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: March 31, 2011

File Number: 2010-06245-I

Citation: 2011 HRTO 630

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

WRITTEN SUBMISSIONS

Emily Curasco, Applicant	)	Mary Eberts, Counsel
University of Windsor, Respondent	)	Raj Anand, Counsel
Richard Moon, Respondent	)	Jo-Anne Pickel, Counsel
University of Windsor Faculty Association	)	James Renaud, Counsel
Women and the Law	)	Emir Crowne, Counsel
Academic Women for Justice	)	Agnes Whitfield

[1] This Interim Decision deals with the Request for Order During Proceedings filed by the respondent, Richard Moon, in which he seeks an order removing him as a party to this proceeding. In addition, this Interim Decision deals with the three separate Requests to Intervene filed respectively by the University of Windsor Faculty Association, Women and the Law, and Academic Women for Justice/Femmes Universitaires pour la Justice.

[2] The applicant, Dr. Carasco, filed her Application on July 14, 2010 alleging the respondents discriminated against her in employment contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the "*Code*").

[3] As described in the Tribunal's two previous Interim Decisions in this matter, the applicant is a Professor at the Faculty of Law, University of Windsor. In November 2009, she applied for the position of Dean at the Faculty and, as of February 2010, was one of the final two candidates on the short-list.

[4] The applicant alleges that during the final stages of the interview process Professor Moon advised the Search Committee ("the Committee") of allegations of possible plagiarism to purposefully sabotage her candidacy. She alleges he did this because she was a woman of colour.

[5] Ultimately, the Committee decided not to recommend either of the final two candidates for appointment as Dean. The applicant alleges that the actions of the Committee and its chair also amount to discrimination against her on the basis of race and sex.

Request to Remove Respondent

[6] In *Persaud v. Toronto District School Board*, 2008 HRTO 31 (CanLII) ("*Persaud*"), at para. 4, the Tribunal reiterated its concern about the "unnecessary naming of personal respondents" and offered a framework for considering whether to remove personal respondents:

(….) the following non-exhaustive list of factors may be helpful in assessing whether a personal respondent should be removed:

a. Is there is a corporate respondent in the proceeding that also is alleged to be liable for the same conduct?

b. Is there any issue raised as to the corporate respondent's deemed or vicarious liability for the conduct of the personal respondent who sought to be removed?

c. Is there is any issue as to the ability of the corporate respondent to respond to or remedy the alleged *Code* infringement?

d. Does any compelling reason exist to continue the proceeding as against the personal respondent, such as where it is the individual conduct of the personal respondent that is a central issue or where the nature of the alleged conduct of the personal respondent may make it appropriate to award a remedy specifically against that individual if an infringement is found?

e. Would any prejudice be caused to any party as a result of removing the personal respondent?

In considering whether any compelling reason exists to continue the proceeding against a personal respondent, one way of approaching this question is to ask whether it is necessary to involve this person as a party in order to have a fair, just and expeditious resolution of the merits of the complaint.

[7] The parties disagree about the application of the factors set out in a - c above. Prof. Moon argues that as an employee of the University of Windsor ("the University"), who was acting within the scope of his employment, the organizational respondent is vicariously responsible for his conduct. He also relies on a letter from the University that advises him

> it will bear any responsibility for any remedy awarded by the Tribunal that arises from a finding that the actions of Prof. Moon as alleged in the Application contravened the *Code*.

[8] In her Response to the Request, Dr. Carusco argues that Prof. Moon's conduct was outside the scope of his employment, that the allegations against Prof. Moon are

independent from the allegations against the University, and that the University cannot fulfil every remedy she is seeking from Prof. Moon. Moreover, she states that the fourth criterion set out in *Persaud* (d) militates in favour of maintaining Prof. Moon as an individual respondent.

[9] It is not necessary to determine at this stage whether Prof. Moon's conduct is independent from the University's or whether he was acting within the scope of his employment at the time of the disclosure to the Committee. These are, in any event, factual matters which will have to be determined on the basis of evidence.

[10] It is clear on the face of the Application that the individual conduct of Prof. Moon is a central issue in this case. For that reason, the Tribunal denies the Request to remove Prof. Moon as a respondent to this proceeding.

[11] Having said that, it would appear that the allegations against Prof. Moon are relatively discrete compared to those against the University. It is potentially unfair to Prof. Moon to require him to participate in the entire proceedings. Once the hearing is scheduled and disclosure of evidence has taken place, it will be necessary to address the order of the evidence with the parties to ensure that Prof. Moon is not needlessly required to participate in those aspects of the hearing that do not apply to him.

Requests to Intervene

[12] Requests to intervene in matters before this Tribunal are governed by Rule 11. With respect to organizations that are not the Ontario Human Rights Commission, the following portions of Rule 11 apply:

> 11.1 The Tribunal may allow a person or organization to intervene in any case at any time on such terms as the Tribunal may determine. The Tribunal will determine the extent to which an intervenor will be permitted to participate in a proceeding.
>
> **Intervention by a Person or Organization other than the Commission**
>
> 11.2 A request to intervene by a person or organization, other than a request by the Commission, must be made in Form 5, Request to

Intervene, and must be delivered to all parties and any affected persons or organizations identified in the Application or the Response and filed with the Tribunal.

11.3 A Request to Intervene must include an answer to each question in Form 5 and must:

a) describe the issue(s) that the person or organization wants to address;

b) explain the proposed intervenor's interest in the issue(s) and its expertise, if any, regarding the issue(s);

c) set out the proposed intervenor's position, if any, on each of the issues raised in the Application and the Response; and

d) set out all the material facts upon which the proposed intervenor will rely.

11.4 Where a party wishes to respond to a Request to Intervene, the response must be in Form 11, Response to Request, and must be filed with the Tribunal no later than 21 days after the Request to Intervene was delivered.

11.5 A copy of the Response to Request under Rule 11.4, if any, must be delivered to the proposed intervenor, all other parties and any identified affected persons or organizations and filed with the Tribunal.

[13] The Tribunal has the discretion to grant intervention status to an organization that complies with the above Rules. In exercising my discretion, I have been guided by the following helpful criteria set out by the Board of Inquiry (the predecessor to the Tribunal) at para. 19 of *Jeppersen v. Ancaster (Town),* [2001] O.H.R.B.I.D. No. 1 ("*Jeppersen*"):

In my view, the following considerations, while not exhaustive, inform the decision whether intervention should be granted and, if so, on what terms:

(a) whether the intervention will unduly delay or prejudice the determination of rights of the parties to the proceeding;
(b) whether the applicant has a significant interest in the issue on which intervention is sought;
(c) whether the applicant is likely to provide assistance to the Board that will not otherwise be provided.

University of Windsor Faculty Association

[14] The Tribunal indicated in *Boyce v. Toronto Community Housing Corporation*, 2009 HRTO 131 (CanLII) that:

> A union or association nearly always has an interest in a human rights application brought by an employee in a bargaining unit it represents when the application alleges discrimination in employment. Absent exceptional circumstances, the applicant's bargaining agent will be granted intervention status in Tribunal proceedings where it requests it.

[15] Although this passage suggests that the Faculty Association would have an interest in this Application, the University of Windsor rightfully points out that the circumstances in this case are unusual in that the applicant was applying for a position outside the bargaining unit, and one in which the Faculty Association has no apparent institutional interest in the outcome.

[16] Instead, the Faculty Association's interest in this proceeding is summarized as "employment equity, human rights/discrimination and procedural fairness in the University hiring practices."

[17] It would appear that its position on employment equity mirrors that of the applicant's. The University points out that the applicant was the former president of the Faculty Association, which may, in part, explain the convergence of views. To the extent that individual members of the Faculty Association have any expertise in the topic, they can presumably be called as witnesses by the parties to these proceedings.

[18] With respect to human rights, the Faculty Association states broadly that it "has an interest in the enforcement of human rights on the University campus both on a policy level and on an individual basis." Its explanation of that interest falls short of articulating a position on the issue, as is required by Rule 11.3(c) and (d), and is sufficiently vague that the Tribunal cannot ascertain whether the Association has a viewpoint independent of that of the parties that would assist the Tribunal in

understanding the issues. Likewise, other than saying that it has an interest in its members being treated with procedural fairness, it fails to articulate what it sees as the relevant procedural fairness issues in this proceeding.

[19] Given that the Faculty Association seeks to be able to call, cross-examine, and make submissions on the above issues, the parties would have to serve it with their material, which threatens to be voluminous. If granted intervenor status, its participation will add to the complexity of an already complex process for what appears to be no added benefit to the Tribunal.

[20] In light of my findings on each of the three *Jepperson* criteria, the University of Windsor Faculty Association's Request to Intervene is denied.

Women and the Law

[21] This group identifies itself as the largest student group at the Faculty of Law at the University. Its Request to Intervene (Form 5) does not set out the terms on which it seeks to intervene, so it is difficult to ascertain whether it is seeking to call evidence and cross-examine witnesses or simply file submissions.

[22] In any event, the attached factum to the Request does not suggest that this group can assist the Tribunal to determine the relevant issues raised by this Application. If the parties feel that one or more of the group's members has relevant evidence, this can be addressed by calling these individuals as witnesses to the proceeding (subject, of course, to the Tribunal's discretion to not allow evidence that it determines is inadmissible or irrelevant.)

[23] The group's interest in the issues in this Application is sufficiently nebulous that its participation as an intervenor is not necessary on this basis. Accordingly, Women and the Law's Request to Intervene is denied.

Academic Women for Justice/Femmes Universitaires pour la Justice

[24] The Request to Intervene states that this organization:

> (…) represents women who are studying at universities in Canada and who may wish to pursue academic careers and women who are currently teaching at universities and who may wish to develop their academic career by applying for senior administrative or research positions in the future.

[25] In its Response to the Request to Intervene (Form 11), the University points out that the Request does not provide any information about the structure or membership of the organization. The Response states further that its own research revealed that the organization was established six months prior to its Request to Intervene and that it appeared to be composed of two individuals. No supplementary materials were filed by the organization clarifying or correcting the University of Windsor's information.

[26] Moreover, even on the face of the Request, this organization has failed to demonstrate that it has a significant interest in the issues associated with this Application, or that it is likely to provide the Tribunal with any meaningful assistance that would not otherwise be provided by the parties. The parties are capable of relying on the academic literature and calling the necessary witnesses to address the issues in which this organization professes to be interested.

[27] Finally, this organization fails to articulate the terms on which it seeks to intervene. Any one of these reasons would be fatal to a Request to Intervene. Accordingly, the Request to Intervene by Academic Women for Justice/Femmes Universitaires pour la Justice is denied.

[28] I am not seized of this matter.

Dated at Toronto this 31st day of March, 2011.

_____*"signed by"*_____
Naomi Overend
Vice-chair