



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**B E T W E E N:**

**Anne Marie Miraglia**

**Applicant**

**-and-**

**University of Waterloo**

**Respondent**

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## DECISION

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**Adjudicator:** Brian Cook  
**Date:** July 5, 2010  
**File Number:** 2008-00823-1  
**Citation:** 2010 HRTO 1459  
**Indexed as:** **Miraglia v. University of Waterloo**

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**APPEARANCES:**

Anne Marie Miraglia, Applicant	)	Andrew Pinto and
	)	Christian Vernon, Counsel
	)	
	)	
University of Waterloo, Respondent	)	Christopher Riggs, Counsel
	)	
	)	

[1] Anne Marie Miraglia is a university professor in the Department of French Studies at the University of Waterloo (the “University”). She alleges discrimination in employment on the grounds of sex. In particular, she alleges that the process that was followed in her promotion from the rank of Assistant Professor to full Professor was marred by discriminatory factors. She alleges that she was treated differently than a male faculty member and that she has experienced a negative salary differential as a result of the discrimination. Finally, she alleges that complaints that she filed at various times, which raised human rights issues, were not dealt with appropriately by the respondent.

### **The tenure and promotion procedure**

[2] The University’s tenure and promotion procedure is set out in “Policy 77 – Tenure and Promotion of Faculty Members”.

[3] A faculty member seeking a promotion must first inform the Chair of the member’s department. The faculty member then assembles a dossier and identifies at least three external referees. The referees must be professors at universities other than the university where the candidate teaches.

[4] The first formal stage in the promotion process is the Department Tenure and Promotion Committee (the “Department TPC”). The Department TPC is chaired by the department Chair and includes four to six tenured faculty members, the majority of whom should be full professors, elected by department faculty. The Policy notes the desirability that each DTP include both men and women. In smaller departments, the Dean is permitted to make other arrangements.

[5] The second stage of the process involves a review by the Faculty Tenure and Promotion Committee (the “Faculty TPC”). The Faculty TPC is chaired by the Faculty Dean and includes at least five elected tenured faculty members “broadly representative” of Faculty program areas.

[6] The third stage is the University Tenure and Promotion Committee (the “University TPC”). The University TPC is chaired by a vice-president of the university and includes the Faculty Deans and other senior university staff.

[7] The next step in the process is the University President. If the President decides in favour of promotion, the promotion is reported to the University Senate and the Board of Governors “for information”.

[8] A negative decision by the President may be appealed to a three-person Tribunal and Policy 77 establishes rules for the establishment of Tribunal panels.

[9] The applicant’s application for promotion from the rank of Assistant Professor to full Professor was not supported by a majority of the Department TPC. It was supported by a majority of the Faculty TPC. It was not supported by the University TPC and the President did not decide in favour of promotion. The applicant appealed and a Tribunal was established. The Tribunal allowed her appeal and she was appointed to the rank of full Professor.

[10] The overall university promotion process relies on the integrity of TPC at the Department, Faculty and University level. The reasons for this are discussed in more detail in the earlier Interim Decision, 2009 HRTO 1810 (CanLII).

[11] Integral to the TPC process is the confidentiality of the proceedings before each Committee. Faculty members on the Committees are required to frankly assess the academic qualifications of their colleagues. This would not be possible unless there was an understanding that the proceedings are strictly confidential. The parties to this hearing appreciated and respected this and agreed that I would not hear evidence about what was said during the deliberations at the various TPC committees. I did hear general evidence about the nature of the proceedings themselves.

## The Department of French Studies

[12] The Chair of the Department is Professor Francois Paré. He joined the University in 1991 and became a full Professor in 2003. He came to the University from another university where he had been Department Head for 14 years. The applicant also joined the department in 1991. She became an Associate Professor in 1996, when she also gained tenure. After 1991, no new people were hired in the department until 2001. Between 1991 and 2001 the number of faculty in the department varied, but there were generally about eight full-time faculty members. The majority were male. There were only three members of the department who were full Professors and they were all male. The applicant was the first woman in the department to become a full Professor.

[13] In 2001, one new faculty member was hired, and in 2003, three new faculty were hired and a further three positions were subsequently also filled. The majority of those hired since 2003 are women.

[14] A significant issue in the department, at least between the applicant and Professor Paré, has been her hours of work. The applicant has lived in Toronto since joining the University and so commutes to work. She noted that she has not had an option in this regard since her husband's work required that he be in Toronto. The applicant is not at the University five days a week but the evidence establishes that no other faculty member is either. Professor Paré is there most days but even he has obligations that typically take him away from the campus a half-day per week.

[15] Full-time faculty usually teach on Tuesdays and Thursdays or Monday, Wednesday and Friday. Office hours are usually scheduled on teaching days. The Tuesday and Thursday schedule features longer class times than the three days per week schedule. The applicant does not teach in the summer semester. When she is teaching, she is typically at the University on Tuesdays and Thursdays and attends on Wednesdays as required.

[16] Professor Paré believes that it is important for faculty to be present more than

when they are scheduled for teaching or office hours. In his view, “face time” is an important component of the university experience and he therefore expects faculty to be available to talk to colleagues and students as much as possible. Professor Paré agrees that faculty need time for research, preparation, marking, etc., and understands that for some these tasks can best be done at home. Special accommodations are also made for individuals who need them. For example, one faculty member is Jewish and needs to be home before sunset on Fridays and another has young children and prefers not to be scheduled after 3 PM so that she can collect them from school.

[17] There was some conflicting evidence about the applicant’s availability for department meetings. The applicant testified that she always responds to requests for meetings and makes herself available. Professor Paré indicated that this was not always the case.

[18] The applicant summoned Priya Mehta as a witness. Ms. Mehta worked in the department of French Studies as an Administrative Assistant from 2005 to 2007. She now works in a different department. Her job duties included organizing departmental meetings. She testified that the applicant was always accommodating in regards to meeting times. The applicant responded quickly, and if she was not available for the proposed meeting time, gave alternate dates. Professor Paré told her that the applicant was not very available but this was not her experience. This witness testified that her impression was that Professor Paré and the applicant had a “strained relationship” and she often witnessed a “battle of wills”.

[19] Tara Collington is a faculty member of the Department of French Studies and was called as a witness by the respondent. She was hired in 2001 and was granted tenure and promoted to Associate Professor in 2006. She testified that she has never felt any form of discrimination as a female faculty member. However, she noted that she is younger than the applicant and that the applicant could have had a different experience. She testified that she was aware of some conflict between the applicant and Professor Paré, particularly with respect to availability issues.

### **The male faculty member identified as a comparator by the applicant**

[20] One of the people hired in 2003 is a man who is identified by the applicant as a comparator for the purpose of this proceeding. His application to become a full Professor preceded hers by one year. The applicant believes that his application went smoothly whereas hers did not. He also earns a higher salary than she does. She asserts that she and he are comparably qualified and the discrepancies prove that she has experienced discrimination.

[21] As discussed in the Interim Decision, the male faculty member who is identified as a comparator by the applicant had concerns about the impact of these proceedings on his interests, particularly his privacy interests. He is not a party and has not sought intervener status. He made submissions regarding the applicant's request for access to documents that pertain to him. Pursuant to the Interim Decision, the respondent was required to produce documents relating to the male faculty member that would otherwise have remained confidential. The Interim Decision established some procedures to respect his legitimate concerns but noted that processes such as this Application frequently require disclosure of information about third parties. While the small size of the faculty makes anonymity impossible, the male faculty member will be referred to by his initials, GP, in this Decision.

### **The applicant's promotion**

[22] The applicant was eligible for promotion in 2006-2007. Professor Paré wrote a memo to the applicant in November 2005 about this and told her that he would support her promotion. However, he also indicated that GP was also eligible for promotion and that he thought that GP's promotion should go first. Professor Paré sent the applicant an email on April 11, 2006 to explain the promotion procedure. He again told her that GP was also eligible for promotion and that because of this, it might be better for her to wait until the next year to apply for promotion. He indicated, "I don't think that it would be strategically wise for the Department to send two dossiers in the same year."

[23] There was conflicting evidence about whether Professor Paré was correct that it would not be “strategically wise” for two promotions to go forward together. There was evidence that this is not considered a problem in other departments. Professor Paré testified that he was guided at the time by Dean Kerten, who was at the time the Dean, who told him that it was best for only one candidate at a time to go forward for full professorship.

[24] Whether or not there was a strategic issue, there was a logistical issue as department faculty have to serve on promotion committees and it can be a problem to assemble two committees that meet all the composition criteria.

[25] The applicant testified that she was “shocked” by the suggestion that GP’s promotion should go first because she had considerably more seniority as a teacher at the University. She had a conversation with GP about promotion. He told her that he was contemplating applying for promotion but he was concerned because he was relatively new to the department and the University.

[26] Professor Paré testified that he was aware that the applicant was “not enthusiastic” about postponing her promotion in favour of GP. However, he felt that GP had the stronger case for promotion. He had come to the University from another university where he had been recommended for promotion to full professor. When he was hired by the University of Waterloo, it was clear that he wished to be promoted to full professor. He has a very good reputation in the academic community both in Canada and internationally.

[27] The applicant wrote an email to Professor Paré on April 12, 2006. She stated:

I have decided that it would be best for me to apply for full professor in 2007-2008 rather than 2006-2007. The impact of my new book and the articles written during this sabbatical leave will strengthen my application. I know that you do not wish two Dept members to present their application in the same year. It is also clear to me that you want [GP] to present his application before me although I have two more years in the profession and, I believe, just as many publications.

It is therefore important that you both understand that if [GP] decides not to apply in 2006-2007, I will not agree to postpone my own applicant until 2008-2009.

I will maintain my right to present my application as agreed in our informal discussion regardless of whether two Dept members apply at the same time.

[28] GP's promotion then proceeded and he was successfully promoted to full professor.

[29] The applicant and Professor Paré had further correspondence and conversations about her promotion in early 2007. The applicant understood that Professor Paré felt that her application might be denied. He was concerned about her teaching and also about her "service". In a March 9, 2007 email, he said: "Remember that service includes not only work within the department, but work for the faculty of arts and the university, work with national and international professional associations, conference and workshop organizing coordination of journal special issues, etc."

[30] The applicant and Professor Paré subsequently exchanged emails about the composition of the Department TPC. The applicant was particularly concerned that a particular male professor ("DR") should not be a member of the TPC because she felt that he might be biased against her because of issues in the past. These included her perception that DR had a "traditional view of women". The applicant wrote to Professor Paré at the end of March to express this concern. She also pointed out a provision of Policy 77 that permits an applicant to challenge membership of a TPC because of "bias, apprehension of bias or perceived conflict of interest." The policy provides that any such challenge shall be considered by the committee, excluding the member challenged.

[31] Professor Paré wrote back to say that he was still working on the composition of the Department TPC. When the Committee was struck, it included Professor Victoria Lamont. She is a member of the English Department and was added in order to achieve gender balance as recommended by Policy 77. In addition, she was a

necessary addition in order to have the requisite number of full professors on the Committee. DR was also a member of the Committee.

[32] The applicant filed a formal challenge to DR's membership on the Committee. The Committee met without DR and unanimously rejected the challenge.

[33] The Department TPC met on November 1 and 6, 2007, and discussed the applicant's promotion application at each meeting. The results of the Committee's discussion were relayed in a letter dated November 8, 2007. Pursuant to Policy 77, this letter was intended to set out the Committee's preliminary findings. The applicant then has an opportunity to respond and the Committee does not issue a final recommendation about the promotion until that response has been considered.

[34] The letter indicated that the Committee had focussed on the applicant's scholarship, teaching and service. With regard to the former the Committee "saw evidence of a good to very good dossier in terms of scholarship, although not an excellent or outstanding file." With regard to teaching, the Committee "saw considerable difficulties". Specifically, teaching evaluations conducted by students showed "evaluations that were consistently below and at times well below the departmental average." According to the letter, the Committee felt that the applicant's service contributions were "fairly limited" although they appeared "satisfactory at the departmental level." The Committee concluded that the applicant's "very good contribution in the areas of scholarship was not sufficient to overcome the significant concerns raised by your teaching and service records." The letter concludes with a personal recommendation from Professor Paré, as Department Chair, that the applicant withdraw her candidature.

[35] The applicant responded to the November 8, 2007 letter. In a preliminary memo to Professor Paré, she complained that the Committee had "blatantly misrepresented" her scholarship. She asked that a member of the Faculty Association be present at the Committee's meeting of November 27 when her response would be considered. This memo was copied to Dean Coates who responded and suggested that the applicant

avoid “using strong and argumentative language”.

[36] In her submission to the Committee, the applicant took exception to the characterization of her scholarship. Her review of the letters from the five external referees showed that they were very impressed with her level of scholarship and she argued that the letters from the external referees were evidence that clearly fulfilled the Policy 77 requirement for a “high order of achievement”. She reviewed her performance evaluations for the period 2001 to 2007 and noted that her rating was from 1.25 (“good”) to 1.50 (“very good”). Given this, she questioned the suggestion that there were “considerable difficulties” with her teaching. She also noted that her student evaluation scores were close to the departmental average.

[37] The Committee met on November 29, 2007, and its opinion remained unchanged. A letter of transmittal was forwarded by Professor Paré. It is a more detailed discussion of the points raised in the Committee’s earlier letters to the applicant.

[38] The opinion of the Committee was not unanimous. Professor Socken, a male colleague on the Committee, filed a minority opinion. He felt that the majority had acknowledged the applicant’s high level of scholarship but with “unwarranted reluctance”. He felt that there was a “serious problem” with the Committee’s assessment of the applicant’s teaching as it was his opinion that the applicant was viewed as “competent, hard-working, knowledgeable and fair.”

[39] Professor Paré was asked about Professor Socken’s minority opinion. He indicated that he had not been surprised by it and felt that it could be explained based on a different interpretation of Policy 77 with respect to the overall importance of teaching as opposed to scholarship.

[40] The applicant asked that her promotion go forward to the Faculty TPC. As with the Department TPC, Policy 77 requires the Faculty TPC to give an applicant for promotion an opportunity to respond to any preliminary concerns before it makes a final recommendation. Following its initial meeting, Dean Coates, as Chair of the

Committee, wrote to the applicant on December 12, 2007, giving her a chance to respond to “significant reservations” concerning her promotion. These included concerns about her teaching performance, scholarship and the fact that she had not secured any substantial external research funding.

[41] The applicant filed a detailed and lengthy submission to the Faculty TPC. On January 12, 2008, Dean Coates wrote to the applicant to advise her that her case for promotion was approved by the Faculty TPC. He offered his sincere congratulations.

[42] The Faculty TPC recommendation in favour of promotion was not unanimous. The Committee was composed of nine voting members, including Dean Coates (there were two non-voting observing members). The vote was 7 – 2 in favour of promotion. Dean Coates was one of the dissenting members.

[43] The letter of transmittal from the Committee is dated February 7, 2008, and was written by Dean Coates. The letter was sent to the University President and the members of the University TPC. The applicant felt that the letter was very negative and the reasons for this response are understandable. The letter stated in part:

The Committee shared the view that this was, on balance, a marginal case, with the majority believing that Professor Miraglia had made it across the bar and a minority arguing otherwise. The Committee also recognized the difficult and clearly awkward environment within the Department of French Studies and noted that the process of reviewing the application for promotion to full Professor both reflected and potentially added to those difficulties.

[44] The Faculty TPC letter was reviewed by the University TPC, following which, the applicant received the following letter from the University President:

This brief note is to inform you that I have accepted the advice of the University Tenure and Promotion Committee that you not be promoted to the rank of Professor at this time.

UTPC was unequivocal in its unanimous conclusion that your case does not meet the standards set out in Policy 77 for promotion to the rank of Professor (i.e. “a high order of achievement in both scholarship and

teaching by a tenured Associate Professor together with satisfactory performance in service”); I agree with this assessment.

I draw your attention to the provisions of section VII of Policy 77 should you wish to appeal my decision.

[45] The applicant responded to this letter by asking that it be reconsidered. In the alternative, she noted that Policy 77 requires that reasons for any negative decision be provided. The President provided a brief response on March 24, 2008. He indicated that he agreed with “the ‘minority’ assessment set out in Dean Coates’ February 7/08 memo to me setting out the views attributed to those opposed to the recommendation for promotion.”

[46] The applicant then filed a formal complaint against Professor Paré. In a letter to Dean Coates dated April 1, 2008, she alleged that she had been subject to “harassment, intimidation and discrimination.” She provided a detailed submission in support of her allegations. Her complaint was forwarded to Professor Paré, who provided a detailed response. Dean Coates dismissed her complaint in a letter dated June 9, 2008. In the letter he took exception to the applicant’s “use of very strong language”.

[47] Dean Coates testified that he was not surprised to receive the applicant’s complaint against Professor Paré. Nor was he surprised by the response from Professor Paré because he had “heard all of this before”. He did not think that any investigation was required.

[48] The applicant filed a grievance with Dr. Amit Chakma, then Vice-President, Academic and Provost of the University, under the Memorandum of Agreement between the University and the Faculty Association. She also filed an appeal of the decision of the University President regarding her promotion.

[49] The appeal was heard on August 13, 2008, by an Appeals Tribunal consisting of three faculty members from different departments. The Appeals Tribunal heard evidence from the applicant, two witnesses she called, the President, Professor Paré,

and Dean Coates. The Appeals Tribunal unanimously concluded that the applicant was entitled to promotion to full Professor. The Appeals Tribunal felt that the best evidence regarding the applicant's scholarship was the opinions of the external referees, who they found "were unequivocally and unanimously in favour of the candidate's promotion." The Appeals Tribunal heard evidence about the applicant's evaluations and concluded that any gap between her performance and the departmental average was "minimal and of no great consequence." The decision itself did not address the "service" criteria that had featured at the Department TPC, but in a pre-hearing memo, it advised the parties that the material filed "established that the requirement for satisfactory performance in service has been met" and that "no hearing time will be spent on this element."

[50] Dr. Chakma responded to the applicant's grievance on September 29, 2008. He suggested that her concerns could be best be addressed through a review by Professor Robert Kerton, the former Dean of Arts. He subsequently clarified that Professor Kerton would not be able to provide a remedy binding on the University. He would be able to make recommendations, but the final decision on any action would be taken by Dr. Chakma in his capacity as Provost.

[51] The applicant then decided to abandon the grievance and filed the present Application with the Human Rights Tribunal.

### **The General Legal Test**

[52] Section 5 of the *Code* provides:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour,

ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

[53] Generally, an applicant has the initial burden to establish a *prima facie* case of discrimination. If this burden is met, it then falls to the respondent to provide evidence of non-discriminatory grounds for the conduct in question. If the respondent discharges its burden, the applicant must then show that the reasons offered by the respondent are not the true explanations for its actions, but a pretext for discrimination. The decision is made on a balance of probabilities. The applicant does not have to show that discrimination was the only reason for the alleged events. A finding that discrimination was at least partially responsible for the events may be sufficient to trigger a finding that the applicant's *Code*-protected rights were infringed.

[54] Assuming, without deciding, that the applicant has established a *prima facie* case, for the reasons that follow, there are non-discriminatory explanations for the respondent's conduct. The question is thus whether the applicant has established that it is more probable than not that she experienced discrimination on the basis of her sex.

### **The Promotion process**

[55] It is important to note, first, that Policy 77 is not a precise document. It is open to interpretation, in particular regarding the relative importance of the general categories of teaching, service and scholarship. Some of those involved in the applicant's promotion process attached more importance to the teaching and service categories than others who concluded that scholarship was of paramount importance.

[56] Professor Paré clearly felt that teaching and service were very important and that the applicant was deficient in regards to service in particular, and this was a reason for not supporting her candidature. This was reflected in the decision of the Department TPC Committee. The dissenting member of the Department TPC took a different view. He felt that the paramount criterion was scholarship, and that teaching and service were not as important as did the majority.

[57] The letter of transmittal from the Faculty TPC indicates that the Committee did not have a unanimous opinion about either the relative importance of teaching and service as opposed to scholarship, or about how to weight the applicant's contributions under the three areas.

[58] The Appeals Tribunal which made the final decision in the process concluded that several of the factors mentioned in Dean Coates' transmittal letter from the Faculty TPC relating generally to service and teaching were not relevant considerations, based on their interpretation of Policy 77. Even before the hearing, the Appeals Tribunal advised that it was not going to consider the service category, having determined that the applicant met the necessary requirements under that category.

[59] In addition to lack of precision in Policy 77 about how the various aspects of a candidate's performance are to be weighted, it is clear that the decisions about any particular candidate are necessarily quite subjective. On behalf of the respondent, Mr. Riggs submitted that the sort of "vigorous debate" that occurred throughout the applicant's promotion process is "the strength of the system."

[60] I note that the promotion process under Policy 77 does not require that a candidate be supported by the Department Chair. However, it seems clear that if the candidate is not supported, she can anticipate that her promotion may not go smoothly. Similarly, if the candidature is not supported by the Dean, there may be similar problems.

[61] Professor John North is a Professor in the English Department and has served on the Faculty TPC for about 15 years. He was called as a witness by the applicant. He testified that in his experience, it is rare for a person who has been turned down for promotion at the Department TPC level to go forward to the Faculty TPC. This is because it is typically a "hard fight to go against your colleagues and your Chair". The exception is if the candidate is in a "fragmented department" in which case a candidate might pursue promotion to the Faculty TPC.

[62] Professor North indicated that while it can be difficult to succeed if a candidate has been turned down at the Department level, at the same time, a decision of a TPC is a decision of the committee and not of an individual. While the opinions of the Chair and Dean presumably carry significant weight, their views do not necessarily carry the day.

[63] In this case, the Dean was in the minority and the majority voted in favour or promotion. However, the fact that he then authored the letter of transmittal resulted in a letter that seems to be a classic example of “damning by faint praise”.

### **The Applicant’s allegations**

[64] The applicant concedes that there is no direct evidence of discrimination. However, she submits that there is circumstantial evidence which, taken as a whole, demonstrates that she experienced discrimination.

[65] She alleges that the discrimination started with the decision that GP’s promotion would go forward first. Although she agreed to wait a year, she did so reluctantly and feels that she was pressured into agreeing. She alleges that she then experienced discrimination in the process leading up to the recommendation of the Department TPC. She alleges that Professor Paré tried to sabotage her promotion by suggesting that she remove some parts of her dossier. While he advised her to do this on the basis of advice that he had received that dossiers should not be excessively long, she felt that if she had followed his advice, important support for her promotion would not have been in her dossier.

[66] She alleges that the letter of transmittal from the Department TPC unfairly characterized her record both with regard to her scholarship and her teaching. The applicant was particularly upset by the way that the Department TPC letter characterized the opinions of the external referees as she thought that the letter diminished what she felt were very positive letters.

[67] The applicant alleges that the letter of transmittal from the Faculty TPC was very negative and unfair. It was written by the Dean who was part of a minority of two to seven. The Dean was then part of the Faculty TPC and adversely influenced that committee and the President.

[68] The applicant does not allege that the Dean directly discriminated against her on the basis of sex. The applicant's theory of the case is rather that the discrimination originated with Professor Paré. The Dean in turn supported the Department Chair. The University TPC and the President then supported the Dean. The applicant concedes that other women in the department have not experienced discrimination on the grounds of sex but she argues that the discrimination is particular to her because she is of an earlier generation. Professor Paré is of the same generation. That earlier generation was generally not as open to women advancing to higher levels in universities as is now the case and many women encountered a "glass ceiling". The applicant alleges that even if Professor Paré does not now show discrimination as against the new generation of women faculty, there is a residual discrimination that influences his behaviour towards her. As the respondent noted, the applicant's theory must also deal with the fact that there were two women on the Department TPC who were part of the unanimous decision.

[69] The applicant submits that that discrimination can be inferred by contrasting her experience with that of GP. She submits that she and GP were comparable in regards to academic experience and qualifications and that there must be a discriminatory basis for the differential treatment.

## **Analysis**

[70] There are some difficulties with the applicant's arguments.

[71] First, I was not provided with sufficient evidence to allow me to find that the applicant and GP were in fact comparable in regards to their scholarship and academic qualifications. I must agree with the respondent that I am not in a position to make a

comparison between the relative academic merits of these two scholars. This is true in general terms and in particular with respect to an assessment of the strength of the reports of the external referees and whether their significance was downplayed in the applicant's case, as she alleges. Assessment of the body of work of scholars in the field of French Studies is not an area in which this Tribunal has independent expertise. The evidence does not provide me with a basis to make any specific findings about the relative importance or quality of the body of work as between the applicant and GP or of the relative strengths of the reports of the external referees. The evidence appeared to me to indicate that both the applicant and GP are recognized as scholars who have contributed significantly in their respective fields of work.

[72] Second, even if there were evidence to allow me to make such an assessment, the evidence that I was given indicates that there are different types of scholarship. One type of scholarship involves academic research that is principally done by an individual scholar, resulting in single-author books and articles and other scholarly work. This is the type of scholar that the applicant typifies. The other type of scholarship was described as "collaborative" scholarship. This type of scholar is involved in bringing together other scholars, sometimes across disciplines, to produce work from the group rather than the individual. GP is a collaborative scholar. Since the types of scholarship practiced by the applicant and GP are so different, GP may not be a clear comparator with respect to scholarship.

[73] There are also career path differences. GP was recruited from another university where he had been on track to becoming a Full Professor. The applicant's academic experience has been with the University only.

[74] On the basis of the evidence presented it does appear that the applicant is correct that GP did not encounter the same level of difficulty in his promotion process. For example, at the Faculty TPC level, the vote was 5 to 4 in favour of his promotion. This was a narrower margin of support than occurred when the Faculty TPC considered her application, but this is not reflected in the letter of transmittal from the Dean.

[75] The difference in tone between the two transmittal letters may show differential treatment between the applicant and GP. However, it does not establish that the differential treatment was based on sex. There are obviously a number of things that might have influenced the different tone of the letter of transmittal in regards to GP as opposed to the letter in regards to the applicant, including the author's personal view of the merits of the promotions.

[76] The *Code* is not designed to protect against all forms of differential treatment. It is designed to protect only against discrimination on one or more of the grounds listed in the *Code*, in this case, sex.

[77] On this point, the definition of "discrimination" offered by McIntyre, J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 is helpful:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[78] The evidence in this case shows that there are explanations for the difficulties that the applicant experienced that have nothing to do with her gender but rather have to do with different assessments of the merits of the strength of her candidature and different views about the criteria to be applied. At the department level, it is clear that there was some conflict about availability and what was meant by the category of service. As often happens when there is conflict, the disputes sometimes took on a personal quality. The Dean was concerned about the personal aspects of the dispute. He felt that the applicant was not always prudent in her choice of words and was concerned about the effect of this on the collegiality that is particularly important in a small faculty. This concern is reflected in the Dean's letter of transmittal from the

Faculty TPC. The applicant felt that her choice of words was appropriate on the basis of the unfair treatment that she experienced.

[79] As noted, the applicant concedes that there is no direct evidence of discrimination on the grounds of sex. I have considered the evidence presented, including the circumstantial evidence referred to by the applicant, and I must conclude that while the applicant certainly experienced difficulties in her promotion process, it has not been established on a balance of probabilities that her difficulties were due in any part to her sex.

### **Salary differential**

[80] The applicant alleges that she has received differential treatment on the basis of sex with respect to her salary. She believes that this is generally true and specifically true in comparison with GP.

[81] The University has a tradition of ongoing evaluation of salary equity for female faculty. The issue has been the subject of review by various University committees over the years and was last assessed in 2008-9 by the Working Group on Women's Salary Equity, which produced its report in April 2009.

[82] There are a number of factors that influence a faculty member's salary. First, the starting salary for the faculty member is individually negotiated at the time of hire. After that, the salary is increased based on annual performance assessments. Subsequent performance assessment increases are based on the previously increased base. As a result, a high or low assessment in the early years can have a significant impact on the salary in later years. A member's salary can increase dramatically if he or she consistently gets high ratings.

[83] The Working Group made a number of systemic recommendations. Most of these were not directed at correcting gender imbalance but rather at rationalizing the overall system. The Working Group identified systemic concerns relating to the fact that

women faculty members who have children will typically be off on maternity leave in the early stages of their career and/or work on a more part-time basis than male colleagues when their children are young. This can impact on their performance ratings in the early years.

[84] The Working Group also devised a screening process designed to identify salary anomalies. This process identified 67 female faculty members and the Working Group then looked more closely at the particular situations of these women. The applicant was included in this group. The Working Group recommended that the salaries of six of the women be adjusted to recognize a gender-based salary anomaly. A further 27 cases were referred to the appropriate Dean or Chair for review because “the possibility exists for an anomaly to emerge in the short or medium-term.”

[85] The Group found that no action was necessary with respect to the remaining 34 individuals. The applicant was in this group. In a letter to the applicant, the Chair of the Working Group advised:

In your case, the committee determined that no further action was required on its part because your starting salary fell within a reasonable range considering your experience and the year and faculty in which you were hired, and your current salary is consistent with a regular progression through the ranks.

[86] The Working Group did not review any of the identified cases to determine if the performance ratings that the person had received were appropriate. In the above-noted letter, the Chair of the Group advised:

The committee did not investigate the relationship between an individual’s accomplishments and their yearly evaluations as determined by their Chair/Director and Dean as such assessment required specific disciplinary expertise.

[87] The applicant alleges that her performance assessments have resulted in lower ratings than should have been the case because of differential treatment based on sex. She relies for this on the evidence about her relationship with Professor Paré and on the fact that GP has a higher salary than she does.

[88] I must conclude that this argument fails for the same reasons that apply to the general allegation of discrimination on the grounds of sex. The evidence does not support a conclusion that the results of the applicant's performance ratings were influenced by her sex. The fact that GP earns a higher salary and is a man is not sufficient to establish discrimination on the grounds of sex, as there are many factors to which the difference can be attributed. On the basis of the evidence presented, I cannot infer that gender discrimination accounts at all or in part for the differences between the applicant's salary and GP's salary.

### **The failure to investigate the allegations**

[89] The applicant alleges that the respondent did not properly investigate her complaints of discrimination. It is established that an employer has a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so may itself result in liability under the *Code*: *Moffatt v. Kinark Child and Family Services*, [1998] O.H.R.B.I.D. No. 19, *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII). This may be true even if it turns out that the allegations are not substantiated: *Nelson v. Lakehead University*, 2008 HRTO 41 (CanLII).

[90] The criteria for assessing the sufficiency of an employer's investigation are set out in *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230 (CanLII), at para. 87:

- (i) the response must be prompt;
- (ii) there must be corporate awareness that the conduct complained of is prohibited;
- (iii) the matter must be dealt with seriously;
- (iv) there must be a complaint mechanism in place;
- (v) the respondent must act so as to provide a healthy environment;
- (vi) the respondent must communicate its actions to the complainant.

[91] In the present case, the respondent has developed a human rights policy, which

forms part of “Policy 33 – Ethical Behaviour”. The policy has been in place since 1982 and has been updated from time to time. The policy provides in part:

[T]he University of Waterloo is committed to providing an environment which supports and rewards its members on the basis of such relevant factors as work performance and achievement. Harassment, discrimination and the abuse of supervisory authority, for example, are inimical to this environment. Further, as required by the Ontario Human Rights Code, the University has a responsibility to provide an environment free from harassment and discrimination, and accordingly must deal effectively, quickly and fairly with any situation involving claims of harassment or discrimination that comes to its attention.

[92] The Memorandum of Agreement between the Faculty Association and the University also incorporates the *Code*.

[93] The applicant filed a formal complaint about Professor Paré on March 11, 2008, in a letter addressed to Dean Coates. The letter states: “I have been a victim of harassment, intimidation and discrimination on several occasions.” It references Policy 33 and the Memorandum of Agreement.

[94] While the letter does constitute a formal complaint about “harassment, intimidation and discrimination”, it does not specifically allege discrimination on the grounds of sex.

[95] Attached to the letter was a 14-page detailed summary of the applicant’s experience and the basis for her allegations of harassment, intimidation and discrimination. This document does not allege discrimination on the grounds of sex or give any example of discrimination on the basis of sex.

[96] At the same time that the applicant filed her formal complaint with Dean Coates, she also filed her appeal to the Appeal Tribunal with regard to the President’s decision to deny her promotion. The letter of appeal is dated March 11, 2008, the same date as the letter to Dean Coates.

[97] The applicant then filed another formal complaint against Professor Paré in a letter to Dean Coates dated April 1, 2008. It includes the chronology in the March 11, 2008 complaint and adds some further details. Like the earlier complaint, the second complaint deals generally with allegations of harassment, intimidation and discrimination, but does not allege discrimination on the grounds of sex.

[98] When Dean Coates received the complaints, he forwarded them to Professor Paré. He provided a full response, setting out his version of the history of the matters raised in the complaints.

[99] Dean Coates provided a formal response to the applicant's complaint on June 9, 2008. He concluded that the complaints were not supported and that he would not be investigating the matter further. He noted that there was "a difficult working relationship at present – although both individuals do continue to conduct their business in an appropriate and business-like fashion."

[100] The applicant filed a formal grievance on June 17, 2008, set out in a letter to Amit Chakma, who was then the University Vice-President and Provost. The letter includes a brief rebuttal to some of the points in Dean Coates's response to the complaints. This letter does not set out any allegation of discrimination on the grounds of sex.

[101] The applicant met with Dr. Chakma on July 29, 2008. She prepared a presentation and the record includes a written copy of the presentation. This document does include allegations of discrimination on the grounds of sex. The document states "I truly believe that at the root of this treatment is the fact that I do not live in Waterloo and that I am a woman."

[102] Dr. Chakma did not respond to this presentation until September 29, 2008. In the meantime, the Appeals Tribunal met on August 13, 2008, and ruled in the applicant's favour in a decision dated August 14, 2008. In his letter, Dr. Chakma offered to settle the grievance by appointing Professor Robert Kerton, former Dean of Arts, to review her complaints. There were then further discussions about the proposed

investigation. The applicant asked if Professor Kerton's findings and recommendations would be binding on the University. When Dr. Chakma advised that they would not be binding, the applicant filed the present Application with the Human Rights Tribunal of Ontario and did not pursue the grievance. (To the extent that these documents constituted "settlement discussions", neither party claimed they were privileged on that basis and both in fact felt that they were important to understand the history of the matter.)

[103] The applicant submits that the respondent failed to investigate her complaints of discrimination. As noted earlier, the *Code* is not designed to deal with all allegations of discrimination or unfair treatment. The reach of the *Code* is limited to the grounds that are set out in the *Code* and analogous grounds. In my view, this applies to the duty to investigate. While an employer may have a duty to investigate general complaints of discrimination and harassment as a result of other legal obligations, for example a collective agreement, the duty to investigate under the *Code* is limited to a duty to investigate complaints that invoke the *Code* in some way. In this case, it appears to me that this did not happen until the applicant filed her grievance in July 2008.

[104] The University's policy 33 is somewhat vague as to the obligations of the University official who receives a complaint. It states: "Those dealing with alleged violations of this policy shall be guided by principles of fairness and natural justice."

[105] It is true that Dr. Chakma did not immediately institute an investigation of the *Code*-related allegations that were set out in the grievance. However, in my view, the fact that the allegations were made in the context of a formal grievance is important context in regard to the University's response. Moreover, at the time the grievance was filed, there was also a formal appeal process in regards to the applicant's promotion, which was the central issue underlying the grievance. The response from Dr. Chakma did include an offer to investigate the allegations, which would presumably have included the *Code*-related allegations in addition to the more general allegations of harassment and discrimination.

[106] The applicant was not prepared to engage in the proposed investigation because the results would not be binding on the University. While it is perhaps understandable that the applicant would be unwilling to settle her grievance on the basis proposed by Dr. Chakma, a respondent's duty to investigate under the *Code* does not include an obligation to agree to be bound by the results of an investigation.

[107] For these reasons, I am satisfied that with respect to its duty under the *Code* the respondent did not breach its duty to investigate the applicant's allegations of discrimination on the grounds of sex.

### **Order**

[108] The Application is dismissed.

Dated at Toronto, this 5<sup>th</sup> day of July, 2010.

*"Signed by"*

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Brian Cook  
Vice-chair