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: June 20, 2012

File Number: 2010-06245-I

Citation: 2012 HRTO 1214

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

WRITTEN SUBMISSIONS

Emily Carasco, Applicant	)	Mary Eberts, Counsel
University of Windsor, Respondent	)	Raj Anand, Counsel
Richard Moon, Respondent	)	Freya Kritjanson, Counsel

INTRODUCTION

[1] This matter, which involves the applicant's failed bid to become the Dean of the University of Windsor Law School, is scheduled to proceed to hearing commencing on August 21, 2012. The Tribunal has issued numerous Interim Decisions and Case Assessment Directions on procedural matters raised by the parties.

[2] More recently, the parties have asked the Tribunal to address the following issues:

1. The applicant's request for clarification on whether she can call evidence and cross-examine the respondents' witnesses in phase I, relating to issues reserved for phase II.

2. Disclosure and production of documents by the University of Windsor (the "University").

3. The late production of documents by the applicant.

[3] By way of background, on October 26, 2011, I issued an Interim Decision (2011 HRTO 1931) in which I bifurcated the hearing of the evidence on the merits into two phases.

[4] A subsequent Interim Decision (2012 HRTO 195) prohibiting the applicant from continuing systemic allegations unrelated to her individual complaint of discrimination, apparently left the parties uncertain about the previous phasing order. In response to a Request for an Order During Proceeding ("RFOP") brought by the University, I upheld my original phasing order in an Interim Decision (2012 HRTO 781) issued on April 23, 2012.

[5] The applicant's RFOP requesting further clarification of my phasing order was brought on May 2, 2012. She filed supplementary submissions in support of this request on May 7, 2012. In addition, the applicant brought a RFOP for disclosure on May 7, 2012.

[6] Prior to the applicant's RFOP on disclosure, counsel for the University and the applicant exchanged a series of letters and emails through the Registrar of the Tribunal in which the University raised concerns about the applicant's failure to complete her production and disclosure requirements, and both counsel raised concerns about the manner in which the respective production had come to them.

DECISION AND ANALYSIS

Clarification of Phasing Order

[7] The applicant seeks an order allowing the parties the full right to cross-examine on all matters raised in her Application, including those which I specifically directed would be reserved for the second phase of the hearing on the merits.

[8] She also seeks to be able to testify and be cross-examined about the matters raised in paragraphs 5-8, 17-21, 27-32 and 36-38 of her Application "that deal with the actions and reactions of the Applicant and the Respondents and their witnesses in the decanal search phase."

[9] Finally, she seeks to be able to give evidence during the first phase "about her racial identity, how it was developed, and how it affected her actions;" and, likewise, she would like to be able to adduce "evidence, in chief or through cross-examination, about the reactions of others to that identity and to the equity-seeking activities deriving from it."

[10] With respect to her first request, the parties are limited to cross-examination relating to the subject matter of the first phase of the hearing on the merits. It may be necessary to recall witnesses in the second phase to conduct further cross-examinations (which this Tribunal has the authority to order), but I have determined that this is a more expeditious route than allowing the parties the unfettered right to cross-examine on matters where the issues of relevance have not been determined.

[11] Having said that, in the event that a witness for either respondent testifies that the applicant's history (or that aspect of her history that is to be dealt with in the second phase) was a factor in his or her evaluation of her candidacy, then the applicant will be free to cross-examine on this testimony.

[12] With respect to the second request, a review of paragraphs 5-8, 17-21, 27-32 and 36-38 of the revised Application reveals that they deal predominantly, although not exclusively, with matters specifically reserved for the second phase of the hearing on the merits. For example, paragraph 6 of the revised Application deals with the alleged failures of the Equity Assessor assigned to the decanal search (which is clearly properly part of the first phase), but then goes on to link the Equity Assessor's oversight to the alleged failure of the University to properly implement the Equity Assessor role (which is a matter beyond the scope of the first phase).

[13] To the extent that the allegations in these paragraphs address matters reserved for the second phase, the parties will not be permitted to call evidence on them in their case-in-chief in the first phase. Nor will they be permitted to cross-examine witnesses on these matters in the first phase, subject to the caveat set out in paragraph 11 of this Interim Decision.

[14] I appreciate that the applicant attempts to narrow her request to examine and cross-examine on the "decanal search phase," but she would be required to do that in any event. As I have noted in earlier decisions, the allegation of discrimination in this case is that the applicant was discriminated against during the decanal search phase, which led to her failed bid to become Dean. Any evidence led – at either phase of the hearing of the merits – has to ultimately relate to the "decanal search phase."

[15] The applicant argues that by limiting her, she is being prevented from calling circumstantial evidence in a case of alleged racial discrimination. She discusses at some length the Tribunal's jurisprudence and the Ontario Human Rights Commission's

policy work on the subtle nature of much racial discrimination. Suffice to say, I am familiar with the authorities quoted.

[16] Contrary to what is being implied in these submissions, I have not determined that the applicant may not call evidence on these issues, but simply that the first phase of the hearing on the merits will be focussed on certain issues. At the end of the first phase of the hearing, the parties will be given the opportunity to make submissions about what further circumstantial evidence I should hear.

[17] With respect to the final request, the applicant wishes to testify about her history of alleged discrimination at the Faculty of Law and its impact on her identity. The bulk of this history was expressly limited to the second phase and is not properly part of the first phase of the hearing on the merits.

[18] The applicant expresses her belief that under the current order, the subject matters of this proposed testimony are "consigned to the second phase and the exercise of discretion as to their admissibility." I would note that any testimony, be it in the first phase or the second, is subject to the "exercise of discretion" as to its admissibility. While the parties to an application before this Tribunal are of course entitled to seek to call evidence they believe to be relevant, it is the Tribunal which must ultimately determine what evidence is relevant and otherwise admissible.

Production and Disclosure Issues

The Applicant's RFOP

[19] The applicant seeks an order requiring the University to produce "executed copies of all confidentiality agreements signed by members of the Search committee." In response, the University notes that it has produced all such documents, an assertion which the applicant does not contest. This constitutes a full answer to this issue.

[20] In addition, the applicant seeks an order in which the University produce a set of

documents which are numbered in accordance with the list of disclosure it produced on January 4, 2012. She also asks that this list contain better descriptions of the documents to assist her to identify the documents.

[21] Prior to filing this RFOP, counsel for the applicant wrote a letter to the Tribunal, dated May 2, 2012, which she copied to the respondent, complaining about the difficulty she was experiencing in identifying which number on the University's list of disclosure applied to which document. Counsel for the University wrote back immediately, complaining to the Tribunal that the University had delivered its documents in an electronic format more than five months earlier, but had not heard from counsel for the applicant about any alleged deficiency. Counsel concluded that letter with the following sentence: "Nevertheless, we are prepared to work with Ms Eberts, if she can let us know how we can assist in arranging the documents more conveniently."

[22] It is not clear whether counsel for the applicant took counsel for the University up on his offer as her materials of May 7, 2012, make no reference to this exchange. I would note that the preferred course of action would be for the parties to attempt to work out an arrangement rather than utilizing the public resources of the Tribunal to resolve matters on which they have chosen to disregard one another's offer of help. However, to prevent a further RFOP on this topic, the Tribunal orders that the respondent University prepare a package of material in which it affixes the document number to the front page of each document, and assembles these documents in numerical order.

The University's Request

[23] On December 19, 2011, the University filed an RFOP requesting production of a series of documents. This was to have been the addressed by oral submissions at a teleconference on February 23, 2012, but the parties reached a resolution of the issue in advance of the teleconference and advised me of that agreement at the

teleconference. In a Case Assessment Direction dated March 7, 2012, I confirmed the agreement:

> With respect to the 2005-2006 correspondence, counsel for the applicant agreed to deliver it to the respondents by March 9, 2012 and have the Excel spreadsheet with respect to this correspondence prepared and delivered to the respondents by March 15, 2012. If she is not able to meet this deadline, she must file a Request for an Order During Proceedings to request an extension.

[24] The University wrote to the Tribunal to advise it that the applicant had failed to comply with her undertaking and had not filed a request for an extension, as per my direction. On May 2, 2012, the applicant wrote a letter in response to the Tribunal, some portions of which are excerpted below:

> … Unfortunately, that material is arguably relevant and I did not have much choice about whether or not to produce it.
>
> As I am working by myself out here in Saskatoon, I gave people a best efforts undertaking on this documentation for the end of March, and I am sorry it has been longer in coming than I had hoped. It was very difficult for me to do all by myself. Today we took to Staples for printing three boxes of correspondence between Dr. Carasco and her co-authors for the two years in question….
>
> Staples has told us that we will not have the printing back until Monday of next week. When we have it, we will immediately take it to Canada Post and send it off to counsel for the University and counsel for Mr. Moon.
>
> That is the best I can do. I do not think that I can make Staples produce the copies any faster.

[25] I would note that counsel for the applicant gave a lawyer's undertaking to produce this material by a particular date. I would further note that Rule 4(7) of the Rules of Professional Conduct of the Law Society of Upper Canada state:

> A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner.

[26] Moreover, the applicant disregarded my direction the CAD to request an

extension if she was unable to meet this deadline. I agree with the submission of the University that its ability to prepare for the upcoming hearing is compromised by the late production of this material.

[27] Counsel for the applicant expresses her frustration that she is attempting to assemble a large volume of material with insufficient resources. However, it is the scope of the Application that has resulted in the necessity to produce these materials. The applicant's resource problem cannot be addressed by simply excusing the applicant from complying with the Rules of Procedure.

[28] In addition to the timing issues, the University has raised concerns that the applicant's most recent production, which it states arrived on May 11, 2012, consisted of three boxes of unstapled pages containing 779 emails, with attachments. However, other than drawing the Tribunal's attention to the problem, it seeks no remedy.

[29] If the parties believe that their rights have been or will be affected by a failure to comply with the rules they are entitled to seek an order from the Tribunal, but otherwise they should endeavour to comply with their pre-hearing obligations in a cooperative and straightforward manner. This is in the best tradition of the bar and will help to ensure that the issues in dispute will be brought before the tribunal in a fair, just and expeditious manner.

Next Steps

[30] The deadline for the disclosure of documents under Rules 16.2 and 16.3 and disclosure of witnesses under Rules 17 is quickly approaching. The parties may continue to have disputes about the level and nature of the disclosure and/or production, but they are expected to comply with the July 6, 2012 deadline to the best of their ability regardless of any outstanding issues between them.

ORDER

[31] In summary, I have issued the following orders/directions:

a. The parties are directed to confine their phase I evidence-in-chief to the matters reserved for phase I. Any cross-examination of witnesses is to be similarly restricted.

b. The respondent University shall prepare a package of material in which it affixes the document number to the front page of each document, and assembles these documents in numerical order.

c. The parties shall comply with the July 6, 2012 deadline for disclosure of documents and witnesses regardless of any outstanding disputes between them about the level and/or nature of the disclosure and/or production between them.

Dated at Toronto, this 20th day of June, 2012.

"Signed by"

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Naomi Overend
Vice-chair