



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Anne Marie Miraglia

Applicant

-and-

University of Waterloo

Respondent

-and-

University of Waterloo Faculty Association

Intervenor

INTERIM DECISION

Adjudicator: Brian Cook
Date: October 29, 2009
File Number: 2008-00823-1
Citation: 2009 HRTO 1810
Indexed as: **Miraglia v. University of Waterloo**

SUBMISSIONS BY

Anne Marie Miraglia, Applicant)	Andrew Pinto, Counsel
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)	
University of Waterloo, Respondent)	Christopher Riggs, Counsel
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)	
University of Waterloo Faculty Association, Intervenor)	David Wright, Counsel
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)	
Male Faculty Member)	Ross Wells, Counsel
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[1] This Interim Decision deals with a request by the applicant for production of documents that relate to a colleague. The applicant is a member of the faculty of the University of Waterloo. She alleges discrimination in employment on the grounds of sex. In particular, she alleges discrimination in the process surrounding her promotion to the rank of full professor. To prove her allegations, the applicant seeks production of documents concerning a male colleague who was promoted to full professor at around the same time as she was. He is referred to as “the male faculty member” in this Interim Decision.

[2] The hearing in this matter is underway. I have heard evidence from the applicant and three witnesses called by the applicant. I have also heard evidence from Dean Kenneth Coates, the Dean of the Faculty of which the applicant is a member. The hearing is currently scheduled to continue on November 9 and 12, 2009.

[3] The applicant filed a Request for Order During Proceedings regarding the disclosure issue and an amended Request after retaining Mr. Pinto, her current counsel. The respondents replied to the Requests opposing disclosure of the documents.

[4] A conference call hearing was held on September 16 to deal with a number of matters, including the disclosure issue. After this, and pursuant to Interim Decision 2009 HRTO 1539 (CanLII), submissions were invited and received on the disclosure issue from the applicant, the respondent, the Faculty Association and the male faculty member. The Faculty Association filed a Request to Intervene with respect only to the disclosure issue. The Association confirmed that it did not otherwise wish to intervene in respect of the Application. The male faculty member’s submissions were also limited to the disclosure issue and he did not make any request to otherwise participate in the proceeding. A copy of this Interim Decision will be sent to the Faculty Association and the male faculty member.

[5] Due to the short time remaining prior to the start of the hearing, I deferred making a determination on the disclosure issue until I had heard evidence from the parties

about the substance of the Application. Having heard evidence and reviewed the written submissions, I can now make a determination on the disclosure issue.

[6] As discussed at the hearing, each party has the right to raise any concerns arising out of this Interim Decision when the hearing continues on November 9, 2009.

Background

[7] Applications for promotion at the University follow a somewhat complex process. The first level of review is the Department Tenure and Promotion Committee (“the Department TPC”). The Department TPC is chaired by the Chair of the department and the Chair writes a report on behalf of the committee. The second level is the Faculty Tenure and Promotion Committee (“the Faculty TPC”), which is chaired by the Dean of the Faculty. The Dean writes a letter of transmittal after the committee meets. The third level is the University Tenure and Promotion Committee (“the University TPC”). The University TPC is comprised mostly of the University Deans. The President of the University attends these meetings and receives a recommendation from the University Tenure and Promotion Committee.

[8] The applicant’s application for promotion was not approved by the Department TPC. It was approved by the Faculty TPC but not approved by the University TPC and the President.

[9] The applicant had the right to appeal the decision to an Appeals Tribunal, and she did so. Her appeal was allowed and as a result she became a full professor.

[10] The applicant submits that the difficulties and negative decisions that she received during this process were at least in part the result of discrimination on the basis of sex. She alleges that the male faculty member’s application, which was approved at all levels, is an appropriate comparator. She further alleges that his application proceeded before hers and that the decision to postpone her application in favour of his was also influenced by discrimination on the basis of sex. Finally, she

alleges that her salary is lower than the male faculty member's salary and that the reason for this is also discrimination on the basis of sex.

The disclosure request

[11] The applicant seeks production of the following regarding the male faculty member:

1. A copy of the *curriculum vitae* that formed part of his application for promotion to the rank of full professor.
2. Information about the male faculty member's salary from 2003 to date.
3. Anonymized versions of the letters received from outside referees that were considered by the University and the promotion committees.
4. A copy of the transmittal letter written by the Dean to the University TPC regarding the results of the meeting of the Faculty TPC.
5. Course evaluation ratings for courses taught by the male faculty member.

Relevance

[12] The first question is whether the documents in question are relevant. The Tribunal's Rules provide that the first step in the determination of relevance is whether the requested documents are arguably relevant. Documents that are arguably relevant may be subject to a further review to determine if they are relevant for the purposes of admissibility into evidence. In this case, given that the hearing is well underway and based on the submissions of the parties, this Interim Decision addresses whether the documents are relevant for the purpose of admissibility into evidence, and not just whether they are arguably relevant.

[13] The applicant submits that the documents in question are relevant to the issues in the Application. The applicant does not suggest that the male faculty member should not have been promoted. Rather, her allegation is that he was favoured in the promotion process despite being less qualified than she was and gender was a factor in the differential treatment. She further alleges that there is a salary differential and that the explanation for this is gender. To pursue this allegation, it is necessary to know

what his salary is. While some salary information may be available pursuant to the *Public Sector Salary Disclosure Act, 1996*, S.O. 1996, c. 1, Sched. A, as amended, this information may not provide complete information about the male faculty member's salary.

[14] At the hearing, the respondent argued that the documents in question are not relevant and should not be admitted on that basis. In its view they are not relevant because they cannot prove the applicant's allegations. The fact that the male faculty member's application for promotion went more smoothly than did the applicant's or that his salary is different than hers does not prove discrimination.

[15] The Faculty Association of the University of Waterloo submits that the documents in question are not relevant for essentially the same reasons as those set out at the hearing by the respondent. The Faculty Association submits that promotion and salary decisions are made on the basis of the particular application and that there is no basis for a "one on one" comparison with another individual faculty member.

[16] The male faculty member did not make submissions on relevance, but raised other concerns, discussed below.

[17] In my view, with the exception of the student course evaluation results, the documents in question are relevant to the issues raised in the Application. Because discrimination is often subtle, difficult to prove and may happen behind closed doors, the Tribunal has recognized that the applicant regularly requires information in the possession of the respondent to make his or her case: *Washington v. Toronto Police Services Board*, 2009 HRTO 217 (CanLII) at para. 14.

[18] The applicant alleges that she has been treated differently from the male faculty member and that the reason for this is her gender. She seeks to challenge as discriminatory the decision-making process that she says resulted in differential treatment compared to a male colleague. The applicant may or may not be successful in proving her allegations. However, in my view, it is clear that the documents in

question are relevant to the issues raised in the Application. They provide comparative evidence about how the male faculty member has been treated and this evidence is relevant to the allegation that she was treated differently. The reasons why the student course evaluation results are not relevant are discussed below.

Privilege and confidentiality

[19] The respondent, the male faculty member and the Faculty Association submit that even if the documents in question are relevant, they should nevertheless not be disclosed because they are privileged. The privilege in question arises out of the assertion that the documents were created on the understanding that they would remain confidential. It appears that this argument pertains only to the letters of reference and the letter of transmittal from the Dean and possibly the results of the student course evaluation ratings. They do not appear to pertain to the *curriculum vitae* of the male faculty member or his salary. These latter issues are discussed later in these reasons.

[20] The respondent referred to the decision of the Ontario High Court in *University of Guelph and the Canadian Association of University Teachers*. (1980), 112 D.L.R. (3d) 312. In that case, the Court adopted the four tenets of privilege cited by *Wigmore on Evidence*, previously adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254:

1. The communication must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

[21] The male faculty member agrees that this is the appropriate test as does the Faculty Association.

[22] *University of Guelph* concerned a university promotion case. A professor had failed in his application to become a full professor. An arbitrator heard a resulting grievance and had to deal with a request by the professor for production of documents that had been considered by the University promotion committee. The arbitrator had ordered that the documents be disclosed and that decision was the subject of the review by the Court.

[23] Hollingworth J. reviewed the *Wigmore* test and concluded:

The matter, as I see it, boils down to whether or not the fourth principle of Dr. Wigmore should be deemed valid, namely, that confidentiality is more important than disclosure. I find in this case that it is. It seems to me that in order to get an honest opinion from colleagues of a person who is appearing before a board set up by the university and particularly when everyone knew (and, indeed, it is admitted in the brief of counsel for the respondent confidentiality was known by the respondent) that the only way one can get this honest and unbiased answer is by assuring people who make submissions that they will be protected by a cloak of confidentiality. In short, to break the rule of confidentiality would be to rupture irretrievably the effective working of a system of peer evaluation of tenure, merit increments and of promotion. By disclosure, witnesses would inferentially and conceivably be held *in terrorem*. This has been stressed for many, many years and to me is one of the most sacred and fundamental principles of law and is not an ancient and skeletal shibboleth. Indeed, it is something I do not think should be departed from here. It is true that the terms of reference are broad. In fact, they are extremely broad, and perhaps they could be couched in less infelicitous language, but nevertheless I think they all must be interpreted within the concept of confidentiality which has been woven inextricably into our law. I therefore have no problem in stating that the arbitrator has misconducted himself in law and that his award should be set aside.

[24] I note that the dispute in *University of Guelph* was very different than the dispute in the case before me. In that case, a professor was seeking access to the documents that the committee reviewed about his promotion. They would be analogous to the letters about Professor Miraglia that were reviewed by the Tenure and Promotion Committees as part of her application for promotion. The process at the University of Waterloo, at least in 2003 and onwards, differs significantly than the procedure in place at the University of Guelph in 1980. In the latter situation, applicants for promotion

could not access documents that were used in the promotion process about themselves. At the University of Waterloo, at present, applicants for promotion can access such documents but with the names of the authors withheld, even though authorship may be deduced in some cases based on the content of the letters.

[25] A University will likely receive the most candid opinion from referees who understand that the person they are writing about will never see the reference letter. It was this level of confidentiality that was at stake in the *University of Guelph* case. The University of Waterloo's Policy 77 represents a distinct departure from that level of confidentiality. Under the policy, on request, an unsuccessful candidate for promotion does receive a copy of the (redacted) reference letters. The referees are told that this could happen and write the reference letter with this knowledge.

[26] I further note that in the promotion process, the members of the various Tenure and Promotion Committees have full access to the reference letters, including knowledge of who wrote them.

[27] While a level of confidentiality attaches to the letters, they are nevertheless provided on the understanding that the person seeking promotion may be able to access them in a redacted form. They do not therefore originate in a confidence they will never be disclosed. While the ability to access independent assessments of University faculty by academics outside the University is important, and while some level of confidentiality may be essential to the full and satisfactory maintenance of the relation between the referees and the University, it appears that the University has conceded that it is sufficient if the names of the referees are withheld. In my view, the potential damage to the integrity of the promotion caused by disclosure to the applicant of the reference letters regarding the male faculty member is not significantly different than if he accessed them himself, something he would have been entitled to do if his application for promotion had not succeeded.

[28] After applying the *Wigmore* analysis, I find that the reference letters that were considered in the promotion of the male faculty member are not privileged on the basis of confidentiality, provided they are disclosed with the names of the authors withheld.

[29] The respondent suggested that the *Wigmore* test was applied in *Nelson v. Lakehead University*, 2007 HRTO 6 (CanLII), so as to deny disclosure of documents in a case where the applicant alleged discrimination in a university promotion. The facts in that case and the circumstances giving rise to the production request were quite different than the case before me. While the *Wigmore* test was mentioned, the matter was decided on different grounds.

[30] The respondent also asserts privilege on the basis of confidentiality with respect to the letter of transmittal from the Dean following the Faculty TPC meeting that discussed the promotion of the male faculty member.

[31] The confidentiality concerns with respect to the Dean's letter are somewhat different. It has been agreed in this hearing that it is not proper for me to hear evidence about the deliberations of the various TPC meetings. This is because it is agreed that the TPC process requires a high degree of confidentiality with regard to the proceedings. In particular the current process requires that faculty be free to speak openly and frankly about colleagues who are seeking promotion. Unsuccessful candidates for promotion are not entitled to know what was said about them during the TPC meetings or who said it.

[32] However, it appears a letter of transmittal does not generally identify any individuals or attribute any views. It is a document that an unsuccessful candidate may be expected to access and will presumably be written with that in mind. In applying the *Wigmore* test to the letter of transmittal, in my view, it is not privileged. However, it should only be disclosed in a way that as much as possible removes any names or information that might identify any specific faculty member apart from the male faculty member. Counsel for the respondent will review the Dean's letter of transmittal and determine if any redaction is required. He should then disclose the letter to the

applicant including any redactions that may be necessary. Any concerns arising out of the redaction can be raised on November 9, 2009.

[33] The degree of confidentiality that attaches to the student course evaluation ratings is not clear. I assume that they do not contain any information about the specific students. They are shared as a matter of course with the faculty member who taught the rated course. While I understand that the results are not generally shared with other colleagues, it does not appear that the system of student course evaluation rating would in any way be undermined or compromised if the ratings for the male faculty member were to be disclosed in this case.

[34] However, I note that the documents disclosed by the applicant in this case do not include student course evaluation ratings about courses that she has taught, although there is reference to her ratings in some of the documents. I assume that the relevance of the course evaluation ratings about the male faculty member is to allow comparison with the applicant's course ratings. Since the ratings of the applicant have not been placed in evidence, it will not be possible to compare the applicant's ratings with those of the male faculty member. It does appear that the reference to her ratings in the documents that have been filed would form an adequate basis for comparison. In these circumstances, the relevance of the male faculty member's course ratings is not clear. The student course evaluation ratings for the male faculty member will not be disclosed at this time.

Disclosure of the *curriculum vitae* and salary information

[35] In the University community, a faculty member's *curriculum vitae* is usually widely distributed by the member and is thus widely available. It pertains to the person's professional life and is unlikely to contain any sensitive personal information. It does not seem to be a document that would be considered confidential and I see no reason why the *curriculum vitae* of the male faculty member that was considered by the TPCs should not be disclosed.

[36] A person's salary is generally at least somewhat confidential. However, this is not true of people employed in the public sector who are subject to the *Public Sector Salary Disclosure Act*. It requires that an employer subject to the *Act* shall publish the names and salary of any employee who earns over \$100,000. The information that must be published is set out in section 3(2) of the *Act*.

3(2) The record shall indicate the year to which the information on it relates, shall list employees alphabetically by surname, and shall show for each employee,

- (a) the employee's name as shown on the employer's payroll records;
- (b) the office or position last held by the employee with the employer in the year;
- (c) the amount of salary paid by the employer to the employee in the year;
- (d) the amount of benefits reported to Revenue Canada, Taxation, under the *Income Tax Act* (Canada) by the employer for the employee in the year.

[37] Information about the male faculty member has been subject to this legislation since 2006. The applicant argued that the published information might not be accurate because there might be other income that is not published. As well, the income might be distorted if the male faculty member had been on sabbatical. Finally, the information available under the *Act* pertains only to 2006 and subsequent years.

[38] In my view, for the purposes of this Application, the information that is publicly available should be sufficient. The information that must be disclosed includes the salary and benefits paid and reported to Revenue Canada. It is not clear that any other payment, if there was any other payment, would be relevant to the issues in the Application. It further appears that the information from 2006 onwards should be sufficient to give comparator salary information in this case. The respondent shall provide information about any sabbatical period that the male faculty member has taken since January 1, 2006.

The rights of the male faculty member

[39] The foregoing analysis concerns only the rights of the parties to the Application. The male faculty member is not a party to the Application and he has not applied for intervenor status. He was entitled to make submissions on the disclosure request and he has filed those submissions. He relies on the submissions of the University and also asserts that he has always assumed that his employment records are confidential and objects to any breach of that confidentiality.

[40] The position of the male faculty member is very understandable. However, his concerns arise in many cases where information about third parties is disclosed. Nevertheless, I do find that steps should be taken to manage the legitimate privacy concerns, as much as possible. To that end, I direct that the disclosure of the documents discussed in this Interim Decision will be released to the applicant's counsel. He may review the documents with the applicant but will not provide her with a copy to retain. In addition, she will sign an undertaking not to disclose the contents of the documents to any person other than for the purposes of the Application or as required by law.

ORDER

[41] I order the following:

1. The respondent shall produce to the applicant's counsel a copy of the male faculty member's *curriculum vitae*;
2. The respondent shall disclose to the applicant's counsel the male faculty member's salary and benefits, as reported to Revenue Canada from January 1, 2006 to the present and shall provide information about any sabbatical period that the male faculty member has taken since January 1, 2006;
3. The respondent shall produce to the applicant's counsel copies of the letters received from outside referees, with the names of the referees redacted, that were considered by the University and the promotion committees in relation to the male faculty member;

4. The respondent shall produce to the applicant's counsel a copy of the Dean's letter of transmittal concerning the male faculty member, with any names or information that might identify any specific faculty member apart from the male faculty member redacted.
5. The records disclosed shall be subject to the following conditions:
 - a. The applicant will provide a signed undertaking to the respondent not to disclose the contents of the documents to any person other than for the purposes of the Application or as required by law.
 - b. Counsel for the applicant may review the documents with the applicant but may not provide her with a copy to retain.

Dated at Toronto, this 29th day of October, 2009.

"Signed by"

Brian Cook
Vice-chair