tribunal's general approach to reconsideration.

PROCEDURAL FAIRNESS

[13] The applicant argues that she was denied procedural fairness in two ways. First, she says, the Tribunal denied a Request for Order During Proceedings seeking disclosure of materials that, if granted, she says, could have shown that the individual respondent's blog postings occurred while he was at work. Second, she says, the Tribunal gave her no notice that it was considering the issues of freedom of expression and freedom of association. I will address each of these issues in turn. I note that both sides were represented by experienced counsel familiar with the type of issues at stake in Tribunal cases.

(a) The Production Request

[14] The blog postings alleged to violate the *Code* were made by the individual respondent and by an anonymous poster. The individual respondent acknowledged that he had to approve a posting from others before it would appear on the blog. My analysis made no distinction between the post that the individual respondent wrote and the one that he approved and posted. In my view, such a distinction would have been wrong.

[15] The Application was filed on December 15, 2009. On September 6, 2011, the applicant served on the respondents and filed a Request for Order During Proceedings seeking production of the following information:

> a) the IP addresses and e-mail addresses for the anonymous posters;
>
> b) raw data logs that showed the visitors to the blog at the material time that the material was posted;
>
> c) all deletions and updates to the blog for the material time.
>
> [emphasis added]

As set out in her Request, the reason the applicant sought this information was so that "the applicant can determine what other witnesses to call at her hearing and/or whether she needs to add any other party to these proceedings".

[16] In their response to the Request, the respondents stated they had no access to such information and that counsel had been advised of this in 2010. If such information was available, the respondents said, it resided with Google Inc., which owns and administers the blog in question. The respondents also took the position that the request was untimely, noting that the Application had been filed nearly two years earlier, and that attempts to add parties at this stage would almost certainly lead to a need to adjourn the hearing scheduled in December 2011. The applicant, in reply, argued that the individual respondent could give direction to Google to provide him with the information and, in the alternative, asked that the Tribunal convert the request into a third party records request. The reply mentioned that an important issue would be

whether the respondent Dvorak and anonymous posters were posting from OPSEU or work computers, and the information sought would be important to testing credibility.

[17] A pre-hearing teleconference was held on October 27, 2011 to address the request. The applicant's counsel requested the adjournment of the hearing, and his focus was on the fact that he wished to use this information to identify the anonymous poster. The Request for Order was denied orally on the basis that it had not been delivered to Google Inc., and I stated my concern about whether the information requested was central to the Application. I explicitly stated that I did not preclude the applicant from re-filing the request if it was delivered to Google and the issues proved relevant given the evidence that was heard.

[18] In her Request for Reconsideration, the applicant argues that the data she sought was evidence that could have established that Mr. Dvorak's postings were made from work, an issue that turned out to be a factor in the analysis of s. 5(2): see para. 26 of the Decision. She states that the denial of this request affected the fairness of the hearing.

[19] There are several problems with the applicant's argument. First, the applicant's Request for Order did not seek data about the IP address from which Mr. Dvorak made the postings. It sought information about the IP addresses of the anonymous posters whose identities were unknown, with the primary goal of attempting to name them as respondents, just two months prior to the hearing, over two years after the events in question and outside the one-year limitation period. It was abundantly clear at the oral teleconference that the applicant's primary goal in filing the disclosure request was to try to find out who had made the anonymous postings, in particular whether it was her ex-husband, and name that person as a respondent.

[20] Second, counsel for the applicant did not ask Mr. Dvorak in cross-examination whether he used a work computer when he made the postings. Mr. Dvorak's credibility on this matter was not made an issue by the applicant. Had Mr. Dvorak stated that the

postings were made outside work and the applicant sought to pursue this issue, she could have renewed the request at that point. The applicant's suggestion that the Tribunal blocked her from pursuing the issue of where the postings were made is not reflected in how she pursued her case at the hearing. Her attempt to argue a violation of procedural fairness now is an attempt to repair a deficiency in the preparation and presentation of her case.

[21] Third, a detailed attempt to trace IP addresses through Google Inc., an American company, would have delayed the hearing considerably in a two-year-old case, with little or probative value. After obtaining the information, the applicant would then have had to trace the IP address and determine whether it was linked to the Ministry of Community Safety and Correctional Services. One queries why, if the applicant's goal was to obtain disclosure to support an argument the individual respondent made the postings from work, she did not request an order that the Ministry disclose whether he was logged into his work computer at the time when the postings were made in the two years prior to the hearing. Granting this last-minute disclosure request would not have facilitated the fair, just and expeditious resolution of human rights disputes that is mandated by the *Code*.

[22] Fourth, while I did make mention of the fact that there was no evidence that Mr. Dvorak made the postings at work for the employer, the central basis for the finding that the applicant was not subject to harassment "in the workplace" was the fact that this was a blog identified with the union that was directed at communication between union members and their leadership.

[23] For all these reasons, there was no violation of procedural fairness in the denial of the applicant's request for a last-minute adjournment and order against Google Inc. in the absence of notice to it, and certainly nothing that affected the final disposition of the matter.

(b) Alleged Failure to Provide Notice that Expressive and Associational Rights would be Considered

[24] I turn next to the applicant's submission that the Tribunal considered ss. 2(b) and (d) of the *Canadian Charter of Rights and Freedoms* without any submissions from the parties on this point, without these issues being raised by them, and without notice to the parties. Her counsel states that no arguments were made by the respondents asserting any rights under sections 2(b) and 2(d) of the *Charter*.

[25] In their submissions, the respondents say that they are "stunned" by this submission. They write, "One of the central issues raised and argued at the hearing of this matter was the constitutional protection of union and expression and associational activity under sections 2(b) and (d) of the *Charter*," and note, "the Associate Chair repeatedly raised the constitutional issue during oral argument, and asked questions about what role, if any, section 2 of the *Charter* should play in his deliberations". They note that they specifically included an excerpt from *Sullivan on the Construction of Statutes*, 5th Edition, which deals exclusively with the principle that any ambiguity in the scope of the *Code* should be resolved in compliance with the constitution.

[26] Counsel for the respondents did not file written final argument (there was no expectation that the parties do so), and counsel for the applicant did so. The issue of the union's expressive and associational rights and how they should affect the interpretation of the *Code* was raised by the respondents as a central issue. Respondent counsel commenced his argument noting that a central feature of the Ontario *Code* is that it does not contain a restriction on publication. He argued that in evaluating this blog posting, *Charter* values must infuse the *Code* and referred to the union's associational and expressive rights. Before concluding his submissions on the merits, he emphasized as a final point that this was a local union president who was advocating for the rights of his members, and noted that these were constitutionally-protected rights. He noted what he described as policy concerns about "shutting down criticism" of the employer through a human rights application. His book of authorities included a constitutional case on union freedom of expression: *R.W.D.S.U., Local 588*

v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8, and the Sullivan excerpt mentioned above.

[27] The applicant included in her authorities cases about union expressive and associational rights under the *Charter*. Her counsel referred to *Pepsi-Cola* and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20. The former deals with union expression under s. 2(*b*) of the *Charter* and the latter with associational rights under s. 2(*d*). *Pepsi-Cola* was referred to in support of the argument that the union had to respect the *Code* in the course of its protected activities. Paragraph 30 of the applicant's written closing submissions reads as follows:

> **Collective Bargaining and strikes are not a "free for all" – Criminal, Torts and Human Rights Laws are to be respected**
>
> In the context of collective bargaining or any other activity for that matter undertaken by OPSEU criminality, torts including defamation and human rights Code related violations are not protected activity – even if an employer grants amnesty from disciplinary proceeds, it does not mean that a criminal court does not have the jurisdiction to deal with any criminal acts that occur, [nor] does it mean that a civil court does not have jurisdiction to deal with any libel that occurs. It also does not mean that the Human Rights Tribunal has no jurisdiction to deal with a claim of a manager that her rights were violated under the *Human Rights Code*. It is trite that one's human rights cannot be contracted out: N.*A.P.E., Local 3201 v. Newfoundland* 1996 CarswellNfld 133F, [1996] 2 S.C.R. 3; *Ontario (Human Rights Commission) v. Etobicoke (Borough)* 1982 CarswellOnt 730, [1982] 1 S.C.R. 202; *Pepsi-Cola Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156.

[28] Moreover, even in the parts of the respondents' submissions that did not explicitly allude to the *Charter*, they constantly made reference to the union's role in expressing its views on matters of collective bargaining. The importance of these factors for the respondents, both expressed as constitutional rights and as non-constitutional values that should be used in interpreting the *Code*, were at the heart of their arguments.

[29] For all these reasons, it is clear that the argument that constitutionally-protected rights of expression and association should influence the Tribunal's interpretation of s. 5 of the *Code* was explicitly raised by the respondents, addressed by the applicant and clearly important to their submissions. There was no violation of procedural fairness.

SITUATING THIS CASE IN THE *CODE* AND THE JURISPRUDENCE

[30] This is one in a series of recent cases that has dealt with when the *Code* will be interpreted to restrict rights protected under s. 2 of the *Charter*. Unlike some other human rights statutes, for example s. 14(1) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, currently being considered by the Supreme Court of Canada in the appeal (under reserve) of *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, there is no explicit prohibition in the Ontario *Code* on publications or articles that affront dignity on the basis of a prohibited ground.

[31] The *Code*, of course, does restrict expressive activities. Prohibitions on harassment and discrimination based on prohibited grounds restrict what can be said by one employee to the other in the workplace, by a housing provider to a prospective tenant, or by a service provider to a customer. The *Code* provides that in the workplace, or when acting in the commercial marketplace as a service provider or landlord, one must respect equality rights and that includes not saying things that constitute harassment and discrimination based on one of the prohibited grounds in the *Code*. These restrictions, however, do not apply to a person in all aspects of his or her life. What would be sexual or racial harassment contrary to the *Code* when said in the workplace is not a violation of the *Code* when expressed across the dinner table at a neighbour's house. The comment made at the dinner table is no less sexist or racist, but it is not something that can form the basis of an application to the Tribunal.

[32] The boundaries of what falls under the social areas of services, accommodation, contracts, membership in a vocational association and employment are not always clear. An adjudicator must undertake an interpretation of the broad words in the *Code* to

determine, in a contested case, whether this is the type of activity that it regulates. In doing so, the Tribunal must interpret rights broadly, and also undertake a purposive and contextual interpretation of the legislation. The need for a large and liberal approach to the rights in the *Code* does not relieve those applying it from the difficult task of interpreting its boundaries.

[33] In a series of cases, the Tribunal has applied the well-established principle of statutory interpretation that ambiguities in statutes should be resolved in favour of the protection of *Charter* rights (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 61-66). In these cases, where the issue was whether the activities in question fell within the relevant social area, the Tribunal has favoured an interpretation under which in cases of ambiguity the *Code* would not restrict activities at the core of the fundamental freedoms protected by s. 2 of the *Charter*.

[34] For example, in *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152, and *Bystrov v. Algonquin College of Applied Arts and Technology*, 2011 HRTO 2276, the Tribunal held that the content of media editorials and articles did not fall under the protection of the *Code*, relying on the protection of freedom of expression in s. 2(b) of the *Charter* to find that the scope of the *Code* rights claimed did not extend to restrict expression of opinion in the media, a matter at the core of *Charter* rights.

[35] In *Dallaire v. Chevaliers de Colomb*, 2011 HRTO 639, the applicant alleged that the inscription on a monument erected by the respondent religious organization on church property was discriminatory under the *Code*. Holding that the scope of the definition of "service" and "facility" in s. 1 of the *Code* should be limited in light of the protection of freedom of religion in s. 2(a) of the *Charter*, the Tribunal found that the inscription was an expression of religious belief that did not fall under the *Code*. *Tesseris v. Greek Orthodox Church in Canada*, 2011 HRTO 775, held that in light of the protection of freedom of religion in s. 2(a) of the *Charter*, teaching, dissemination and religious practice by clergy are not services under the *Code*.

[36] In *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court again emphasized the obligation of administrative tribunals to apply the *Charter* in interpreting their legislation and exercising discretion, confirming in my view the approach taken in the Tribunal's case law. At para. 35, the Court stated as follows:

> Rather, administrative decisions are always required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and ... cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).

WORKPLACE HARASSMENT AND PUBLICATIONS

[37] The case was challenging because its facts raise a conflict of principles about when it is legitimate to restrict expression under the *Code*. The *Code* restricts harassing expression between colleagues to ensure a harassment-free workplace. It does not regulate the content of expression and comment in public debate, in part because such matters fall within the core of freedom of expression. A union's role is to represent employees in a sometimes adversarial relationship with management; debate and criticism and public statements may be essential to its function. Union expression has many similarities to public debates such as expression by the media, politicians, academics and public interest organizations. At the same time, its leaders are often co-workers of the managers in the workplace and interact on a day-to-day basis in their jobs. Depending on one's perspective, union expression can be seen as similar to matters to which the *Code* does not apply, or at the heart of what the *Code* is meant to govern.

[38] The parties' views of this case, not surprisingly, reflected these alternate perspectives. For the applicant, this case should be treated no differently from any other

case of workplace harassment on the basis of sex. What was key for her was the applicant's position as a woman in the workplace, in this case a traditionally male-dominated one that had been the subject of *Code*-based conflict, and the need for employment to be free of any kind of sexism. That the expression was in the course of union-management relations, in her view, should not matter, as the effect on the employee was the same. The *Code*'s effect, she suggested, should be to free the workplace and employment relations, including union-management interactions and criticism of managers, from statements linked to prohibited grounds.

[39] For the respondents, the fact that this was union expression was key, and to interpret these communications as being within the ambit of what the *Code* governs would be to bring the *Code* into areas not intended. The respondents saw the primary vulnerability here as being that of front-line employees in relation to managers, with managers holding the power in the workplace. The union, in their view, must be able to freely criticize the employer and the managers, who hold the power in the workplace, without fear that a human rights tribunal would later dissect the manner in which their views were expressed. They were also concerned about opening up the floodgates to this type of claim by individual managers against the union, fearing that it may have a chilling effect on what union representatives do.

[40] While the parties invited me to a make a stark choice, the Decision attempted to steer a more nuanced path in interpreting ss. 5(1) and 5(2) of the *Code* in these particular circumstances. It recognized the importance of both the concerns about a workplace free from *Code*-based stereotyping by co-workers, and of free expression by unions as the representative of workers who are vulnerable in their relations with management. It set out a case-by-case approach to determining such issues, analyzing all of the circumstances in order to determine on which side of the line between public expression and workplace interaction between co-workers such situations should be seen to fall. Among the factors were the seriousness of the conduct, its effect on the workplace, the role of the person making them, the effect on the applicant, and the reaction of the respondent to any concerns raised (para. 27).

[41] Although I found it a difficult decision, in the end I concluded that the facts in this case tipped in favour of the public expressive nature of the comments. Central to the tipping of the balance in favour of this union expression were:

(1) The connection of the comments to a matter of union concern, made during bargaining, and made on a blog focused on union-management relationships, by the President of the union local.

(2) The impact of the comments on the applicant was her concern they had brought her personal life into the workplace, not the sexist stereotypes. As she described it, her concern and upset would have been the largely the same whether the point about her relationship with Mr. Gray was made using sexist language or not.

(3) The absence of any evidence of *Code*-based effects in the workplace. The only impact described was people commenting on the fact they had read about her.

(4) The applicant was mentioned twice among voluminous numbers of posts that were accessible for a period of only about a month.

[42] In this particular context and based on the evidence I heard, I found that these posts did not violate s. 5(2) of the *Code* as discrimination with respect to employment by the respondents Dvorak and Ontario Public Service Employees Union. I found that they did not violate s. 5(1) of the *Code* because the union blog should not be considered to be "in the workplace".

THE REQUEST FOR RECONSIDERATION

[43] Against this background, I turn to the applicant's and Commission's arguments on the substance of the Request for Reconsideration. There are many arguments expressed in different ways, but in essence all are a challenge to the manner in which the Decision addressed the competing interests and values. They suggest that the blog posts should be treated no differently than if they had been made by a fellow employee, and not made in the context of union activity, or that if there was any conflict of rights in this situation, the applicant's rights should have taken precedence. While they state that the Tribunal failed to properly reconcile or balance the rights in question, these are

really arguments that the balancing should have gone the other way in these circumstances. They are an attempt to reargue the case, and as such, do not justify the exercise of the Tribunal's discretion to reconsider. Given the nature of the arguments made by both the Commission and the applicant, in particular the repeated suggestion by the applicant that the Decision reverses decades of jurisprudence, I find it important to address them directly and in more detail than the typical reconsideration decision.

(a) New *Charter* Arguments

[44] The applicant makes various new *Charter* arguments. She suggests that the blog posts, because they drew on sexist stereotypes to make their point, were not protected under ss. 2(b) or 2(d) of the *Charter*. She argues that the Tribunal failed to distinguish between "legitimate speech" and "illegitimate expression that runs counter to the equality rights values" in the *Charter* and the *Code*. This argument is not consistent with the principle that expression is protected under s. 2(b) of the *Charter* regardless of its content if it conveys meaning. See, for example, *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825. The nature of the expression is a factor in the balancing of rights, and the Decision explicitly analyzed this issue at paras. 27 and 33-35. The applicant's submission that the speech is "illegitimate" or not worthy of protection because it drew on a sexist stereotype runs counter to established jurisprudence on freedom of expression.

[45] The second argument is that the Decision itself violated the applicant's rights under ss. 7 and 15 of the *Charter* because it did not uphold her claim of discrimination on the basis of sex. To establish a violation of s. 7 the applicant would have to establish that the Decision affected her rights to "life, liberty or security of the person" and that the deprivation was not in accordance with the principles of fundamental justice. The applicant states that her security of the person was:

> ...negatively impacted by the psychological effect of engaging in protracted litigation to obtain a remedy, only to find that any chance to obtain a remedy is undermined and made meaningless by the Tribunal's minimization of her complaint and failure to properly consider equality

> rights guarantees in the *Charter* when it, on its own motion, and without notice to the parties, embarked on a competing rights analysis. Such a decision further degrades the Applicant's psychological well-being and sense of self-worth.

Losing a human rights case one believed she or he ought to win is not a violation of s. 7. While s. 7 does protect against "serious state-imposed psychological stress" (see, for example, *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44), this is not the type of situation that attracts such protection, such as losing custody of a child (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46).

[46] The applicant alleges that the Tribunal's Decision violated s. 15, the equality rights section of the *Charter*, by failing to uphold her claim against the respondents. This is another way of stating her disagreement with the Decision. It is not a violation of the *Charter* to interpret the *Code* in a manner with which the applicant disagrees, or even in a manner that is wrong. There is no basis to suggest that the Tribunal has violated s. 15.

(b) The Applicant's Managerial Role

[47] I address next the Commission and the applicant's arguments that I erred in considering that there were no *Code*-related effects in the workplace and gave inappropriate weight to the applicant's status as a manager. They suggest that the applicant's testimony about the effects on her as a result of the postings establishes that there were *Code*-related effects in the workplace.

[48] It is important to clarify the nature of the evidence and the factual findings in the Decision. The applicant highlights, correctly, that there was evidence that the applicant was distressed as a result of the posting and that this distress affected the applicant at work. I also noted that the applicant was concerned people would think she had slept her way to the job.

[49] What I found, however, was that Ms. Taylor-Baptiste's distress resulted from the allegation of nepotism based on her long-term spousal relationship with Mr. Gray. In her description of the stress she experienced, it primarily related to the fact that she was identified in the blog postings with Mr. Gray and Mr. Taylor-Baptiste, not the fact that it was done in a sexist way. Her upset, I believe, would have been similar whether Mr. Dvorak's non-discriminatory point about nepotism was made using sexist stereotypes or not. When asked what her reaction was when she read the blog postings, the applicant stated that she was upset because she was a private person and for someone to make reference to how she got her job or have it in the public for anyone to see was demeaning and harmful. She expressed concern that people knew her name as a result of the blog. She stated that she was upset because the postings on the blog were "personal" and she had lost sleep "about people writing things about me". Since the suggestion of nepotism was the reason for her upset, and because there was no evidence of anything said or done that stemmed from the sexist nature of the comments, I found that there were no *Code*-related effects in the workplace.

[50] The Commission states that the Tribunal's Decision is contrary to Commission policies that confirm that women in authority may be sexually harassed or subject to inappropriate gender-related behaviour by subordinates. It also states that it is contrary to its policy statements that "cyber-harassment can be done by anyone, including a co-worker". It states that spreading degrading sexual rumours and gossip about a female employee, including on-line, in an attempt to undermine her credibility is a form of sexual harassment. It argues that "it is a matter of public importance for the Tribunal to clarify that sexually discriminating or harassing behaviour is prohibited by the *Code* whenever it occurs between employees in the workplace, regardless of whether the targeted employee has management responsibilities".

[51] The Tribunal is not bound by Commission policies. In any event, the Decision is not inconsistent with the policies cited. The mention of the applicant's managerial status as part of the context does not suggest that the *Code* does not protect managers from harassment or discrimination by subordinates, and such a statement would clearly be

wrong. The applicant's position as a manager, in which criticism from the union is inherent in the job, was a relevant factor in evaluating whether the applicant manager's claim against a union and its president for this particular blog post was made out. It was part of the context in evaluating all of the circumstances as part of the balancing of rights.

(c) Section 5(2): "In the Workplace"

[52] The Commission submits that the Tribunal's finding that the blog posts were not "in the workplace" is contrary to the broad interpretation of the extent of the workplace in *Hughes v. 1308581 Ontario*, 2009 HRTO 341, British Columbia human rights jurisprudence, and arbitral caselaw. It notes that misconduct on an employer's property is not an essential element to the application of the *Code* or employer discipline where there is an appropriate factual nexus to the workplace. It argues that such a factual nexus appears to exist here.

[53] The Decision did not suggest that conduct could only fall under s. 5(2) if it happened on the employer's property. Indeed, it found the opposite when it found that comments in cyberspace, in many circumstances, would be covered under s. 5(2). I agree that where there is an appropriate factual nexus to the workplace, conduct can fall under s. 5(2) as in *Hughes*. What was central to the finding in this case was that this was communication between the union and its membership, like a union newsletter or union meeting. While that has a link to the workplace because of the union's role as representative of its members, I found that such communication should not be seen as "in the workplace" because it related to union communications. In my view, the Tribunal should be reluctant to find that union communications with members are "in the workplace" even on a broad definition, because of the union's role as a public actor in representing employees, and its need to do so independent of management. I do not believe union communications with members in cyberspace are "in the workplace" any more than a meeting at a union hall or a newsletter, typical means of communication before the widespread use of the internet.

[54] In any event, this case did not depend on the finding that s. 5(2) did not apply. Had I found it applied, the same balancing exercise would have been undertaken as under s. 5(1) and the result of the case would almost certainly have been no different.

(d) Balancing Competing Rights

[55] Supported by the applicant, the Commission argues, "While the Decision did set out the applicable competing rights, it did not attempt an analysis of how those rights should be balanced". It argues that it was an error to describe the rights of the respondents as at the core of freedom of expression and association without a careful analysis of context and that the Tribunal erred in failing to consider how closely the rights affected were to the core of the applicant's *Code* rights before determining the balancing. It relies upon the Commission's Policy on Competing Rights ("Policy"), and argues that it is supported by the Decision in *N.S.*, above, that set out the principles in balancing rights to a fair trial and religious freedom.

[56] The Policy was not referred to or applied in the Decision; the case was argued in December of 2011, before it was released in January 2012. Nevertheless, although the Tribunal is not bound by Commission policies, the approach taken in the Decision reflects the analytical approach taken in the Policy and advocated by the Commission in its submissions. While the Commission expresses its concern as an argument that the Tribunal failed to engage in balancing, its submissions really reflect a different view of the scope of the rights in question than that set out in the Decision.

[57] Many of the factors applied in the analysis relate to the question of how much the issues affected the core of the applicant's *Code* right in the social area of employment. These include the effect in the workplace and the seriousness of the comments. The Ontario *Code* protects against harassment and discrimination in the workplace, and not comments in public debate or publications, electronic or print. The considerations discussed in the Decision and evaluated above go to the question of how central these blog entries were to her employment *Code* rights. While the Commission and applicant

clearly disagree with the legal analysis and factual findings about the connection to the workplace and degree of seriousness of the comments, the analysis is not inconsistent with the mode of analysis in the Policy or jurisprudence.

[58] I also reject the Commission's argument that because the post drew on sexist stereotypes to make its point on matters of union concern, it was not at the core of freedom of expression or association. The jurisprudence does not support this distinction. The political and public interest nature of this union expression, on a matter of legitimate concern to it as the democratic representative of employees in the bargaining unit, places it at the core of freedom of expression. The use of stereotypes to convey a message of union concern does not remove it from this core.

[59] In *R. v. Sharpe*, 2001 SCC 2 at paras. 21-23, where the expression at issue was child pornography, the majority of the Court made the following comments:

> Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.
>
> Nevertheless, freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra, supra*, or the prevention of harm that threatens vulnerable members of our society as in *Butler, supra*, may justify prohibitions on some kinds of expression in some circumstances. Because of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny.
>
> The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy: *Irwin Toy Ltd. v. Quebec*

> *(Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765. While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society. As stated in *Irwin Toy, supra*, at p. 968, the guarantee "ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection", the Court continued, "is . . . 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual". As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is "the matrix, the indispensable condition, of nearly every other form of freedom" (p. 327).

[60] I acknowledge that the Supreme Court has held that propaganda promoting hatred against particular groups lies outside the core of freedom of expression: *Ross*, above; *R. v. Keegstra*, [1996] 1 SCR 825; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892. However, the use of stereotypes based on prohibited grounds to convey a political point is of a completely different nature than the promotion of hatred. Indeed, this distinction is at the heart of the analysis in *Whiteley*. The fact that they lie at the core of freedom of expression is one of the reasons why newspaper editorials cannot lead to *Code* claims, even if they contain racist or sexist statements that would offend the *Code* if said by a service provider to a customer, a worker to a co-worker, or a vocational association to its members. The use of stereotypes, on its own, does not diminish the importance of political expression.

[61] That said, I emphasize that the Decision makes clear that in a different set of factual circumstances, a blog like this one could be found to violate the *Code* (para. 42). Certainly, if there were statements made on this blog that were equivalent to hate speech, they would not be found to fall at the core of freedom of expression given the caselaw above and the balancing could come out very differently.

[62] For all these reasons, I do not agree that the Decision failed to apply a careful balancing of facts and circumstances. Reasonable people may disagree on where such a balancing should come out, but that is not the basis for a reconsideration.

CONCLUSION

[63] For all these reasons, I find that there is no basis for reconsideration. The reasoning was based closely on the particular facts of this case, which raised issues of first impression. It involved a novel, difficult and controversial fact situation with competing legal values that had to be balanced. There is no conflict with established principles or other reason to grant the exceptional remedy of reconsideration.

[64] The Request for Reconsideration is dismissed.

Dated at Toronto, this 1st day of February, 2013.

David A. Wright
Associate Chair