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: October 26, 2011

File Number: 2010-06245-I

Citation: 2011 HRTO 1931

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

WRITTEN SUBMISSIONS BY

Emily Carasco, Applicant	)	Mary Eberts, Counsel
University of Windsor, Respondent	)	Raj Anand, Counsel
Richard Moon, Respondent	)	Jo-Anne Pickel, Counsel

[1] This Interim Decision deals with the Request for Order During Proceedings (Form 10) filed by the respondent University of Windsor ("the university"), in which it seeks an order bifurcating the case and changing the venue from Windsor to Toronto. It also deals the Tribunal's request for submissions on its jurisdiction to deal with the systemic issues raised by the applicant.

[2] The other respondent, Richard Moon, has indicated his support of the university's two Requests. The applicant has indicated in her Response to the Request for Order (Form 11) that she is opposed to the Requests in the university's first Request.

[3] Subsequent to the delivery of the Form 11, the respondents sent in further submissions in which they respond to the material in the applicant's Response. The applicant filed further submissions in which she queried the right of the respondents to do that, and then, in the alternative, filed further submissions in response. I am exercising my discretion to consider the full array of submissions on these issues.

Venue

[4] Given that Windsor is the community in which the dispute arose, and in which the parties reside, it is the default choice of venue for the hearing. The respondents argue, however, that the balance of convenience favours Toronto because counsel for the parties reside in Toronto. The applicant argues that the hearing should be held in Windsor, and that her counsel is currently not residing in Toronto.

[5] At this stage, it is difficult to determine the balance of convenience as none of the parties have tendered their witness lists. The hearing scheduled for April 3-5, 2012, will take place in Windsor. The Tribunal may wish to set the venue elsewhere for some of the subsequent hearing days in the event that there is agreement or the balance of convenience favours it.

Request to Bifurcate

[6] The university requests that the Tribunal hear the evidence in phases; that the

evidence concerning the decanal search being heard in the first phase, followed by the evidence of systemic discrimination being heard in the second phase. It further requests that the hearing be bifurcated so that the issue of remedy is addressed only in the event that the Tribunal issues a finding in favour of the applicant on liability.

i. The Request to Bifurcate between Liability and Remedial Phases

[7] The more straightforward of the requests to bifurcate is the request to bifurcate between the liability phase and the remedial phase. The applicant opposes this on the basis that the remedies requested by the applicant are not "so complex as to require sequestration of the remedies phase of the hearing." I do not concur with this assessment.

[8] The remedies requested by the applicant – in particular the request to be instated as Dean together with the wide-ranging public interest remedies – are not the usual remedial requests seen by this Tribunal. On their face, they would require significant evidence to support them, as well as extensive argument. It would not be a good use of the Tribunal's or the parties' resources to hear this evidence and argument unless and until such time as a finding of liability is made.

[9] Accordingly, the hearing will be bifurcated between liability and remedial phases.

ii. The Request to Bifurcate the Evidence into Two Phases

[10] The university has asked that the Tribunal first hear the evidence concerning the decanal search before hearing the evidence concerning the allegations of systemic discrimination. It does not suggest that the Tribunal make findings with respect to the decanal search before proceeding to hear evidence concerning the systemic discrimination, but simply that the evidence be heard in phases.

[11] The applicant opposes this on the basis that the systemic allegations set out in Part A (Complaint of Individual Discrimination on the Basis of Race and Sex) are

integrally related to her individual allegations with respect to the decanal search. These systemic allegations appear to fall into two broad categories.

[12] The first category is that the Faculty of Law has historically given preferential treatment to persons who are white and male for faculty positions, promotions and pay. The applicant alleges that this preference has affected her personally, namely that she was underpaid in comparison to her colleagues in the 1980's, a less-qualified candidate than her was selected to be the Associate Dean in 1990, and her bid to become a full professor in 1998-1999 was initially rejected (although overturned on appeal).

[13] The second category of systemic allegations found in the applicant's "Complaint of Individual Discrimination" is that she has been involved in equity-seeking initiatives, and that this involvement has negatively affected the perception of those engaged in the decanal search. While the allegations with respect to this second category are largely unparticularized, the applicant does mention three specific and recent examples of her conduct in this regard. The first example has to do with the motion before the Faculty Council and the second two have to do with her apparent opposition to the hiring procedures used in the appointment of two junior faculty.

[14] With the exception of the three specific examples, which on their face may have a more immediate bearing on the decanal search, the allegations in both the first and second categories are more properly described as "context," either because of the broadness of the allegations or their age (i.e., some 11-30 years prior to the decanal search).

[15] I agree with the approach taken by Vice-chair Hart in *DeFreitas v. OPSEU*, 2010 HRTO 618, in which he determined that he would hear the evidence concerning the individual event prior to hearing what he labelled the "broader institutional evidence." In particular, I agree with his reasoning, as set out in paragraphs 13-14 of that decision:

> … there is always a tension between focussing on evidence that is directly related to the allegations at issue and the scope of relevant evidence regarding the broader institutional context in which these events took

> place. The danger inherent in simply opening the hearing room doors to hear a broad range of such contextual evidence is that it may cause the hearing to become sidetracked by collateral issues as the respondents necessarily have the right to call evidence to rebut the broader contextual evidence that the applicant seeks to adduce. …
>
> I do not agree that simply bifurcating the hearing of the evidence to first hear all evidence directly relevant to the applicant's individual allegations prior to hearing any evidence regarding the broader institutional context would result in the individual evidence taking on a different form. The evidence is the evidence and will be received in the same form whether I first hear evidence regarding the individual allegations or whether I hear all evidence at the same time. …. In my view, hearing this individual evidence first will serve to provide me with a better framework to assess the potential relevance of and necessity for the broader institutional evidence.

[16] Accordingly, the university's request to bifurcate the evidence into two phases is granted. For greater specificity, the applicant will be permitted to call evidence on the decanal search, including the process followed, as well as why she felt she was qualified for the position. She may also call evidence, if she believes these events negatively impacted on her candidacy, concerning her criticism of/involvement in the two junior faculty appointments referred to in paragraph 40 of her Application, as well as involvement in the motion concerning the Jewish High Holidays outlined in paragraphs 37-39 of her Application.

[17] The parties will be obliged to disclose and produce documents, witness lists and witness statements, pursuant to Rules 16 and 17 of the Tribunal's Rules of Procedure, in accordance with the dates set out in the October 20, 2011 Notice of Hearing, only with respect to the evidence concerning the decanal search as outlined in paragraph 16 of this Interim Decision. I will consider the timing and process for disclosure of the systemic evidence at a later point.

Systemic Discrimination

[18] The Application is divided into two parts. As noted above, part "A" deals with the "Complaint of Individual Discrimination," while part "B" is the "Complaint of Systemic

Discrimination on the Basis of Race and Sex." This part deals with what the applicant alleges to be the systemic discrimination at the University of Windsor from 1980 onwards.

[19] Although I am not aware of this being specifically raised as an issue by the parties, there is a question of whether the applicant has the standing to bring such a complaint. The *Code* provisions relevant to this question are as follows:

> 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,
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> (a) within one year after the incident to which the application relates; or
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> (b) if there was a series of incidents, within one year after the last incident in the series.
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> …
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> (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,
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> (a) would have been entitled to bring an application under subsection (1); and
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> (b) consents to the application.
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> …
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> 35. (1) The Commission may apply to the Tribunal for an order under section 45.3 if the Commission is of the opinion that,
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> (a) it is in the public interest to make an application; and
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> (b) an order under section 45.3 could provide an appropriate remedy.
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> (2) An application under subsection (1) shall be in a form approved by the Tribunal.
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> (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.

[20] The parties are directed to provide submissions on the issue of standing and the Tribunal's jurisdiction over these systemic allegations. Specifically, the applicant is to deliver her submissions to the other parties and the Tribunal by November 14, 2011. The respondents are to deliver their respective submissions to the other parties and the Tribunal by November 21, 2011. The applicant may deliver any reply submissions by November 28, 2011.

ORDER

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

(a) The hearing scheduled for April 3-5, 2012 will take place in Windsor, Ontario;

(b) The remedial portion of the hearing will be bifurcated from the liability portion;

(c) The Tribunal will hear the evidence concerning the decanal search prior to hearing any evidence of systemic discrimination. It will determine the relevance and necessity for systemic discrimination after it has heard the evidence concerning the decanal search;

(d) The parties will be required to disclose and produce documents, witness lists and witness statements, pursuant to Rules 16 and 17 of the Tribunal's Rules of Procedure, in accordance with the dates set out in the October 20, 2011 Notice of Hearing. Such documents, witness lists and witness statements are to be only with respect to the evidence concerning the decanal search as outlined in paragraph 16 of this Interim Decision;

(e) The applicant is directed to deliver to the other parties and the Tribunal written submissions on the issue of standing and the Tribunal's jurisdiction over the systemic allegations found in Part B of her Application by November 14, 2011;

(f) The respondents are directed to deliver to the other parties and the Tribunal written submissions on the issue of standing and the Tribunal's jurisdiction over the systemic allegations found in Part B of the Application by November 21, 2011; and

(g) The applicant may deliver to the other parties and the Tribunal a written reply by November 28, 2011.

[22] I am not seized of this matter.

Dated at Toronto, this 26th day of October, 2011.

"Signed by"

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Naomi Overend
Vice-chair