



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Emily Carasco

Applicant

-and-

University of Windsor, University of Windsor Faculty of Law, and Richard Moon

Respondents

INTERIM DECISION

Adjudicator: Sherry Liang
Date: September 27, 2010
File Number: 2010-06245-I
Citation: 2010 HRTO 1968
Indexed as: **Carasco v. University of Windsor**

[1] This is an Application filed on July 14, 2010, under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”).

[2] This Interim Decision deals with the Request for Interim Remedy filed by the applicant. The respondents the University of Windsor and University of Windsor Faculty of Law (the “University”) filed a Response to the Request, opposing it. The personal respondent does not take a position. The time for filing a Response to the Application has not yet elapsed.

BACKGROUND

[3] The applicant is a Professor at the Faculty of Law, University of Windsor. In November 2009, she applied for the position of Dean at the Faculty and as of February 2010 was one of the final two candidates on the short list. During the final stages of the interview process a colleague of the applicant, the personal respondent, came forward with allegations that the applicant had participated in plagiarism, which was made known to the search committee.

[4] Ultimately, the search committee decided not to recommend either of the final two candidates for appointment as Dean. The Faculty was advised of this at a meeting on April 14, 2010.

[5] The applicant alleges that the actions of her colleague, the search committee and its chair amount to discrimination against her on the basis of race and sex. She alleges that their actions would not have been taken had the Faculty not been on the brink of choosing a woman of colour as its Dean.

[6] The applicant retained counsel following the April 14 meeting. On the morning of April 28, in anticipation of a Faculty meeting that evening, counsel for the applicant wrote to counsel for the University, setting out the applicant’s position that the University should not fill the Dean’s position until her claim has been settled. The applicant

requested that a new search committee not be constituted and indicated that should the committee be struck, she would take interim proceedings to prevent the position from being filled pending that resolution.

[7] The applicant attended at the Faculty meeting of April 28, at which time an Acting Dean was appointed and a new search committee struck. By letter dated May 12, counsel for the University confirmed to counsel for the applicant that the University was not prepared to halt, delay or postpone the search for a new Dean. Counsel stated that he would accept service of any claim or application made by the applicant for an interim remedy.

[8] The applicant filed this Application on July 14, in which she refers to a request for an interim order, but did not make a Request for Interim Remedy at that time. The Request was filed on September 10.

THE REQUEST AND RESPONSE

[9] In her Application, the applicant requests as remedy, among other things, that she be appointed to the position of Dean for a term of five years, with an option of having the term renewed. She also seeks monetary compensation and public interest remedies.

[10] The Request for Interim Remedy seeks an order from the Tribunal directing the University to suspend the search for a new Dean, prohibiting any further search and requiring that an Acting Dean fulfil the duties of Dean until the disposition of the Application.

[11] In the Request, the applicant states that her Application will likely not be disposed of until after a new Dean is appointed. As such appointments are for five-year terms, she states that the incumbency of a new Dean will prevent the granting of her remedial request that she be appointed to the position. If the Dean's position is not

open again until at least 2016 and perhaps, with a re-appointment, 2021, she will be at an age that will present a “probably insurmountable” barrier to her ever being appointed.

[12] The applicant submits that if it follows the ordinary course, the new search for a Dean will thus effectively preclude the granting of the only effective remedy for the discrimination. The interim remedy is thus necessary to ensure that the Tribunal will be able to provide a full, effective and appropriate remedy should the complaint be decided in her favour.

[13] The applicant submits that loss of the opportunity to be appointed to the position of Dean cannot be compensated by a money payment. On the other hand, the interim relief would not prejudice the University and the law school as the appointment of an Acting Dean is an accepted method of handling transitions and gaps in such a position.

[14] The applicant states that suspending the search for a new Dean will provide additional impetus for the Faculty and University to proceed expeditiously to resolve the complaint, whereas continuing the search provides an inducement for delaying a resolution.

[15] The applicant submits that granting the interim so as to preserve the status quo and safeguard the ability of the Tribunal to grant her an appropriate remedy is consistent with the *Code* as well as the publicly-espoused values of the University and law school and the individual respondent.

[16] The University submits that granting the Request would be an onerous intervention into the University’s governance, would seriously prejudice the ability of the Faculty to effectively fulfil its mission and would have a negative impact on its faculty and students. Although it has appointed Acting Deans in the past, these appointments are normally for a period not exceeding one year. The current Acting Dean has agreed to serve for a term of one year, the usual period for such an appointment. A suspension

of the search would force the University to have a series of Acting Deans for an indefinite period of time.

[17] The University states that the responsibilities of the Dean include setting long-term strategic priorities, alumni relations and fundraising, raising the profile of the law school, and being part of the senior management team of the University in fulfilling its institutional mission. The inability to fill the position would have a serious impact on the fulfillment of these responsibilities. An Acting Dean does not have the mandate to set directions, the gravitas for appeals to donors, and does not provide students with the role model and leadership the University wants them to have. The absence of long-term direction from a Dean would discourage donors. The University lists a series of time-sensitive priorities over the next two to three years that it states a series of Acting Deans will not be in a position to address.

[18] The University contests the position of the applicant that appointment to the office of Dean would be an appropriate remedy if her Application is successful on its merits. It does not agree, however, that the Tribunal would be prevented from making such a remedial order in the presence of an incumbent. It submits that the refusal of the Request therefore does not affect the ability of the Tribunal to order a new search or even order the applicant's appointment as Dean and displace the incumbent. In the University's submission, granting the Request is not necessary to furthering the remedial purposes of the *Code*.

[19] The University also submits that the delay in bringing this Request is a factor in determining whether the interim remedy is just and appropriate in all the circumstances. In this case, the applicant knew on April 28, 2010, that a new search committee was appointed and would begin its work. The Application was not filed for another almost three months and this Request about two months after that.

[20] The University states that since April 28, it has retained a search consultant and completed pre-search consultations with the University community and other interested

stakeholders, as well as finalizing a revised “position profile” for the office of Dean. Significant efforts have already been made and significant costs incurred. Active recruitment is underway, including the preparation and purchase of external advertisements for the position in a number of publications. An order directing the University to suspend its search will adversely affect its reputation in the community.

DECISION

[21] Rules 23.2 and 23.3 of the Tribunal’s Rules of Procedure, relating to requests for interim remedies, state:

23.2 The Tribunal may grant an interim remedy where it is satisfied that:

- a) the Application appears to have merit;
- b) the balance of harm or convenience favours granting the interim remedy requested; and,
- c) it is just and appropriate in the circumstances to do so.

[22] Normally, the Tribunal’s power to order respondents to do or refrain from doing something is contingent upon a finding that they have violated the *Code*. Interim remedies are extraordinary in that they constitute an order to do or refrain from doing something in the absence of a finding that the *Code* has been violated. For this reason, an applicant has a significant onus to meet to demonstrate that the request meets the three elements in Rule 23.2: *TA v. 60 Montclair*, 2009 HRTO 369 (CanLII), as discussed in *Homonay v. Workplace Safety and Insurance Board*, 2009 HRTO 1495 (CanLII).

[23] The Tribunal will assume, without deciding, that the Application meets the first criterion above. In the circumstances of this case, it has not been established that the balance of harm or convenience favours granting the interim remedy requested, or that it is just and appropriate in the circumstances to do so.

[24] The University’s materials establish that there will be a significant detriment to it if it is unable to appoint a new law school Dean until the conclusion of these proceedings.

I accept that the detriment extends to the law school community as a whole, including its students, and that the interim orders sought will affect its ability to accomplish both short-term and long-term objectives, with potentially lasting impacts.

[25] There may be some detriment to the applicant in not having the benefit of the interim orders, but I am not convinced that without them, she will be deprived of the opportunity to receive the remedy she seeks. The University submits, and I agree, that the appointment of a new Dean does not preclude the option of a remedial order instating the applicant to the position of Dean should the applicant succeed in her Application. It is true that the presence of an incumbent may be a factor influencing the Tribunal's determination of whether this is an appropriate remedy, but it is too early at this stage to gauge the significance of this factor against all of the other potentially relevant considerations.

[26] In this context, I am not persuaded that the possibility that the appointment of a new Dean may influence the Tribunal's decision on a remedial order is sufficient to outweigh the harm to the University in suspending the search for a new law school Dean pending the conclusion of the Application.

[27] As to whether it is just and appropriate in the circumstances to grant an interim remedy, the Tribunal has stated that, ultimately, it must decide whether the interim remedy is necessary to further the remedial purposes of the *Code*, and is fair in all of the circumstances. For the same reasons as above, I cannot conclude that the interim remedies requested are necessary to ensure the availability of a complete, appropriate and effective remedy should a violation of the *Code* be established. Further, and although not in itself determinative, the fact that the applicant did not seek these interim orders until almost five months after she became aware of the new search process, and until this process was well underway, influences my assessment of the fairness of granting the relief sought.

[28] In the circumstances, I deny the Request for Interim Remedy. As the University

has indicated its agreement to mediation, mediation will be scheduled with the parties following the filing of Responses.

[29] I am not seized of this matter.

Dated at Toronto, this 27th day of September, 2010.

“Signed by”

Sherry Liang
Vice-chair