HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Anne Marie Miraglia

Applicant

-and-

University of Waterloo

Respondent

RECONSIDERATION DECISION

Adjudicator:	Brian Cook
Date:	November 17, 2010
File Number:	2008-00823-I
Citation:	2010 HRTO 2286
Indexed as:	**Miraglia v. University of Waterloo**

[1] On July 5, 2010, the Tribunal issued its Decision in this Application, 2010 HRTO 1459 (CanLII) (the "Decision"), dismissing the Application. The applicant has asked the Tribunal to reconsider its Decision. In accordance with the Tribunal's Rules, the applicant delivered a copy of her Request for Reconsideration to the respondent, but the respondent has not been asked to file a Response. The respondent has, however, sent correspondence dated November 1, 2010, alleging that the applicant has inappropriately posted the Request on a website.

BACKGROUND

[2] The applicant alleged that she was subject to discrimination on the basis of sex during the process that led to her becoming a full Professor. The Tribunal Decision found that while it was clear that the applicant certainly experienced difficulties in the promotion process, it had not been established that, on a balance of probabilities, the difficulties she experienced were due to discrimination on the grounds of sex. The decision also concluded that it had not been established that the salary difference between the applicant and a male faculty member she identified as a comparator was due to discrimination on the grounds of sex.

THE REQUEST FOR RECONSIDERATION

[3] The Request for Reconsideration (the "Request") provides the following reasons why the Tribunal should reconsider its Decision:

> a. There are new facts and evidence on sexual discrimination and on pay inequity that could potentially be determinative of the case and that could not reasonably have been obtained earlier;
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> b. The decision includes numerous factual errors and errors of law;
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> c. The decision is in conflict with established law or Tribunal procedure;
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> d. The issues involve a matter of general or public importance.

The Test for Reconsideration

[4] Under section 45.7 of the *Code*, the Tribunal may, at the request of a party or on

its own initiative, reconsider its decisions in accordance with Tribunal's Rules.

> 45.7(1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules.
>
> (2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules.

[5] The Tribunal has issued Rules governing such requests as well as a Practice Direction to provide guidance to the community on the Tribunal's exercise of its reconsideration powers (Practice Direction on Reconsideration, January 2008, amended June 2008). Most relevant is Rule 26, which states:

> 26.1 Any party may request reconsideration of a final decision of the Tribunal within (thirty) 30 days of the date of the decision.
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> 26.5. A Request for Reconsideration will not be granted unless the Tribunal is satisfied that
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> (a) there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or
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> (b) the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or
>
> (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.

[6] The Tribunal's Practice Direction on Reconsideration begins with the following statements:

> 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 finality of orders and decisions.

Reconsideration is not an appeal or an opportunity for a party to repair deficiencies in the presentation of its case.

New evidence

[7] According to the Request, new evidence is available from Professor Agnes Whitfield, who is President of Academic Women for Justice/Femmes universitaires pour la justice and "possibly other members of the Association." The applicant states that the Association was founded only after the hearing at the Tribunal was concluded. According to the Request, in addition to evidence about systemic discrimination in universities, Professor Whitfield could speak of her own experience with respect to Professor Parè. However, the Request does not specify the nature of this experience or its context.

[8] According to the Request, there is also new evidence available from an "expert witness" and in the form of a "rough, initial draft of the expert witness report on discrimination against women in academia, and two articles on pay inequity in academia." This information was not provided with the Request.

[9] The Request indicates that the evidence from the expert witness was available at the time of the hearing but she was "discouraged" from introducing evidence of systemic sexual discrimination during a telephone conference call in September 2009, involving her counsel, counsel for the respondent and me. The Request alleges that as a result, her counsel was "prevented from submitting the draft report from our expert on pay inequity and sexual discrimination" and also prevented from submitting other evidence concerning systemic discrimination. The Request alleges that this is an example of "bias" on the part of the Vice-chair.

[10] The Request further references emails that were exchanged with the Faculty Association. These predate the hearing at the HRTO but were not submitted at the

hearing. According to the Request, this was based on advice from her then counsel who felt that the emails were privileged. The applicant indicates that she did not agree with this characterization.

[11] On October 25, 2010, the applicant forwarded two more documents in support of her Request. The documents are emails from the applicant to the current Department Chair concerning a department meeting that took place on October 13, 2010. In the emails, the applicant indicates that she was "shocked" and "disgusted" by comments that Professor Paré made about another colleague. The applicant alleges that Professor Paré stated at the meeting that the colleague had not published anything in 20 years when in fact she had just published a book in September. While the colleague had not specifically informed Professor Paré of this, the applicant believes that Professor Paré ought to have been aware. His alleged statement that the colleague had not published, when she had, is evidence, in the applicant's submission, that supports her own allegations. There is no evidence that the colleague involved shares the applicant's view or that she is even aware that the applicant wrote the emails or that they have been forwarded in support of the Request.

[12] I find that the new information that the applicant references in the Request does not establish a reason to re-consider the Decision. There does not appear to be any new evidence that was not available at the time of the hearing that is specific to the issues that were decided in the Decision.

[13] The fact that the applicant has recently encountered other Canadian academics with an interest in systemic sex discrimination and pay inequity in universities is not, in my view, new evidence unavailable at the time of the hearing. The suggestion in the Request that there might be some evidence relevant to Professor Whitfield's experience with Professor Parè is not sufficient. There are no specifics about this experience and it appears that any such evidence, at best, could only be "similar fact" evidence or "opinion evidence" and therefore not determinative of the question of whether the applicant experienced discrimination on the basis of sex.

[14] The October 2010 emails from the applicant about things that were said about another faculty member at a recent department meeting are also, at best, "similar fact" evidence. The emails are not potentially determinative. They are clearly not potentially determinative of the issues in the Application, which relate to the applicant's own difficulties in the promotion process.

[15] With respect to the suggestion that the applicant was "discouraged" and told not to present evidence on systemic discrimination, I observe that the only actual decision by the Tribunal about the scope of the evidence was the previously-noted Interim Decision, 2009 HRTO 1810 (CanLII). It may be that there was discussion during the telephone conference call on September 16, 2009, about the scope of the Application and the fact that a hearing dealing with evidence about systemic discrimination in Canadian universities generally would likely result in a much longer and more complex hearing. However, any such discussion cannot be taken as a refusal to allow evidence about systemic issues. The applicant was not prevented from making a formal request to introduce such evidence and the Request provides no substantiation for the allegation that any discussion that may have taken place about systemic discrimination demonstrates bias. Moreover, the applicant did not raise any allegation of bias at the time.

[16] The emails with the Faculty Association were available to the applicant before the hearing. They were not discussed at the hearing and there was no request that they be introduced as evidence. The fact that she may now disagree with legal advice she received at the time about the status of the emails is not a reason for granting a reconsideration now.

[17] The Request suggests that there is also new evidence available concerning salary inequality as between her and G.P., the faculty member whom she identified as a male comparator. The question of G.P.'s salary was discussed on several occasions during the hearing process. It was addressed in the Interim Decision. The Interim Decision noted that information about G.P.'s salary was publicly available pursuant to

the *Public Sector Salary Disclosure Act*. At paragraph 38, I found as follows:

> 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.

[18] According to the Request, the applicant did not discover information about G.P.'s salary until after the hearing was over. She does not explain why she did not obtain the publicly-available information. Also, as noted in the Decision, there was no dispute that G.P. had a higher salary than the applicant and this was discussed at the hearing.

The applicant's general dissatisfaction with the Decision

[19] The remainder of the 27-page Request sets out the applicant's dissatisfaction with the Decision. This includes general allegations of unfairness, bias, conflict of interest and "errors of law" regarding my findings. With few exceptions, which are addressed below, the expression of the applicant's dissatisfaction consists of a detailed review of the issues that were argued at the hearing.

[20] As indicated above, the reconsideration process is not intended to provide parties with an opportunity to re-argue the issues that were argued at the hearing, or to repair deficiencies in the presentation of the case. In any adversarial process, it is foreseeable that the losing party may not accept the findings in the decision. The expression of that dissatisfaction alone cannot provide a basis for granting a reconsideration request.

[21] The Request reiterates the applicant's view that she experienced discrimination and harassment on the basis of her sex. She has restated the significant disagreements that she had with Professor Parè, who was then the Chair of the department; her opinion that her academic work is superior to the academic work of

G.P.; and that her promotion should accordingly have proceeded before his and that her pay should be equal or higher than his. She further argues that, contrary to the finding in the Decision, the University's Policy 77 is not open to interpretation and that the only correct interpretation was the one applied by the Appeals Tribunal that determined that the promotion to full professor should proceed.

[22] As noted in the Decision (at paragraphs 76-78), the *Code* is not designed to protect against all forms of unfairness. The issue in this Application was not limited to whether the applicant was treated fairly in regards to her employment with the respondent, whether she was treated fairly during the promotion process, or whether the University's policy on promotion was followed correctly. To succeed, the applicant had to show that the alleged differential or unfair treatment was, at least in part, due to discrimination on the basis of sex. The Decision found that while there was evidence that the applicant had experienced significant difficulties in the process, she had not been able to prove discrimination on the ground of sex.

[23] The Request suggests that if the applicant had been permitted to provide further evidence, the burden of proof would have shifted and that the respondent would have been required to prove that the applicant was not discriminated against. As noted earlier, the applicant was not prevented at the hearing from adducing evidence of systemic discrimination. The applicant has not established that the proposed evidence constituted new facts or evidence that could potentially be determinative of the case and that could not have reasonably been obtained earlier." With regard to the burden of proof, while a respondent is required to provide a non-discriminatory explanation once the applicant has established a *prima facie* case of discrimination, the burden of proof still rests with the applicant: *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII), paragraphs 108-118.

Conflict with established law

[24] The Request argues that the Decision is in conflict with established case law with regard to the respondent's duty to investigate her allegations of discrimination. She

refers to *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230 (CanLII), which was referenced and quoted at paragraphs 89-107 of the Decision where I explained the reasons for the finding that the respondent did not breach its duty to investigate the applicant's allegations. That conclusion was based on findings of fact regarding the history of the applicant's complaints to the University. The applicant does not agree with the findings of fact, but this does not mean that the Decision is in conflict with established case law.

Recording the hearing

[25] The Request states that the hearing should have been recorded and suggests that the fact that it was not recorded was in some way unfair although the nature of the perceived unfairness is not clear. The Tribunal's approach to requests for recorded hearings is set out in the "Practice Direction on Recording Hearings", which is available on the Tribunal's website. In this case, a request that the hearing be recorded was not made.

Errors in the Decision

[26] The applicant submits that the Decision contains a large number of errors. For the most part, these relate to findings with which the applicant disagrees and areas of the evidence which she feels were not discussed in sufficient detail or which she feels should have led to a different conclusion. The discussion in the Request concerning these points is essentially an attempt to reargue the case.

[27] The Request indentifies some factual errors:

- On page 1, the Decision states that the Application concerned the applicant's promotion from Assistant Professor to full Professor. As the Request notes, this is an error. The applicant was seeking promotion from Associate Professor to full Professor. This error is repeated on page 2. However, the correct history is stated in subsequent discussions of the history of the applicant's promotion in the Decision.

- According to the Request, the history of Professor Paré's employment with the University at paragraph 12 of page 3 is not correct.

- At paragraph 31, the Decision indicates that Victoria Lamont was a full professor. According to the Request, Victoria Lamont is an Associate Professor.

- At paragraph 68, the Decision indicates that the decision of the Department TPC was unanimous. In fact, as discussed earlier in the Decision, the decision was not unanimous as one of the members dissented.

[28] In my view, correcting these minor discrepancies would not change the findings made and the conclusions reached in the Decision.

Allegations of bias and conflict of interest

[29] The Request also makes a number of allegations regarding factors that the applicant believes may have improperly affected the outcome of the case. These include the fact that, at the time that the Decision was released, the then President of the University was being considered for the position of Governor General of Canada; respondent counsel made reference to the possibility of a "judicial review"; the Decision references personal information about people discussed in the Decision but who were not called as witnesses; and the Vice-chair hearing this case is male.

[30] The threshold for a finding of bias is a high one; apprehension of bias must be serious and reasonable. The Supreme Court of Canada, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, sets out the well-accepted test for bias at 394-395:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

The applicant makes unsupported allegations of bias and conflict of interest which do not meet this high threshold.

Public importance

[31] The applicant argues that the issues raised in the Application have "a direct impact on all academic women across Canada" and also will negatively impact the promotion process for all faculty members employed by the respondent.

[32] With respect, the Application as argued at the Tribunal concerned whether the applicant had experienced discrimination on the basis of sex in the promotion process. While limited evidence was heard about the experiences of others, this evidence was heard and considered only in the context of the applicant's own case.

Conclusion regarding the applicant's request for reconsideration

[33] I found that the applicant experienced difficulties in the promotion process but that there was not evidence of discrimination on the basis of sex. While the applicant firmly believes that she experienced discrimination in the promotion process and does not agree with the findings in the Decision, as discussed earlier, 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 finality of orders and decisions.

[34] Having carefully considered the Request, I am unable to conclude that there are compelling and extraordinary circumstances that require the Decision to be reconsidered.

Concerns raised by the respondent

[35] In correspondence dated November 1, 2010, counsel for the respondent advises that the applicant has "published material" pertaining to the Application and the Request for Reconsideration, by posting information, including an Interim Decision, the

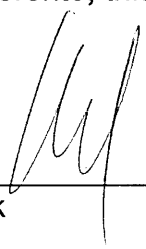
Decision and the Request, on a website. The website belongs to the Academic Women for Justice/Femmes universitaires pour la justice, an organization discussed earlier in these reasons. According to the respondent, the applicant is the Vice-President of the organization.

[36] The respondent asks that the Tribunal make an order to protect the confidentiality of personal or sensitive information, or, in the alternative, direct the applicant to "cease and refrain from any publication or distribution of any information identifying any individuals named in the application." The respondent refers to the Tribunal's decision in *Nourhaghighi v. Toronto Catholic District School Board*, 2009 HRTO 1519 (CanLII).

[37] The circumstances in the case referred to by the respondent were different than they are here. In *Nourhaghighi*, the allegations that the applicant had published inappropriate materials arose in the context of an ongoing case, a case over which the Tribunal had ongoing jurisdiction. In that case, the Tribunal ultimately concluded that the applicant had disregarded the Tribunal's orders and directions and found that the appropriate remedy was to dismiss the Application on the grounds that the applicant had abused the Tribunal's process.

[38] In the present case, the Tribunal has issued its Decision on the Application and so does not have continuing jurisdiction with respect to the applicant's conduct.

Dated at Toronto, this 17th day of November, 2010.



Brian Cook
Vice-chair