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: January 26, 2012

File Number: 2010-06245-I

Citation: 2012 HRTO 195

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

WRITTEN SUBMISSIONS BY

Emily Carasco, Applicant	)	Mary Eberts, Counsel
University of Windsor, Respondent	)	Raj Anand, Counsel

[1] In my Interim Decision dated October 26, 2011 (2011 HRTO 1931), I directed the parties to provide submissions on the issue of standing and the Tribunal's jurisdiction over what I described as the applicant's systemic allegations in Part B of her Application. As noted in my earlier decision, the Application is divided into two parts. Part "A" is labelled "Complaint of Individual Discrimination," while part "B" is labelled "Complaint of Systemic Discrimination on the Basis of Race and Sex."

[2] The applicant submits that she has standing to bring all matters raised in her Application, because it contains allegations that her rights under Part I of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), have been infringed. The respondent University submits that the applicant does not have standing to bring many of the allegations in her Application, including some that appear in Part A of her Application. The respondent University further submits that these and other allegations should be dismissed on the basis of standing and delay.

[3] In my previous Interim Decision, I specifically drew the parties' attention to what I regarded as the key legislative provisions, which I once again reproduce in this Interim Decision:

> 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.
>
> …
>
> (5) A person or organization, other than the Commission, may apply on behalf of another person to the Tribunal for an order under section 45.2 if the other person,
>
> (a) would have been entitled to bring an application under subsection (1); and
>
> (b) consents to the application.
>
> …

35. (1) The Commission may apply to the Tribunal for an order under section 45.3 if the Commission is of the opinion that,

(a) it is in the public interest to make an application; and

(b) an order under section 45.3 could provide an appropriate remedy.

(2) An application under subsection (1) shall be in a form approved by the Tribunal.

(3) An application made by the Commission does not affect the right of a person to make an application under section 34 in respect of the same matter.

(4) If a person or organization makes an application under section 34 and the Commission makes an application under this section in respect of the same matter, the two applications shall be dealt with together in the same proceeding unless the Tribunal determines otherwise.

….

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

45.3 (1) If, on an application under section 35, the Tribunal determines that any one or more of the parties to the application have infringed a right

> under Part I, the Tribunal may make an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
>
> (2) For greater certainty, an order under subsection (1) may direct a person to do anything with respect to future practices.

[4] The *Code* provides for three ways for an application to be filed. First, a person can file under s. 34(1) if she or he "believes that any of his or her rights under Part I have been infringed." Second, recognizing that sometimes the affected individual(s) is not in a position to file an application, s. 34(5) of the *Code* also allows for other persons or organizations to file an application on his or her behalf, with the consent of the affected individual.

[5] Applications under s. 34(1) or s. 34(5) can raise issues of systemic discrimination. A person may feel that his or her rights are infringed by operation of a policy or a long-standing systemic pattern of practices rather than an idiosyncratic set of actions or circumstances. For example, in the "special diet" cases, multiple individuals filed applications challenging the Government of Ontario's policies concerning when Ontario Disability Support Program recipients were entitled to receive additional benefits for medically prescribed diets: See *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360.

[6] Third, the Ontario Human Rights Commission (the "Commission") may file an application under s. 35 where it believes it to be in the public interest to do so. Unlike applications made under s. 34, there is no requirement that the Commission identify and obtain the approval of individuals whose rights have been allegedly infringed as a pre-condition to bringing an application under s. 35.

[7] It is clear from the structure of the *Code* that an individual whose rights under the *Code* have not been infringed cannot bring an application to the Tribunal concerning a matter which she or he believes is in the public interest. Counsel for the applicant labels such a person an "officious bystander." I prefer the term "public interest applicant."

[8] The only exception to this rule is s.34(5) of the *Code*, wherein an applicant who is able to identify a third person whose rights may have been infringed, and who is able to obtain the consent of that person, may bring an application on his or her behalf. It is not necessary to further consider this provision of the *Code* as there is no indication that this Application is being brought on behalf of third persons (and no consents have been submitted).

[9] It is not clear from the applicant's submissions whether she is asserting that once an applicant alleges that her rights have been infringed, she is then entitled to also make public interest allegations (i.e., allegations unrelated to the infringement of her rights) and request orders related to those public interest allegations. To ensure that my reasoning is comprehensive, I will address this proposition.

[10] While human rights legislation should be interpreted liberally and purposively, that interpretation should nonetheless be consistent with the words chosen by the Legislature. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para. 33. The language of the *Code* suggests that an individual cannot circumvent s. 35 by grafting a public interest application onto an individual case.

[11] An applicant under s. 34 may "apply to the Tribunal for an order under section 45.2." Under s. 45.2 (1), the Tribunal may make an order only "if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the Application." The language of s. 45.2 is unambiguous that a Tribunal must make a finding that an infringement of a party's rights has occurred before it can make a remedial order.

[12] A finding that the individual's rights were infringed would not give the Tribunal authority to remedy the infringement of rights of a non-party. Even if this were not the case, the Tribunal could find itself in the anomalous situation of finding no infringement with respect to the individual, but an infringement under Part I of a non-party's rights,

which would leave it with no remedial jurisdiction to address the latter.

[13] Moreover, such an interpretation of the *Code* would allow a party with a small or even trivial alleged infringement to bring a public interest application, out of all proportion to the individual allegations. A party wishing to bring a public interest application would simply have to assert the belief that their rights were infringed in some way to obtain the desired end.

[14] In summary, I find that the *Code* does not permit an individual to bring a public interest application, either on her own, or in conjunction with an individual case. To allow otherwise would circumvent the intention of the Legislature.

Application to this Case

[15] The applicant has standing to bring an Application with respect to her allegation of infringement of her rights. She does not have standing to bring allegations that are unrelated to any alleged infringement of her rights.

[16] At the outset of Appendix 1 to her Application, the applicant states the following:

> **Complainant: Dr. Emily Carasco**
>
> **Complaint:** (1) Discrimination against Dr. Emily Carasco on the basis of race and sex, by the University of Windsor, University of Windsor Faculty of Law and Professor Richard Moon, contrary to section 5 of the Ontario *Human Rights Code.*
>
> (2) Systemic discrimination on the basis of race and sex by the University of Windsor and University of Windsor Faculty of Law, contrary to section 5 of the Ontario *Human Rights Code*.

[17] Inasmuch as the systemic discrimination alleged in part (2) relates to the alleged infringement of the applicant's rights under s. 5 of the *Code*, she has standing to bring them. On their face, however, many of these systemic allegations appear to be in the

nature of public interest allegations which are only tangentially linked to the applicant's individual case.

[18] The respondent University urges the Tribunal to dismiss those allegations over which the applicant does not have standing. It also urges the Tribunal to dismiss those allegations which are untimely. I am not prepared to dismiss anything at this stage given the problems, discussed below, in ascertaining precisely what the applicant's allegations are.

[19] I would note that the applicant's case of individual discrimination seems to be that she was denied the opportunity to be Dean of the University of Windsor's Faculty of Law for reasons relating to her gender and race. Although she refers to earlier examples of alleged discrimination against her (dating back to when she was first hired by the Faculty in 1980), it is my understanding that this information is included as context to her current allegation.

[20] Unfortunately, the applicant's submissions do little to clarify that which she considers to be allegations of discrimination, over which this Tribunal has jurisdiction to make findings and issue remedial orders, and that which she considers to be evidence of context for her allegations of discrimination. Moreover, the applicant fails to clarify in her submissions which of the allegations in Appendix 1 to her Application relate to her failed bid to become Dean.

[21] Although in paragraph 11 of her submissions, the applicant states that paragraphs 11-35 and 88-101 of Appendix 1 to her Application relate to her "decades of equity advocacy," this link is not always clear. Paragraphs 24-28 relate generally to her qualifications for the position, and not just her advocacy, and paragraphs 29-34 deal with what she alleges is the Faculty of Law's failure to promote women or visible minorities rather than any efforts made by the applicant to remedy this situation. Likewise, paragraphs 88-101 deal with what she alleges to be the University's failure to

implement employment equity, but those paragraphs do not set out what the applicant's role in this was or how it impacted on her candidacy.

[22] The parties are entitled to know the scope of the case they have to meet. Reading the Application in conjunction with the applicant's submissions, it is not entirely clear what are allegations of individual discrimination and what is evidence in support of those allegations. The applicant is directed to clarify this in Appendix 1 to her Application.

[23] Moreover, in light of the ruling that the applicant does not have standing to bring a public interest application, the applicant is directed to remove all allegations from Appendix 1 of her Application in which there is no link to the alleged infringement of her individual rights.

[24] The applicant is directed to re-file Appendix 1 to her Application with the changes set out in paragraphs 22 to 23 of this Interim Decision.

[25] If appropriate, once this is done, the respondent University can bring a Request for Order During Proceedings if it seeks to have any allegations dismissed on the basis of delay or standing. I would note that the Tribunal treats allegations differently than it does evidence. That is, what might be an untimely allegation might nonetheless constitute proper evidence in support of a timely allegation (subject to considerations of relevancy and admissibility). Likewise, assertions of fact over which the applicant might not have standing to bring an application, might be relevant and admissible as contextual evidence to allegations of individual discrimination.

ORDER

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

(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 23, 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.

[27] I am not seized of this matter.

Dated at Toronto this 26th day of January, 2012.

"Signed by"

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Naomi Overend
Vice-chair