HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Emily Carasco

Applicant

-and-

University of Windsor and Richard Moon

Respondents

INTERIM DECISION

Adjudicator: Naomi Overend

Date: April 23, 2012

File Number: 2010-06245-I

Citation: 2012 HRTO 781

Indexed as: **Carasco v. University of Windsor**

WRITTEN SUBMISSIONS

University of Windsor, Respondent	)	Raj Anand, Counsel
Richard Moon, Respondent	)	Freya Kristjanson, Counsel

[1] This Interim Decision addresses a Request for an Order During Proceedings (Form 10) brought by the respondent University to, among other things, (1) strike portions of the applicant's revised Appendix "1" to her Application; (2) clarify my previous "phasing order" in light of the new developments; and (3) establish a revised schedule for filing revised Responses, documents and witness statements.

BACKGROUND

[2] In my most recent Interim Decision, dated January 26, 2012 (2012 HRTO 195), I made the following orders:

> (a) The applicant does not have standing to make allegations that are not alleged infringements of her individual rights.
>
> (b) The applicant is directed to deliver to the other parties and the Tribunal a revised Appendix 1 to her Application by February 22, 2012, in which she removes allegations over which she does not have standing, and clarifies whether matters are included as allegations of discrimination or evidence with respect to those allegations.

[3] The applicant complied with the direction to prepare the revised Appendix 1 by the deadline. This was delivered to the parties in advance of the deadline but for reasons that are not entirely clear, the electronic copy sent to the Tribunal was not received and there was further delay occasioned in getting a copy of it to the Tribunal.

[4] The respondent University filed the above referenced Form 10 on March 13, 2012. The individual respondent filed a Response to the Request for an Order (Response to the Request) on March 26, 2012, supporting the University's Request.

[5] Having not received a Response to the Request from the applicant, I issued a Case Assessment Direction on April 5, 2012, indicating that if I did not have her Response to by April 13, 2012, I would proceed in the absence of submissions from the applicant. No such Response was received and the time for submissions is now passed.

DECISION

Phasing of the Evidence

[6] In my Interim Decision dated October 26, 2011 (2011 HRTO 1931), I ordered that the evidence would be heard in two bifurcated phases. In the phase one, I would hear evidence concerning the decanal search, and three specific examples in which the applicant advised she had been involved in recent equity-seeking initiatives, which she alleged adversely affected her candidacy.

[7] The respondents now request that I hear only the evidence concerning the decanal search in phase one. They suggest that I consider in phase two what, if any, evidence I hear concerning the position taken by the applicant in the hiring of the two junior faculty and in the religious accommodation debate. They state that the revised narrative makes it clear that the allegations concerning these issues are "contextual."

[8] While I agree that these allegations are included as context, that alone does not justify hearing the evidence in phase two. The applicant alleges that the individual respondent "strenuously" opposed her views on the religious accommodation debate. To the extent that the applicant's role in this debate affected the respondents' respective views of her candidacy (if at all), it would be helpful to hear evidence and allow cross-examination on this point in phase one.

[9] Likewise, the applicant's criticism of the process by which the two junior faculty appointments were made seems to me to be sufficiently close in time and subject-matter to the decanal search. I would be interested in hearing evidence concerning whether it influenced how her candidacy was regarded by those who were involved in the decanal search.

[10] In paragraph 47 of its Request, the University complains that the applicant has failed to particularize her allegations concerning the hiring of these two junior faculty. It characterizes her issue as follows: "The University failed, in some unspecified manner, to adhere to certain unspecified hiring procedures when it hired certain unnamed junior

faculty at some unspecified period during the two years before the decanal search…" To the extent that it requires any clarification, the University should seek it directly from the applicant.

[11] I see no reason to amend my October 26, 2011 ruling concerning the phasing of the evidence.

Requests to Strike

[12] In order to determine these requests, it is necessary to clarify the nature of the applicant's case. In both the initial Application and the revised Application, the narrative setting out the applicant's case is found in Appendix 1. For ease of reference I will refer to these as the initial narrative and the revised narrative.

[13] In the initial narrative, the applicant alleges in her Overview that her individual complaint of discrimination revolves around her failed bid to become the Dean of Law at the University of Windsor. In the revised narrative, the applicant again makes it clear that her "complaint" of individual discrimination concerns the failure to become the Dean.

[14] It is important to separate out the "complaint" or the alleged incident of discrimination for which the applicant seeks a remedy under the *Code* in this Application from the other allegations the applicant has pled and are presumptively for the purpose of providing evidentiary support for her complaint. Section 34(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), states:

> 34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
>
> (b) if there was a series of incidents, within one year after the last incident in the series.

[15] The applicant is applying for an order under s. 45.2 (the applicable remedial provision) with respect to the decanal search. She has set out a number of allegations of fact concerning the search process and her qualifications for the position. In addition, she has articulated allegations that are not on their face connected with the decanal search (e.g., previous alleged acts of discrimination and representation of women and persons of colour in the Faculty of Law). The only reason for including these remaining allegations in her Application is to articulate facts (assuming the allegations are proven) from which the Tribunal might infer that the applicant was discriminated against when she was not selected to be Dean.

[16] The mere fact of including an allegation in an Application does not mean that an applicant will be permitted to call evidence on it. The Tribunal may exclude certain evidence on the basis of, for example, relevancy or fairness. No inferences can be drawn from unproven allegations.

i. Contextual Allegations that Circumvent Ruling on Systemic Allegations

[17] In my January 26, 2012 ruling denying the applicant standing to bring a systemic application, the applicant was directed to remove all allegations in which there was no link to the alleged infringement of her individual rights.

[18] The applicant appears to have done this in her revised narrative. That is, she has removed those allegations which are clearly unrelated to her individual case. Those which remain, she has attempted to link to her individual case of discrimination, although the link in some cases appears to be tenuous. As discussed below, the question of whether the application will be allowed to call evidence on the allegations of systemic discrimination will be determined in phase two.

ii. Contextual Allegations that are Untimely, Tangential and Disproportionate

[19] The respondent University argues in its Request that I should strike many of the paragraphs in the revised narrative as untimely. While it acknowledges that the question of timeliness set out in s.34(1) concerns only those incidents for which the

applicant is seeking an order and is, therefore, not directly applicable, it argues the Tribunal's jurisprudence supports striking allegations on the basis of prejudice and lack of good faith.

[20] It also argues that many of the contextual allegations are tangential and, in any event, violate the principles of proportionality.

[21] It is premature for me to address these arguments. In my earlier ruling on the phasing of the hearing, I advised the parties that I would consider what, if any, of the remaining contextual allegations I would hear evidence on in phase two of the hearing. Once this stage is reached, I will hear arguments about delay, proportionality and whether allegations are tangential.

Next Steps

[22] The respondents have requested the right to file revised Responses in light of the applicant's revised narrative. While many of the allegations in the revised narrative appear in the original narrative, the applicant's reorganization and clarification make it appropriate for the respondents to file revised Responses. The respondents may file revised Responses within 21 days of the date of this Interim Decision.

[23] In addition, the respondents have requested that the Tribunal provide them with a revised timetable for delivery of documents and witness statements in light of the new hearing dates. The Tribunal's Rules of Procedure specify that this is to take place 45 days in advance of the first day of hearing unless otherwise ordered by the Tribunal. If this time period is applied, the deadline for delivery of documents and witness statements for the parties would be July 6, 2012.

[24] I am concerned, particularly with the applicant's failure to provide her full document disclosure in the timeframe agreed to by the parties, that July 6, 2012 might be too late. I am also concerned because in an academic environment, witnesses might be difficult to reach over the summer months. The parties are to advise me,

within two weeks of the date of this Interim Decision, whether the July 6, 2012 deadline is appropriate or whether they believe earlier deadlines need to be set.

ORDER

[25] In summary, I have made the following orders/directions:

(a) The phasing of the evidence set out in my October 26, 2011 Interim Decision remains.

(b) The respondent University's Request for an Order to strike allegations in the revised narrative to the Application is denied.

(c) The respondents may file revised Responses within 21 days of this Interim Decision.

(d) The deadline for delivery and filing of documents and witness statements is July 6, 2012. In the event that the parties file submissions in writing within two weeks of the date of this Interim Decision indicating why they believe an earlier deadline is necessary, the Tribunal may amend this order.

[26] I am not seized of this matter.

Dated at Toronto this 23rd day of April, 2012.

"Signed by"

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Naomi Overend
Vice-chair