HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Robert Pellerin

Applicant

-and-

Conseil scolaire de district catholique Centre-Sud and Maryse Francella

Respondents

DECISION

Adjudicator:	David A. Wright
Date:	October 7, 2011
File Number:	2009-01447-I
Citation:	2011 HRTO 1777
Indexed as:	**Pellerin v. Conseil scolaire de district catholique Centre-Sud**

APPEARANCES

Robert Pellerin, Applicant	)	Self-represented
Conseil scolaire de district catholique Centre-Sud and Maryse Francella, Respondents	)	Claire Vachon, Counsel

INTRODUCTION

[1] Robert Pellerin, the applicant, was a principal for the respondent school board (the "Board"). Maryse Francella, the individual respondent, was a superintendent and his supervisor. Mr. Pellerin alleges that Ms. Francella harassed and discriminated against him on the basis of disability and engaged in reprisals for a previous human rights complaint, and that the Board is responsible for her actions. He alleges, among other things, that Ms. Francella violated the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), by criticizing him, placing expectations and demands on him not placed on other principals, engaging in harassing behaviour that she did not engage in with other principals, and undermining his credibility with staff. He alleges that he was treated differently from others and that Ms. Francella tried to make him resign because he had major depressive disorder and had made a complaint to the Ontario Human Rights Commission in 2006. He says that the connection between these events and his disability and previous *Code* Complaint is established because his treatment by the Board changed from how it was before he became ill and filed the Complaint, and because he was treated differently from other principals.

[2] The respondents allege that all of Ms. Francella's actions were legitimate supervision of Mr. Pellerin's job performance and had no connection with his disability or prior *Code* Complaint. They state that there were significant concerns about the applicant's work performance and leadership in the schools to which he was assigned. Ms. Francella, they say, was attempting to manage the applicant's performance and assist the applicant in improving it. The applicant was assigned to two different schools in the academic years 2007-08 and 2008-09 and in each school the Board received significant and serious complaints from school staff about his actions beginning within weeks of the start of the school year. They say that Ms. Francella did not even know about the applicant's disability and prior Commission Complaint during many of the events the applicant says violated the *Code*.

[3] The issue in this case, as in many other applications before the Tribunal, is whether the applicant can establish a connection between Ms. Francella's actions and

the *Code*. The applicant raises a series of events over one school year and the first several months of another during which his performance was being closely monitored and, all agree, critiqued. He asks the Tribunal to make a general inference that this was because of his previous Commission Complaint and his disability.

[4] For the applicant to succeed in this Application, he must establish, on a balance of probabilities, that his disability was a factor in Ms. Francella's actions resulting in differential treatment on this basis, and/or that she intended to reprise against him for his previous Commission Complaint. This depends principally upon Ms. Francella's credibility. Having reviewed the materials filed by the parties, heard Ms. Francella's evidence, including Mr. Pellerin's cross-examination of her, and heard argument from the parties, I conclude that there is no reasonable prospect that Mr. Pellerin can prove discrimination or reprisal within the meaning of the *Code*. Accordingly, the Application must be dismissed.

[5] The facts of this Application also raise the issue of the Tribunal's approach to deciding whether applications should be dismissed during a merits hearing after some but not all proposed evidence has been heard. In my view, this Application should be dismissed at this stage because, after hearing some evidence, it is evident that the Application has no reasonable prospect of success. I discuss the reasons for this approach to the analysis below.

THE APPLICATION AND HEARING

[6] The Application, under s. 34 of the *Code*, was filed on February 29, 2009. The respondents took the position that the Application was barred because of a release in an agreement in which the applicant resigned his employment. In an Interim Decision, 2009 HRTO 1238, the Tribunal held that the release did not bar the applicant from arguing that he experienced harassment on the basis of disability or reprisals, but that he could not challenge the agreement ending his employment or seek reinstatement.

[7] During a pre-hearing conference call with the parties following the Interim

Decision and the filing of an amended set of allegations and Response, the Tribunal suggested to the parties, and they agreed, that Ms. Francella would testify first and that Mr. Pellerin would testify second, without this affecting the burden of proof. Disclosure and the provision of witness statements was ordered, and the Tribunal held a subsequent pre-hearing conference call with the parties shortly before the hearing, during which various production issues were dealt with.

[8] The hearing was held on February 9, 2011. Ms. Francella testified about her actions during the period in question and Mr. Pellerin was given the opportunity to cross-examine her. I then directed that the parties make argument on whether the applicant had established a *prima facie* case or whether the Application had no reasonable prospect of success. In the course of his pleadings, pre-hearing filings, cross-examination and argument, Mr. Pellerin had the opportunity to fully explain the evidence he intended to call and the reasons for his allegation that there was discrimination on the basis of disability or reprisal.

LEGAL PRINCIPLES

[9] The relevant provisions of the *Code* are ss. 5 and 8, which read as follows:

> 5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
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> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.
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> 8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

[10] The *Code* prohibits discrimination in various social areas, including employment, accommodation, goods, services, facilities, and contracts and reprisals for asserting

Code rights. The events that can potentially give rise to a claim of discrimination are therefore extensive. However, the Tribunal's jurisdiction to evaluate events in these social areas is relatively narrow. As has been stated in many decisions, the Tribunal does not have the power to evaluate general claims of unfairness (see, for example, *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1025 at para. 27). A successful claim of discrimination or harassment requires an applicant to show that one of the prohibited grounds was a factor in disadvantage experienced by the applicant. A successful claim of reprisal requires an applicant to show that it was the intention of a respondent to take actions in reprisal for asserting *Code* rights. Discrimination or reprisal need not be the only or even the principal factor in a respondent's decision or actions, but an applicant must show that it was one of the factors.

[11] The burden of proving that a prohibited ground or an intention to reprise was a factor in a respondent's decision or action lies on an applicant. An applicant must establish a connection between the disadvantage and the ground on a balance of probabilities. However, often only the person who made a decision or took relevant actions will know why they were taken, and relevant evidence will frequently be in the possession of a respondent. Human rights law recognizes that a respondent's non-discriminatory explanation may in fact be erroneous or a pretext for discrimination.

[12] Reconciling an applicant's burden of proof with the reality that information from a respondent may be the only way an applicant can prove his or her case is a tension in deciding *Code* applications. On one hand, because the reasons for a decision are often only known to a respondent, it is important to ensure that the Tribunal process provides a fair and appropriate opportunity for applicants to obtain evidence that would permit them to establish discrimination and that the Tribunal use its expertise to focus on such evidence. It is also important that neither party undergo the cost, inconvenience, and potential stress of *Code* proceedings where there is no reasonable possibility that allegations of *Code* violations will succeed, and that public resources be appropriately used in resolving such disputes. Human rights applications should not be an endless search for an unlikely needle in a haystack.

[13] The *Code* and the Tribunal Rules of Procedure require the Tribunal to apply its expertise in the resolution of human rights disputes in a manner that is principled, practical, proportionate and adapted to the dispute before it. The *Code* directs the Tribunal, in s. 41, to adopt procedures and practices that offer the best opportunity for a "fair, just and expeditious resolution of the merits of the matters before it" and this principle guides the interpretation of the Rules (Rule 1.1). The Tribunal is specifically empowered to adopt practices or procedures "that are alternatives to traditional adjudicative or adversarial procedures" (s. 43(3)(a) and Rule 1.6). In particular, the Tribunal is empowered to define and narrow the issues and to determine the order in which the issues and evidence will be presented (s. 43(3)(b) and Rule 1.7 (g) and (h)).

[14] These provisions, in my view, instruct the Tribunal not to be formalistic about the order or extent to which evidence is called. They invite the Tribunal to apply its knowledge of human rights law and the types of disputes that come before it to decide what evidence it needs to hear in order to resolve a dispute, in particular one in which the connection to the *Code* seems weak. They require the Tribunal to balance the principles discussed above. They suggest tailoring the procedure in a particular case to ensure that the applicant has a fair and appropriate opportunity, given the facts of the case, to obtain and present evidence that might prove, on a balance of probabilities, a link between a respondent's actions and the *Code* through disclosure or cross-examination. At the same time, in my view, the process must be structured so that the making of a bald allegation or a mere unfounded suspicion does not place inappropriate burdens on respondents, and so that an application or hearing is terminated when it is clear that there is no reasonable prospect an applicant can prove his or her allegations.

[15] There are various mechanisms in the Tribunal's process to provide for the dismissal of applications that should not proceed to a full hearing. If it appears that an application is outside the Tribunal's jurisdiction, the Registrar will issue a Notice of Intent to Dismiss to the applicant without delivering the Application to the respondent. The applicant may make submissions in response to the Notice of Intent to Dismiss, and the application will be dismissed if it is plain and obvious that the application does not fall within the Tribunal's powers to decide (Rule 3). Once an application is delivered to a

respondent, it may seek early dismissal of the Application without a full response on the basis that there is a full and final signed release between the parties, a civil court proceeding requesting a remedy based on the alleged human rights infringement, a previous complaint filed with the Ontario Human Rights Commission, or the application falls under exclusive federal jurisdiction (Rule 8.2).

[16] Rule 19A, which came into effect on July 1, 2010, provides for a summary hearing, following which an application may be dismissed, in whole or in part, if the Tribunal finds that there is no reasonable prospect that the application or part of the application will succeed. The approach to deciding whether an application has a reasonable prospect of success following a summary hearing was explained as follows in *Dabic v. Windsor Police Service*, 2010 HRTO 1994 at paras. 8-10:

> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
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> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.
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> In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a balance of probabilities, the application must be dismissed following the summary hearing.

[17] As the Tribunal explained further in *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389 at para. 17:

> The Tribunal does not have the power to deal with general allegations of unfairness. For an Application to continue in the Tribunal's process, there must be a basis beyond mere speculation and accusations to believe that an applicant could show discrimination on the basis of one of the grounds alleged in the *Code* or the intention by a respondent to commit a reprisal for asserting one's *Code* rights.

[18] Typically, summary hearings are held at a relatively early stage in the Tribunal's process and do not involve calling witnesses. Summary hearings typically involve receiving the applicant's submissions on his or her legal theory and what evidence he or she anticipates calling at the merits hearing in support of the allegations. In my view, the principle that an application should be dismissed because it has no reasonable prospect of success is not limited to the initial early stage of the Tribunal's process.

[19] The principle that a hearing should not continue if it cannot succeed is captured in the existing legal principle of *prima facie* case. Using this test, the Tribunal has considered whether a hearing should continue after hearing some but not all proposed evidence. As traditionally defined, this was a relatively formalistic concept that assumed a formal, non-active hearing process in which, if it proceeds fully, each side would puts forward all the evidence it wished to call in order. The question is whether the respondent can successfully defend against an allegation of discrimination without putting forward any evidence once all of the applicant's evidence has been called. As set out in paras. 27 and 28 of *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"):

> It will be seen that Professor Ratushny departed from the rule respecting the onus of proof expressed in *Etobicoke*. It was held in that case that at least in direct discrimination cases, where the complainant has shown a *prima facie* case of discrimination on a prohibited ground, the onus falls on the employer to justify if he can the discriminatory rule on a balance of probabilities. The question then is whether this rule should apply in cases of adverse effect discrimination.
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> To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of

proof to one party or the other is an essential element. The burden need not in all cases be heavy--it will vary with particular cases--and it may not apply to one party on all issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a `tie-breaker' the concept of the onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence. The onus will not be a heavy one in all cases. In some cases it may be established without evidence; for example, a requirement that all employees work on Saturday in a business which is open only on Saturdays, but once the *prima facie* proof of a discriminatory effect is made it will remain for the employer to show undue hardship if required to take more steps for its accommodation than he has done. In my view, the Board of Inquiry was in error in fixing the Commission with the burden of proof.

[emphasis added]

[20] In my view, when a general evaluation of the evidence that has been called and is proposed to be called makes it clear that the Application has no reasonable prospect of success; the Application should be dismissed. This is a principled test that is consistent with the *Code*, and that incorporates the concept of *prima facie* case. I think that it is usually more understandable, accessible and flexible to consider the issues and evidence against a general test of reasonable prospect of success.

[21] First, as I noted previously in the summary hearing context, *prima facie* case has been used to refer to various concepts, leading to some confusion. As stated in *Forde*, *supra* at para. 18:

> The applicant has referred to the concept of *prima facie* discrimination. In my view, this concept is not helpful in interpreting the Tribunal's summary hearing rule. In human rights law, *prima facie* discrimination has been used to mean various things. In some contexts – for example *Ontario Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 and *Jagait v. IN TECH Risk Management*, 2009 HRTO 779 -- the term is used to refer to what claimant must show to avoid having a claim dismissed without requiring a respondent to call evidence. In others – for example *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1024 -- it refers to whether, assuming the allegations to be true, there is discrimination. In yet others – for example *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (C.A.) – it refers to what is required for a claimant to demonstrate discrimination within the meaning of the *Code*. In my view, it is much more helpful and understandable to parties to simply speak in the summary hearing context about whether there is a reasonable prospect the application will succeed as set out in *Dabic*.

[22] Largely because of these varying definitions, the concept of *prima facie* case can sometimes be difficult to understand and apply, in particular for the many self-represented litigants who have cases before the Tribunal. Moreover, Latin is best avoided in the Tribunal's process, which aims to be accessible and operates in English and French. The concept of no reasonable prospect of success can capture the relevant inquiries in a principled manner that is easier to understand from the name of the concept itself and that can respond to the specific evidentiary and legal issues in a particular case.

[23] Second, *prima facie* case as traditionally articulated may not have the nuance necessary to get to the merits of the case in a proportionate manner or to allow the question to be considered at the most useful time in the hearing. Many articulations of the concept assume that an applicant may present all the relevant evidence he or she wishes before the question of *prima facie* case is evaluated, and that the respondent need present none. There is only one time to consider *prima facie* case on this theory: after the applicant has completed his or her case. However, this may not be the best

way to get at the substantive question at issue, which is an evaluation of all the evidence and proposed evidence in light of the legal questions at issue.

[24] As the Tribunal reasoned in *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 at paras. 59-61:

> The definition [of *prima facie* case in *O'Malley*] arises from the circumstances of the case in *O'Malley* and specifically the fact that the respondent called no evidence. The Board of Inquiry, at first instance, had failed to follow the rule in *Etobicoke* and placed the burden on the Commission to prove that the respondent had acted unreasonably in the steps which it took to accommodate the claimant.
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> The decision in *O'Malley* does not direct a statutory human rights adjudicator to conduct an analysis of the *prima facie* case as a water-tight compartment. In other words, the Tribunal is not required to hear the complainant's evidence first, determine that it meets the test in *O'Malley*, and only then call on the respondent to provide an explanation. Indeed, it is not uncommon for elements of the complainant's burden to be met through the evidence tendered by the respondent since the respondent is often in the position of having more access to the relevant information.
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> In addition, the Tribunal operates under the *Code* and Rules which empower it to promote and apply non-traditional forms of adjudication and dispute resolution. The Tribunal may, for example, decide on a different order of witnesses and issues to be addressed than what might be expected in a traditional adjudication. These innovations make the concept of the *prima facie* case and the shifting evidentiary burdens less useful from a practical perspective although they retain their conceptual importance.

[25] There are many cases, including the present one, where the *O'Malley* definition is not helpful in getting at the merits of the question of whether the application should be dismissed without hearing all the evidence. It may be that there are one or two key witnesses who should be heard before deciding whether there is reason to hear more evidence. Where, as here, the case turns on the respondent's reasons for decisions and actions, the key witness is the decision maker, who would normally be called by the respondent.

[26] I believe that it is neither appropriate nor principled that the hearing continue

when there remains only a theoretical possibility and no reasonable prospect that evidence that could meet an applicant's burden of proof will come forward. Here, for example, to succeed in his Application the applicant must show that the individual respondent's stated reasons for her actions – to improve the applicant's performance and address staff concerns – are in fact a pretext and that his disability or the intention to reprise were factors in her actions. If, as I conclude below, having heard the individual respondent's evidence and the applicant's theory and intended evidence, there is no reasonable prospect that the other proposed evidence of the applicant or the respondent could change this conclusion, this should put an end to the matter. When an applicant has had a chance to fully outline what evidence he or she still intends to call and the basis on which he or she submits the Application can succeed, but there is no reasonable prospect that a violation of the *Code* would be found, the Application should be dismissed.

[27] Third, the concept of *prima facie* case can in some circumstances lead to confusion for the parties about the relevant burdens of proof. In human rights law an applicant has to show discrimination on a protected ground or reprisal on a balance of probabilities. A respondent has the burden of proof to establish a defence on a balance of probabilities. There are not shifting legal burdens in establishing discrimination. See *Shaw v. Phipps*, 2010 ONSC 3884 (Div. Ct.) at para. 47; *Couchie v. Ontario (Municipal Affairs and Housing)*, 2011 HRTO 689; and *Hendershott*, *supra* at para. 62. However, despite the applicant's burden, a respondent may be required to present evidence that would assist the Tribunal in making that determination. The *Code* empowers and directs the Tribunal to hear the evidence necessary to determine whether the applicant has met or can meet his or her burden of proof. There are circumstances in which it is necessary to hear evidence from the respondent in order to decide whether the Application can succeed. While this principle underlies many of the Tribunal's previous applications of the *prima facie* case test, it is helpful to articulate the principle in a manner that makes it clear that dismissal is not merely about what evidence is in the applicant's possession.

[28] Fourth, the test of no reasonable prospect of success, and the flexibility that it permits, is in my view most consistent with the principle of proportionality that is

fundamental to a modern justice system. It allows the Tribunal to ensure that the hearing and the parties' resources are directed to obtaining, in a focused manner, the evidence necessary to determining the merits of the case, given what is at stake. The emphasis is on determining the just result under the legal tests prescribed by the *Code*, and not the legal strategies of the parties or their representatives.

[29] Fifth, this standard draws upon and incorporates principles that are present in many other areas of law, for example in Rule 21 of the *Rules of Civil Procedure*. The principle that a case can be decided on the basis of limited evidence where there is no genuine issue to be decided is present in Rule 20 of the *Rules of Civil Procedure*. The analysis I propose draws on these concepts.

[30] For all these reasons, I have considered the parties' arguments in light of the evidence in this case in relation to the question of whether the Application has no reasonable prospect of success. In my view, this question should be considered in light of the evidence that has been heard and that is reasonably expected to be presented. This involves a consideration of whether, in light of the pleadings, witness statements, documents relied upon and evidence that has been heard, there is a reasonable prospect that an applicant can meet his or her burden of proof.

[31] The flexible timing of the no reasonable prospect of success approach, in my view, should not mean that a respondent is entitled to have a request for dismissal on this basis fully argued at any point in the hearing. The Tribunal may decline a request to argue the question of no reasonable prospect of success at a particular point in the hearing, including after an applicant's evidence has been called. As confirmed in Rule 1.7(g) and s. 43(3)(d) of the *Code*, the Tribunal must determine the order and stage in which issues, including those considered by the parties to be preliminary, will be considered.

[32] Using the test of no reasonable prospect of success as I propose here incorporates, refines and builds upon principles articulated in previous descriptions of

the *prima facie* case test. An applicant who cannot prove the foundations of the claim that depends on his or her evidence as in *Jagait* cannot proceed with the case and this may be analyzed as a lack of *prima facie* case and/or no reasonable prospect of success. The *prima facie* case test as applied in *Arias* is based on the standard that an application should be dismissed if, assuming all the facts alleged by the applicant to be true, there is not discrimination, and the same principle is incorporated in the concept of no reasonable prospect of success.

APPLICATION TO THE FACTS

[33] The parties helpfully agreed that Ms. Francella would testify first. Her testimony was the best way to get at the relevant evidence in the context of this case and the resolution of the Application depends on the credibility of her assertions that disability and reprisal were not factors in her actions.

[34] The accepted approach to making credibility determinations was set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354. At pp. 356-357, the British Columbia Court of Appeal stated:

> ...Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
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> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[35] Having considered the documents filed by the parties, Ms. Francella's evidence and cross-examination, and Mr. Pellerin's proposed evidence, I accept Ms. Francella's evidence and find that her critiques, expectations and evaluation of Mr. Pellerin's

performance resulted from concerns about his performance as a principal, untainted by his disability or prior *Code* Complaint. There is no reasonable prospect that other evidence proposed to be called would show otherwise. What Mr. Pellerin perceives as harassment and reprisal was legitimate performance management.

[36] I note that when I asked him, Mr. Pellerin said that he does not make the argument that his performance was affected by his medical condition or that he required accommodation for his disability that was not provided. His argument is that his work performance was appropriate and that Ms. Francella criticized him, undermined him, and placed expectations on him not placed on others because of his disability and prior *Code* Complaint.

[37] There would be little served by setting out in detail in this Decision the events that led to Ms. Francella's concerns about Mr. Pellerin's performance and her critiques and close management of his work. The interactions between Mr. Pellerin and his staff and between him and Ms. Francella were extremely difficult for all concerned. It is enough to say that the most significant factor leading to her actions was that, in two different schools, in two successive school years, serious complaints about Mr. Pellerin's leadership style were made by the staff working under him.

[38] Mr. Pellerin believes there had not been close enough supervision of the schools' staff before he became principal, and that he had to assert closer control in order to ensure the functioning of the schools. He believes that the staff complaints about him stemmed from their unwillingness to accept his authority and that he was acting in accordance with Board policies. He submits that in light of this, Ms. Francella's criticism of him stemmed not from his performance, which was entirely appropriate, but his disability and prior *Code* complaint. Ms. Francella's interpretation of the situation was different. She does not agree that the actions of teachers were inappropriate and believed the complaints against Mr. Pellerin represented legitimate concerns about his leadership. Having heard the complaints and spoken with Mr. Pellerin about his actions, she came to the view that his leadership style should have been more team-based and less top-down, and that there were failures in his manner of communicating with staff,

among other things. Also particularly significant was that Mr. Pellerin ignored specific instructions from his supervisors not to make changes in the schools right away.

[39] Ms. Francella's evidence was logical, consistent, and reasonable. It was internally consistent, withstood cross-examination, and was consistent with the notes and documentary evidence she took at the time. She had an appropriate explanation for each action and criticism that Mr. Pellerin suggested, in cross-examination, was discriminatory.

[40] Even assuming, as Mr. Pellerin says, that his treatment after he took sick leave and filed his prior *Code* Complaint was different than before, that he was treated differently from other principals, or that the Board acted inappropriately in relation to others with mental health disabilities, there is no reasonable prospect that the applicant can prove that disability or reprisal was a factor in these circumstances. Mr. Pellerin has had a full opportunity to provide descriptions of the evidence he intends to call, to cross-examine Ms. Francella as to the credibility of her explanations for his actions, and to explain the basis on which further evidence would show discrimination. Assuming Mr. Pellerin's evidence and that of his witness is found fully credible, he cannot show discrimination on a balance of probabilities.

[41] Ms. Francella's testimony, together with the documentary evidence, makes it abundantly clear that her actions stemmed exclusively from good-faith concerns about Mr. Pellerin's performance and her attempts to assist him in improving that performance. It was her legitimate belief that Mr. Pellerin could improve his leadership style and thereby his performance. While not strictly necessary to my conclusion, I would add that in light of the complaints that were received and Mr. Pellerin's communications to her about his actions, her responses are consistent with what one would expect someone in her position to do when faced with the complaints and Mr. Pellerin's response to them. Given these findings, I do not accept Mr. Pellerin's theory that there was any attempt to make him resign because of his disability.

[42] Indeed, Ms. Francella testified that she did not know about his disability or prior *Code* Complaint for much of the relevant period. I accept this evidence. Mr. Pellerin pointed to various indications that might suggest that he had depression, such as a teacher's notation in a letter that he had cried during a meeting with her. While these are indications that might cause someone to question whether Mr. Pellerin was depressed, I do not accept, as Mr. Pellerin suggests, that they show that Ms. Francella is not telling the truth when she says he was unaware of his disability.

[43] There is no basis to suggest that the situations Mr. Pellerin wishes to compare – his own work before he went on leave or the situations of other principals – involved performance concerns or complaints of the same nature or magnitude that arose here and therefore they are of little assistance and do not involve a legitimate issue that needs to be explored through evidence.

ORDER

[44] The Application is dismissed on the basis that it has no reasonable prospect of success.

Dated at Toronto, this 7th day of October, 2011.

"signed by"

David A. Wright
Associate Chair