Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

DR. CHRIS BART, DR. DEVASHISH PUJARI, DR. WILLIAM RICHARDSON, DR. JOSE ROSE, DR. SOURAV RAY, DR. GEORGE STEINER AND DR. WAYNE TAYLOR

Applicants

-and-

MCMASTER UNIVERSITY, THE BOARD SENATE HEARING PANEL FOR SEXUAL HARASSMENT/ANTI-DISCRIMINATION UNDER THE MCMASTER UNIVERSITY ANTI-DISCRIMINATION POLICY, THE SENIOR ADMINISTRATOR AT MCMASTER UNIVERSITY AND CERTAIN UNNAMED INDIVIDUALS AT MCMASTER UNIVERSITY

Respondents

AFFIDAVIT OF CATHERINE MILNE
(sworn December 23, 2014)

I, CATHERINE MILNE, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

Background & Involvement

1. I am a partner at Turnpenney Milne LLP and I was counsel to the Applicants Dr. Chris Bart, Dr. Devashish Pujari, Dr. William Richardson, Dr. Joe Rose and Dr. Wayne Taylor in their Complaint under the McMaster University Anti-Discrimination Policy (the "Policy") against Paul Bates and McMaster University (Complaint "A") in the proceedings below and as such have knowledge of the matters hereinafter deposed.

2. I have been practicing law since 1993 and my practice has been focused in employment law since approximately 2001.

3. Complaint "A", also known as U/SHAD-002 or the "002 Complaint", was filed on March 31, 2011.

4. Also on March 31, 2011, Complaint "B", also known as U/SHAD-003 or the "003 Complaint", was filed by Dr. Terry Flynn, Dr. Milena Head, Dr. Christopher Longo, Mr. Peter Vilks, Ms. Linda Stockton, Ms. Rita Cossa, Dr. Brian Detlor and Ms. Carolyn Colwell against Dr. George Steiner, Dr. Wayne Taylor, Dr. Chris Bart, Dr. Sourav Ray, Dr. Devashish Pujari, Dr. Joe Rose and McMaster University.

5. The Applicants in their capacity as Respondents to the 003 Complaint in the proceedings below (with the exception of Dr. Wayne Taylor who had separate counsel) were represented by Mark Fletcher and Jeff Hopkins of Grosman, Grosman and Gale LLP.

6. Both the 002 and 003 Complaints led to more than one year of preliminary proceedings before the Board Senate Hearing Panel for Sexual Harassment/Anti-Discrimination (the "Tribunal") and culminated in twenty-one days of consolidated, *in camera* hearings between March 2012 and June 2012.

Background to the Proceedings Below

A. The Investigation Process

7. In March 2010, the Director of Human Rights and Equity Services ("HRES") at McMaster University (the "University"), Mr. Milé Komlen, released a report titled "Preliminary Audit on Allegations of Discrimination and Harassment at the School of Business, McMaster University" (the "Komlen Report"). The Komlen Report can be found at DSB-0785, which is at page 4598 of the Tribunal's Record, filed with the Divisional Court (the "Record").

8. As Director of HRES, Mr. Komlen reported to the Provost of the University, Dr. Ilene Busch-Vishniac. It was Dr. Busch-Vishniac who commissioned Mr. Komlen's investigation or audit into the DSB environment which led to his report.

9. The Komlen Report outlined what he found to a "fractious and divisive debate over the School's governance that has involved faculty members and administrators" at the DeGroote School of Business ("DSB") at the University and an "underlying and pervasive culture of hostility" and recommending, amongst other things, (a) the "Invocation of the Anti-Discrimination Policy/ Investigation and Resolution of Complaints with the University as Complainant" including the utilization of the formal complaint procedures under the Policy before the University's Human Rights Tribunal and (b) the "Invocation Of Group Conflict Policy/Appointment of Review Committee and Suspension of Faculty Bylaws".

10. Seven months after the release of the Komlen Report, on October 19, 2010, I was approached by a colleague, Shari Novick and asked if I would be interested and available to work on a time sensitive investigation that was needed at McMaster University. Ms. Novick advised that she had recently been asked by Mr. Komlen to perform a detailed

investigation into allegations that had been uncovered in his Audit. I was subsequently retained by Mr. Komlen on behalf of HRES to investigate the allegations which would ultimately form the basis for the 002 Complaint. My investigation involved interviewing specific complainants as identified by Mr. Komlen. I was initially scheduled to interview Mr. Bates but ultimately Mr. Bates was not interviewed as part of my investigation.

11. Ms. Novick was retained by Mr. Komlen on behalf of the University to investigate the allegations which would ultimately form the basis for the 003 Complaint.

12. As discussed below, it was not until after I was well into the investigation process and prior to the delivery of my single investigation report that I understood the general nature of Ms. Novick's parallel investigation and the fact that some of the individuals whom I had interviewed as part of my investigation into various individual allegations made against Mr. Bates may ultimately be the subject of an investigation into allegations made against them.

13. I subsequently came to learn that the policy under which my investigation was proceeding, the McMaster University Anti-Discrimination Policy (the "Policy"), began as a sexual harassment and human rights ("Code"-related) harassment policy and that it was partially modified to include language dealing with personal harassment. I also subsequently learned that this was the first time the Policy was used to address inter-faculty allegations of personal harassment and that the Tribunal required training in the Policy.

14. I recall that during my investigation, all of the individuals whom I interviewed appeared somewhat skeptical about participating in an investigation with an unclear

outcome that would ultimately rest with the President or Provost, Dr. Ilene Busch-Vishniac. However, they appeared to participate at the strong encouragement of Mr. Komlen.

15. In particular, I recall that one of the Applicants, Dr. Steiner, expressed deep concern from the outset and skepticism at participating in the investigation. Dr. Steiner was originally a complainant in the 002 Complaint but had reiterated his reservation at a meeting attended by almost all the Applicants and Mr. Komlen just before the filing of the complaint (as detailed below) and he withdrew from the complaint shortly after it was filed.

16. I also recall that Dr. Taylor was reluctant to meet with me and to participate in the investigation and specifically questioned me about the investigation process.

17. On or about March 24, 2011, the Applicants (excluding Dr. Ray who was not involved in the proceedings at the time) and I met with Mr. Komlen for a final meeting before the 002 Complaint was to be submitted on March 31. At this meeting many of the Applicants, including Dr. Pujari and Dr. Steiner, indicated that they no longer saw any reason to proceed with a complaint in light of Mr. Bates' recent resignation as Dean. I recall that Mr. Komlen indicated at this meeting that the Applicants, excluding Dr. Richardson, probably would not want to back out now since they did not know what was coming at them from "the other side". I also recall that Mr. Komlen used terms that alluded to a protracted battle of some sort. This was the first time that we had heard that some of the 002 complainants were to be the subject of formal complaints.

B. The Investigation Reports

18. Ms. Novick and I completed our initial, separate investigations on December 21, 2010. Mr. Komlen then provided those reports to then President of the University, Patrick Deane, to determine whether the matter should be referred to the Tribunal, which it ultimately was.

19. I had several concerns about the format for delivery of the two investigation reports. Firstly, I was concerned about the grouping of so many individualized issues into a single investigation report rather than individual case dossiers.

20. Secondly, I was concerned for the privacy of the individual complainants whom I had interviewed as they each appeared to have distinct and varied issues around their dealings with Mr. Bates.

21. Further, in each of my investigatory meetings up until November 30, I had been explaining my mandate and process as the investigator to the complainants as I met them, including the fact that I was there to investigate their allegations, put them to Paul Bates for his response and then prepare summary reports for HRES to share with the President. This shift in the investigation – no longer having the opportunity to meet with Paul Bates - caused me to worry that I would lose the trust of the complainants in the process. Nonetheless, the investigation report became one document drawing similarities between the complainants' treatment by Paul Bates and the University's failure to intervene.

22. On December 16, 2010, Mr. Bates stepped down as Dean of the DSB following the recommendation of the PACDSB Report, circulated by the President that same day.

Following his resignation, Mr. Bates assumed the role of "Special Advisor to the President". The PACDSB Report was also circulated on the McMaster Daily News website that day.

23. In light of the PACDSB Report, it was my belief that many of the individuals whom I had interviewed would likely feel much less inclination to proceed given Mr. Bates' resignation. In fact, Dr. Taylor e-mailed me that same day again seeking clarification regarding the process. Many of the individuals whom I had interviewed became increasingly concerned about the relevance of pursuing their complaints against Mr. Bates in light of his resignation.

24. Ultimately, the individuals continued in participating with my investigation, although with reservation and hesitation, and with the encouragement of Mr. Komlen.

25. My investigation report was delivered on December 21, 2010, five days after Mr. Bates, the primary subject of my interviewees' complaints, had resigned and assumed the role of Special Advisor to the President. Shortly thereafter, Ms. Novick provided me with a copy of her respective report.

26. Once completed, I did not provide my investigation report to the 002 Complainants. I believe that the first time they saw it was when it was delivered to them by Mr. Komlen on or around January 4, 2011.

27. The Applicants, as Respondents to the 003 Complaint were never provided with access to Ms. Novick's report, which formed the basis for the 003 Complaint. Their repeated requests for disclosure of Ms. Novick's report were denied.

28. However, as the President of the University Patrick Deane was provided with both reports by Mr. Komlen in order to decide whether to refer the complaints to the Tribunal in the first place, and as Patrick Deane was the initial instructing client to Mr. Avraam during the 002 and 003 Proceedings, Mr. Avraam would have had access to and the benefit of both reports shortly after they were filed.

C. The Group Complaints

29. Mr. Komlen had unilaterally grouped the various complaints into two single group complaints and two single investigation reports were delivered, establishing the basis for the 002 Complaint and the 003 Complaint.

30. I understood that the various complaints were structured into two group complaints, pursuant to ss. 33-36 of the Policy, which provides the University could act on behalf of the complainants who are unwilling to file a written complaint or appear as a complainant and thus cover the legal costs of the complainants, which otherwise would not have been permissible under the Policy by virtue of s. 65(b). However, for such group complaints brought by the University, the Policy requires the appropriate Vice-President to communicate with any witnesses and the alleged respondent before deciding whether to commence formal proceedings against the respondent. This is described at page 14 of Mr. Komlen's Preliminary Audit on Allegations of Discrimination and Harassment at the DSB.

31. At page 15 of Mr. Komlen's Audit:

> The timelines in the Policy are significant as they allow for a period of consideration by the President or Provost before deciding to initiate formal

> proceedings against the respondents. It is submitted that within the initial 6 week time period, the University has the opportunity to initiate a strategy to avoid the commencement of formal proceedings against respondents and to reduce the likelihood of external scrutiny from courts and tribunals.

32. Within the 003 Complaint, the 003 Complainants were named and provided individualized allegations, a process which is not contemplated in ss. 33-36 of the Policy, which is only to apply where complainants are unwilling to come forward and be named pursuant to the normal complaints procedures contained in s. 47 of the Policy.

33. Contrary to the requirements of ss. 33-36 of the Policy, and as the process was described by Mr. Komlen in his Audit, I am not aware of any efforts by the University administration *to initiate a strategy that would have avoided the commencement of formal proceedings*. None of the Applicants were involved in any such strategies after the filing of the investigation report and before the filing of the complaints. Furthermore, none of the Applicants received any communication from any Vice-President or other member of Administration regarding the allegations against them prior to receiving copies of the written 003 Complaint on April 12, 2011.

34. In contrast, I understood from Mr. Komlen that the President or Vice-President and Provost, Dr. Busch-Vishniac did meet with Mr. Bates in order to discuss the 002 Complaint prior to the complaint being filed. Furthermore, Mr. Bates certainly would have known about the 002 investigation and the fact that he was a named respondent as he was initially scheduled to meet with me, as the investigator in late November 2010.

35. In March 2011, I was asked by Mr. Komlen to act as counsel to draft the 002 Complaint and represent the 002 Complainants at the Tribunal hearing. I accepted the

retainer on the understanding that I could only provide my services for about two or three days per week and that the hearings would be *completed* by August 2011. It was very important to me to put conditions on my retainer as I had very limited firm resources at the time – both my legal partner and associate were on leave at the time. These limitations further exacerbated the extreme time pressures attached to the hearing as discussed below.

36. I was advised by Mr. Komlen that at the time of the filing of the complaint, the 002 Complainants understood that the University was bringing the 002 Complaint on their behalf.

37. The hearings ultimately did not commence until the winter of 2012.

38. Mr. James Heeney was retained by HRES to draft the 003 Complaint on the basis of Ms. Novick's report and to represent the 003 Complainants at the hearing.

D. Legal Fees

39. During the initial stages of the proceeding, the University only paid for the legal fees of the Complainants in each proceeding. Even before a decision was made on the issue of hearing the 002 and 003 Complaints together, it was apparent that in the interests of fairness, the professors in their capacity as 003 Respondents would require legal assistance. The 003 Respondents were not advised about who, if any of them, were named in the 003 Complaint until very shortly before they were served with it in April 2011. In fact, I did not see the 003 Complaint until it was received by the Applicants on April 12, 2011. Immediately upon reviewing the 003 Complaint, it was agreed that all of

the 003 Respondents would write to Mr. Komlen and President George and ask to have their legal fees covered in responding to the 003 Complaint.

40. The University initially refused to cover the legal fees of the professors as 003 Respondents on the basis that only those who had been in management or acting in an administrative capacity, including Dr. Pujari (and two other originally named 003 Respondents, Dr. Khalid Nainar and Dr. Mohammed Shehata) and Mr. Bates, were entitled to have their legal fees covered. Mark Fletcher and Jeff Hopkins were then retained by Dr. Bart and Dr. Ray in their personal capacity to act as their counsel as 003 Respondents in late April/early May 2011. Dr. Taylor was represented by counsel of his choosing, Derek Collins.

41. Dr. Steiner and Dr. Rose did not have legal representation until after July 5, 2011, when the University eventually agreed to cover the legal fees of all of the remaining Applicants as 003 Respondents. This decision was made following the preliminary hearing on June 24, 2011 and after numerous requests submitted by the Applicants, and only after it became clear from the preliminary hearing that providing all the Applicants with counsel would seriously expedite the proceedings. The University's position was presented by George Avraam as its counsel in an email dated July 5, 2011 and was conditional upon the remaining 003 Respondents retaining Mr. Hopkins and Mr. Fletcher. In addition, the other originally-named Respondent in the 002 Complaint (Elko Kleinschmidt) was afforded paid representation by George Avraam who was representing each of the University, Mr. Bates and briefly, Dr. Kleinschmidt.

42. Despite the fact that the un-represented Applicants were required to retain Mr. Hopkins and Mr. Fletcher as a condition to have their legal fees covered, Dr. Kleinschmidt was afforded the right to retain counsel of his choosing, Kevin Robinson. His legal fees were covered by the University.

43. By the time that all of the 003 Respondents were given legal counsel paid by the University, the Tribunal panel had been struck, conference calls between counsel had been convened, the first of two pre-hearing conferences had been held, a number of procedural issues had been canvassed and considered by the parties and the Tribunal Chair and a preliminary timetable had been set.

E. Pre-Hearing Mediation

44. The Applicants were not afforded the opportunity to pursue informal dispute resolution in their capacity as Respondents in the 003 Complaint.

45. In respect of the 002 Complaint, which was initially a wholly separate complaint, I was retained by Mr. Komlen and the HRES office to investigate and ultimately prosecute the complaint on behalf of the Applicants. Once the Complaints were filed, the possibility of pursuing informal resolution of both the 002 and 003 Complaints was never raised with the Applicants by HRES and in particular, was never offered by Mr. Komlen. In fact, although my mandate initially contemplated that I would meet with and interview Paul Bates during the initial investigation that was not done.

46. I recall that once the complaints had been filed, at various points before and during the hearing, some of the Applicants expressed interest in mediation of the

complaints. However, their request was dismissed by the University and the 003 Complainants on the basis of an "all or nothing" approach – to that end, it was the position of the University and the 003 Complainants that all of the parties would have to participate in any mediation and that any mediation would have to occur contemporaneously with the hearings. These conditions would have been nearly impossible given the individualized nature of the complaints and the Tribunal's timetable for the hearings which meant there was no time outside the hearing to engage in mediation.

The Hearing

47. The Tribunal hearing was marked by significant difficulties including incredibly prejudicial time pressures and an inherently unfair framework. Before expanding on these issues below I would note three significant events that occurred prior to and during the Tribunal hearing.

A. Improper Appointment of Tribunal Member

48. Section 54 of the Policy permits the parties to object the appointment of a Tribunal member at the time that the Panel is being struck. Shortly after the end of the hearing on June 6, 2012, and nearly a year before the release of the Tribunal's Decision, one of the Tribunal Members, Dr. Bonny Ibhawoh, was appointed Associate Dean, Research and Graduate Studies for the Faculty of Humanities on July 4, 2012, making him a member of the University's administration.

49. I was involved as counsel at the time the Tribunal was being appointed. In agreeing to the ultimate composition of the Panel, one major consideration was that no member of the Tribunal be a member of the University administration. If any member of the administration had been proposed, we would have objected on the basis that it is improper for a Tribunal member who was or would soon become a member of the University management to be hearing the complaints against the administration, to receive any remedy submissions from the administration and to recommend and/or order any remedies to the administration to carry out.

50. In fact, on May 8, 2011, I wrote to the University Secretariat on behalf of the 002 Complainants exercising our right to make submissions on the proposed panel. In that correspondence we voiced our objection to the appointment of two Tribunal members as possible participants on the Hearing Panel. One of the objections was of a recently appointed member to the Tribunal. I wrote:

> Dr. Wainman's appointment has the appearance of being hastily and deliberately carried out by the University. It is not clear who within the University administration was responsible for putting his name forward. Given that our Complaint alleges, amongst other things, administrative interference with membership on committees and inappropriate treatment of my clients by some within the University administration, it is imperative that there be no apprehension of bias or potential partiality by reason of how an appointee was placed on the Hearing Panel.
>
> Finally, the fact that Dr. Wainman has just recently been appointed to the Panel means that he does not have the benefit of the same level of training that we understand the rest of the Panel members have been receiving in recent weeks and months. Given the complexity of these Complaints, it is our submission that Dr. Wainman's lack of training is a further valid reason to oppose his appointment to the Tribunal.

51. A copy of my letter dated May 11, 2011 may be found in the Tribunal's Second Supplementary Record, filed November 26, 2014 (the "Second Supplementary Record") at page 919.

52. Had my clients the 002 Complainants and I been aware that the Tribunal member Dr. Bonny Ibhawoh was in line to be appointed to the University administration while still being a member of the Panel, we would have objected to his sitting on the Tribunal Panel.

B. Absence by Tribunal Member

53. Section 58 of the Anti-Discrimination Policy states that, "[m]embers of the tribunal must not hear evidence or receive representations regarding the substance of the case other than through the procedures described in this document".

54. The Policy, specifically ss. 66-69, provides for the receipt of *viva voce* witness evidence by examination before the hearing panel, and does not provide for the receipt of evidence by review of audio.

55. I recall that Tribunal Member, Dr. Bonny Ibhawoh was absent for portions of the hearing on two separate occasions: April 13, 2012 and April 24, 2012.

56. On April 13, 2012, Dr. Ibhawoh was absent for a portion of Mr. Hopkins's cross-examination of the 003 Complainant Dr. Milena Head, and all of the re-direct of Dr. Head by her counsel Mr. Heeney. This cross-examination that Dr. Ibhawoh missed involved examination of Dr. Head on the events surrounding her 2009 tenure and

promotion proceeding as it related to her complaint against Dr. Steiner and challenged the reliability of her testimony.

57. On April 24, 2012, Dr. Ibhawoh was again absent, this time during a significant portion of the cross-examination of the Applicant Dr. Devashish Pujari, during which Dr. Pujari's credibility was put at issue by counsel for the 003 Complainants, Mr. Heeney.

58. I have reviewed the audio and it would appear that Dr. Ibhawoh missed no less than 43 minutes and 22 seconds of the cross-examination of the Applicant Dr. Pujari on April 24, 2012.

59. The Tribunal in its decision concluded that Dr. Head was a credible witness (preferring her evidence over Dr. Steiner) and that Dr. Pujari was not a credible witness. Both Dr. Steiner and Dr. Pujari were found liable for breaches of the Policy and received suspensions of three years and one year respectively.

C. The University Led Evidence of Two Witnesses in the Absence of Proper Notice in the Hearing of the 002 Complaint

60. Pursuant to Procedural Order #3, and at the initial suggestion of Mr. Avraam, the parties were required to file the affidavit evidence of any witness they intended to call as a witness at the hearing prior to the testimony being given. Dates were set for the delivery of those affidavits which were prior to the commencement of the hearings.

61. On two occasions during the hearing of the 002 Complaint, counsel for the University was permitted to adduce evidence-in-chief of two witnesses in the absence of any affidavit evidence of that witness being filed prior to adducing that evidence.

62. On April 12, 2012, Mr. Avraam as counsel for the University and Mr. Bates, respondents in the 002 Complaint, examined Dr. Rita Cossa as a witness with respect to allegations made by the Applicant Dr. Richardson in the 002 Complaint. No affidavit of Dr. Cossa was filed in the 002 Complaint. I objected to this conduct as it clearly breached the evidentiary requirements under Procedural Order #3 and the absence of notice prejudiced my ability to conduct my clients' case. Dr. Richardson was not present at the hearing on that day to receive Dr. Cossa's evidence against him.

63. On April 13, 2012, Mr. Avraam, again as counsel for the University and Mr. Bates, respondents in the 002 Complaint, examined Dr. Milena Head as a witness with respect to allegations made by Dr. Richardson and Dr. Pujari in the 002 Complaint. I had received a short synopsis of Dr. Head's expected evidence from Mr. Avraam prior to Dr. Head's testimony. However, no affidavit of Dr. Head in the 002 Complaint was filed prior to her testimony. In light of what had occurred the day before and the Tribunal's failure to enforce the evidentiary requirements, I was prepared to accept this summary of evidence as notice. However, during his examination of Dr. Head, Mr. Avraam went well beyond the scope of the proposed summary of evidence. Again, I objected to this conduct and I was prejudiced in my ability to conduct my clients' case, as the lack of advance notice and the Tribunal's rushed timetable made it nearly impossible to confer with my clients in order to adequately address Dr. Head's evidence against them. As a result of not receiving notice that Dr. Head's testimony would address Dr. Pujari, I was not able to advise Dr. Pujari to be present for this portion of the hearing day. As a result, I was deprived the benefit of Dr. Pujari's observations arising while the *viva voce* evidence of Dr. Head was being heard.

Unfair Procedural Framework of Hearing

A. Consolidation into One Single Hearing

64. Ultimately, the Tribunal consolidated the 002 and 003 Complaints into one single hearing, with the 002 Complaint being heard first although there was significant overlap in the presentation of both complaints.

65. Mr. Fletcher, Mr. Hopkins and I had initially opposed consolidation on behalf of our clients. I had always maintained that consolidation was not in the best interests of my clients as it would improperly conflate the issues arising from each Complaint and prejudice my clients' ability to pursue their separate complaints against the Dean and the University if, at the same time, they were defending themselves against a consolidated series of complex, wide-ranging, individualized complaints brought by various individuals at the DSB and the University against each individual professor. As described above, I had initially opposed even the drafting of one investigation report (and ultimately one single Complaint) on behalf of all of the 002 Complainants as I was of the opinion that their complaints against Paul Bates were all individual in nature.

66. Furthermore, as discussed above, the fact that the individualized complaints in the 003 Complaint were brought together was troublesome itself as all of these complaints were particular to each individual complainant and respondent, and they too were unilaterally grouped together by Mr. Komlen back at the stage when Ms. Novick and I were completing our respective investigations. In fact, I recall that at the pre-hearing conference and prior to consolidation of the two group complaints into a single hearing, counsel for the University, Mr. Avraam, acknowledged the fact that the issues in 003

were in fact narrower than those in 002 and dealt with specific faculty members over specific issues.

67. As well, before consolidation was even under consideration by the Tribunal, I had already expressed serious concerns about even sharing the two complaints between the 002 Complainants and the 003 Complainants. James Heeney as counsel for the 003 Complainants had raised the idea almost immediately on the heels of our filing our respective Complaint documents and well before the 003 Respondents had even received a copy of the Complaint against them.

68. On April 1, 2011, the day after filing the Complaints, Mr. Heeney wrote to me requesting a copy of the 002 Complaint or threatening to bring a motion to have it released. I believed that providing the 003 Complainants with access to the 002 Complaint (to which none of them were a party), and, by extension, providing Mr. Bates access to the 003 Complaint, would compromise the clear requirement for confidentiality under the Policy, and lead to potential evidence tailoring, especially if the 003 Complainants had the opportunity to attend the hearing of the 002 Complaint before delivering their evidence in the 003 Complaint. In light of these risks that I believed could materially prejudice my clients' interests, I expressed opposition to this plan of proceeding at the outset and advised Mr. Heeney and Mr. Komlen that I would not consent to such a release or to the consolidation of the two matters for hearing.

69. I was very surprised and dismayed when the Tribunal served a Notice of Joint Pre-Hearing Conference on all parties to both complaints on June 10, 2011 which enclosed the two complaints and therefore shared the two complaints amongst the various

parties over my objection. A copy of the Notice of Joint Pre-Hearing Conference is filed at page 851 of the Tribunal's Second Supplementary Record.

70. The Notice set the Joint Pre-Hearing Conference date to June 24, 2011 and advised that various procedural issues would be discussed at the pre-hearing conference including *inter alia*, the length and dates of the hearing, deadlines for submissions and "the appropriate consolidation, hearing together or simultaneous hearing of the relating Complaints".

71. In my opinion, the two complaints were distinct and ought to have been treated as such by the University. In fact, from the outset of my involvement in the investigation, I had been arguing that each of the 002 complainant's issues with Mr. Bates ought to be dealt with individually. My initial concern was for the confidentiality of each of the complainants. With time, and even more so once I learned that some of the 002 complainants were respondents in 003, I believed that Mr. Komlen's idea to draft the complaints as two "group complaints" was done not only to attempt to permit the application of ss. 33-36 of the Policy but was also intended to construct two groups that opposed each other. The Tribunal's subsequent and surprising sharing of the two complaints without any advance notice to the parties, further solidified those two sides against each other – despite the significant disconnect between the 002 and 003 Complaints.

72. Indeed, the Tribunal itself recognized that the grouping of the 002 and 003 complaints only served to emphasize lines of division within the DSB, in the second paragraph of its Decision, at page 467 of the Record.

73. By Procedural Order dated June 30, 2011, the Tribunal ordered that any party seeking to make responding submissions regarding consolidation of the complaints, sequence or format of the hearing(s) serve and file such submissions. Mr. Fletcher, Mr. Hopkins, Mr. Collins and I submitted joint submissions on behalf of our clients dated August 5, 2011 submitting *inter alia*, our opposition to consolidation on the basis that consolidation was not permitted in the Policy, and it would make the proceeding more complex both procedurally and substantively including resulting in the inevitable mingling of evidence, where the factual overlap between the Complaints was in actuality very limited, with the exception of the common charge of a generally hostile environment. In Procedural Order # 3, dated October 7, 2011, which is at page 35 of the Record, the Tribunal determined that the matters would not be consolidated and that the 003 Complaint would proceed first.

74. Although we as counsel for the Applicants ultimately agreed to the consolidation, it was done with immense reluctance and reservation. On my part, I felt compelled to agree to consolidation because both the Tribunal and the University sought to impose certain unacceptable and prejudicial timelines if we did not agree to consolidation. Specifically, the University refused to grant an extension on certain production deadlines unless the Applicants agreed to consolidation.

75. The 003 Respondents were required to file all relevant documents by December 13, 2011, and pursuant to Procedural Order #4, their affidavit responses to the 003 Complaint by January 31, 2012. Affidavits in respect of the 002 Complaint were initially due on December 23, 2011.

76. The volume of material that was requested of the Applicants (in both their position as 003 Respondents and 002 Complainants) was enormous. Mr. Avraam on behalf of the University requested production of *all* e-mails or written documents relating to Paul Bates's reappointment and the Burlington Campus expansion. Mr. Heeney on behalf of the 003 Complainants requested "all documents in the power, possession, or control of the Respondents that are relevant to the matters in issue in Complaint 003". It became evident that these deadlines would be impossible to meet.

77. The above production deadline ran parallel to the marking of final exams from the fall semester, and the Applicants were under serious pressure to balance teaching duties and disclosure obligations. Dr. Steiner and Dr. Ray had previously requested released time from their respective course loads in order to allow them to fulfill their ongoing obligations to the Tribunal, and this request was denied by the Tribunal in Procedural Order #3 at pages 16 and 17, which are at pages 54 and 55 of the Record.

78. In Procedural Order #6, issued December 14, 2011, the Tribunal set a production deadline for December 19, 2011, and required the 002 Complainants' affidavits to be filed on January 6, 2012. As most of the Applicants were complainants *and* respondents, these timelines made it practically impossible to begin preparing their responding affidavits until after January 6, 2012 because I was still working with them on their 002 complainant affidavits up until the January 6th deadline.

79. On January 18, 2011, Mr. Zega, counsel to the Tribunal, wrote to counsel for all parties advocating reconsideration of the consolidation issue, in light of the pleadings and evidentiary record then before counsel, as well as the time-pressure then facing all parties

given the commencement of the hearings, then due to begin on February 7, 2012 with subsequent hearing days on February 10th and 12th and 18th.

80. Despite our prior success in resisting consolidation of the two complaints, faced with the impossibility of meeting the January 31, 2012 deadline for serving lengthy affidavits for the 003 respondents and their 26 responding witnesses, and the pending start to the hearing on February 7, 2012, it would have been impossible to prepare proper cross-examinations for the 003 Complainants and their witnesses who would have testified once the hearing started as 003 was initially set to proceed first.

81. Because the request to reconsider consolidation came from the Tribunal and was strongly supported by Mr. Heeney and Mr. Avraam, and given the practical impossibility of starting on February 7, 2012 and the potential sanction for failure to meet these deadlines, the Applicants ultimately felt that they had no choice but to agree to reconsider consolidation and ultimately agreed to consolidation and reversal of the hearing order (with 002 proceeding first) in exchange for the commencement of the hearings being pushed back to March 3, 2012.

82. I believe that the consolidation and reversal of the complaint order had several major effects causing significant prejudice to the Applicants:

a. it essentially allowed the two very distinct set of complaints to be conflated resulting in improper and overlapping questioning and the mingling of evidence throughout the conduct of the entire hearing;

b. it permitted the University, a Respondent in both 002 and 003, and the individual 003 Complainants, to make their case against the Applicants twice and for the University to seek penalties against the Applicants despite having no standing to do so, and being only a Respondent in both complaints;

c. it permitted the 003 Complainants to hear the 002 Complainants/003 Respondents' evidence in advance of presenting their own evidence, providing them with an opportunity to tailor their own evidence during the 003 Complaint;

d. it permitted counsel for the University in the 002 Complaint to make use of the documents contained in the complex, voluminous, single unified global evidentiary record, which were only relevant to 003, to discredit the Applicants and their witnesses in 002 by virtue of their "membership" in the so-called "G21".

83. The end result of these prejudicial effects was the construction of a very complex narrative, involving individualized disputes, constructed into a single dispute with two opposing sides pitted against one another from the outset, namely the Applicants as tenured professors on one side and the former Dean, his supporters and non-tenured staff on the other side. This prejudiced the Applicants.

84. The initial grouping of the inherently individualized allegations into two group complaints, the consolidation of the two hearings, and the Tribunal having ordered the compilation of a single document brief all caused the Applicants to be repeatedly categorized and stigmatized throughout the hearing simply by virtue of being in receipt of emails from the so-called "G21".

85. The G21 was a term used at one point to describe a group of individuals who signed a performance report authored by tenured faculty of the DSB and delivered to the University administration in opposition to Dean Bates's re-appointment. The term was then used throughout the hearing to negatively paint all the Applicants with a single brush vis-à-vis their relations with the 003 Complainants. The so-called "G21 emails" included certain emails and other communications in which the 002 Complainants sought to exercise their right to academic freedom by expressing opposition to the Dean's re-

appointment as part of the wider ongoing debate on the future of the DSB. These communications were then used out of context in the 003 Complaint as purported evidence of the Applicants having a supposed animus against the individual 003 Complainants solely by virtue of the 003 Complainants' support for Dean Bates.

86. The stigma associated with being nothing more than a recipient of a so-called "G21" e-mail was a direct result of the creation of a global evidentiary record which was used to unfairly stigmatize and undermine the credibility and the evidence of all so-called G21 witnesses in both the 002 and 003 Complaints. In fact, in the November 28, 2011 pre-hearing I had drawn to the Chair's attention the fact that documents which were clearly only relevant to the 002 Complaint would be used in 003 as a result of the Global Evidentiary Record.

87. At several points during the hearing, I expressed concern about the effect of consolidation on my clients. For example, in the 002 Complaint, counsel for the University led evidence in chief against my clients through witnesses who were themselves complaining *against* the University in the 003 Complaint. As discussed above, in conducting a supposed "cross-examination in chief", Mr. Avraam was permitted to lead evidence through Ms. Rita Cossa and Dr. Milena Head, both of whom testified against my clients Dr. Richardson on April 12 and April 13, 2011 and Dr. Pujari on April 13, 2011, in the absence of filing their affidavit evidence and despite my objection about the inappropriateness of this course of conduct as it was highly prejudicial to my clients. This example was a direct result of the consolidation of the two complaints into one hearing and its prejudicial effects on my clients.

Time Pressures

A. Prejudice Caused by Unreasonable Time Pressure During Investigation and Filing of Complaints

88. Even before the hearings commenced, during the investigation stage, there were significant time pressures.

89. Mr. Komlen enforced extremely tight timelines on the completion of the investigation reports and the filing of the two complaints, despite the fact that he had completed his initial Audit of the DSB some seven months earlier.

90. Section 43 of the Policy dictates that written complaints shall be submitted promptly, but no later than 12 months from the last date of the alleged harassment, and also provides the Officer – in this case Mr. Komlen – with the power to grant an extension of up to three months, if he fulfilled certain procedural conditions. As a number of the allegations advanced during the U/SHAD proceedings pertained to events that occurred long before the date of filing the written complaints – March 31, 2011 – it is my belief that Mr. Komlen was under immense pressure to expedite the matter to avoid the loss of potential complaints due to limitation issues.

91. For instance, one of the "primary complaints" against the 003 Respondents was the complaint of Dr. Milena Head against Dr. George Steiner, which Mr. Komlen had apparently begun formulating with Dr. Head back in November 2009. Dr. Head's complaint was a key aspect of the 003 Complaint, and she was an important witness for both Mr. Heeney and Mr. Avraam. However, pursuant to the Policy, her complaint was at

risk of being brought out of time, and indeed the Tribunal ultimately permitted it to be brought out of time.

B. Prejudice Caused by Unreasonable Time Pressure During the Hearing

92. Despite the large volume of evidence and witnesses to be called, the Tribunal maintained an extremely rushed pace that was prejudicial to the Applicants in particular given that they were were the only individuals in the consolidated process facing potentially career-ending sanctions (Mr. Bates having already left the DSB at the time the filing of 002).

93. The Tribunal had set itself a firm deadline to conclude the hearing on April 30, 2012 order to accommodate the Tribunal's absolute requirement of a spring completion date. This meant that there was a final date after which no further evidence would be received by the Tribunal regardless of any scheduling complications which may arise throughout the hearing. Although the hearing conclusion date was extended to early June, the firm deadline resulted in an unreasonable timetable and no accommodation for adjournments or re-scheduling.

94. Further complicating the matter was the need to accommodate three Tribunal members' teaching schedules in order that they may all sit concurrently as required by the Policy, leading to even greater scheduling demands placed on counsel and the Applicants and fewer sitting days.

95. The firm deadline for completion caused immense prejudice to the Applicants in their ability to participate in the proceedings and fulfill their professional duties. It also

caused significant pressure on counsel's ability to conduct their case throughout the hearing.

96. During the preliminary hearing on June 24th, 2011, the Chair asked counsel to estimate the amount of time that would be required to lead each of their respective cases. I indicated to the Chair that the 002 Complaint would take 12 days to present, while Mr. Avraam stated that he would require 13 days to respond. Mr. Heeney indicated that the 003 Complaint would take 15 to 18 days to present. Mr. Fletcher indicated that his response to 003 would likely take a month, but could be longer, Mr. Hopkins indicated that he would likely need an additional 3 days to respond to 003, and Mr. Collins expressed the need for an additional day or two. Therefore, and leaving aside Mr. Avraam's response to 003 on which he did not provide a time estimate, at a minimum counsel had estimated that the 002 and 003 Proceedings would require 74 days in order to effectively argue their respective cases.

97. Despite the timing estimates provided by counsel for the various parties, by Procedural Order #5, dated December 5, 2011, the Chair assigned only 19 hearing days corresponding with the Panel's various schedules. This shortened timeframe required counsel to be available until at least 8 p.m. each evening, with many of the hearing dates being heard on weekends.

98. Ultimately, the consolidated hearings occurred over a period of 21 days, less than what Mr. Fletcher, Hopkins and Collins had estimated would be necessary just to effectively respond to the 003 Complaint. As a result, and to fit within the Tribunal's timeline, several witnesses were dropped by the 003 Respondents.

99. Although Mr. Komlen's investigation and report took him a year to complete, once the matter was referred to the Tribunal on March 31, 2011 with the filing the 002 and 003 Complaints, the Applicants were under continuous and intense pressure to submit to the University's sudden urgency in rectifying a "situation" that had existed in some cases since 2005.

100. For instance, although documentary disclosure was to be completed on December 19, 2011, and amounted to nearly 15,000 pages of documents, all of the 002 and 003 Complainant affidavits were to be filed by January 6, 2011, with 003 Responding affidavits due on January 31, 2012 and 002 Responding affidavits due on February 6, 2012.

101. Furthermore, the fact that once it was underway, no adjournments to the hearing schedule were granted impacted the presentation of the evidence. This intimidating atmosphere caused by what I viewed as a punishing schedule enforced by the Tribunal prejudiced my ability to make my clients' case. For example, in the days immediately before the hearing commenced, Mr. Avraam and Mr. Heeney complained to the Tribunal that my witness schedule and order was improper and incomplete. Though I had scheduled to have 11 of my 18 witnesses (including two of the Complainants) called in the first 2 days of hearing, they wanted the Tribunal to order that the other Complainants be ready to provide evidence that weekend. Further, Mr. Heeney wanted the Tribunal to interfere with the order in which I called my witnesses. As a result, in addition to preparing my opening and the first two days of the hearing itself, I was forced to prepare responding motion materials for the first day of hearing on this issue.

102. The fact that there was serious pressure from the Tribunal to follow what the Tribunal and the University referred to as "the full utilization of the hearing schedule" meant that the Applicants were under constant and significant pressure to continue with the hearing with a view to urgent completion. For example, if there was still some time left near the end of a hearing day (the hearings generally started at 8:30 a.m. and continued well into the evening), the Tribunal expected counsel to have the next witness ready to go.

103. For example, on one occasion, on the Thursday, April 5, 2012 before the Easter long weekend, I recall having finished my cross-examination of the Provost, Dr. Busch-Visniac for the day. Although it was already late in the day (close to 8pm), and Mr. Fletcher and I had to call the Provost back anyway in order to allow both of us to complete our questioning, I was criticized by the Tribunal for not being able to stay another hour. In fact, the Tribunal advised the most likely path was going to be less leeway on relevancy issues, and objections related to relevancy, and that these would get "tighter" to meet the absolute deadline for the end of the hearing. That interaction with the Tribunal, one of many, made me feel as if there would be no leeway in terms of the schedule and further that any requests would prejudice our clients.

104. The unreasonable time constraints continued with the scheduling of the remedy submissions hearing. The dates to provide remedy submissions to the Tribunal were set before the Decision itself was released under the Tribunal's continued mandate that the proceedings come to a conclusion as quickly as possible, and despite the fact that the Tribunal took a year to render its Decision on liability. Mr. Fletcher, Mr. Hopkins and I opposed setting dates for the remedy submissions without giving the Applicants the

opportunity to consider the pending Decision with legal counsel. The Tribunal unilaterally set April 21 and April 28, 2013 as dates for the remedy submissions. Ultimately, the Tribunal decided to receive remedy submissions in writing, but I believe only because of the impossibility of setting dates on which everyone was available.

105. Although we as counsel for the Applicants submitted that the time constraints were unreasonable and unfair throughout the proceedings, our objections were overlooked by the other counsel, particularly Mr. Avraam and by the Tribunal. We ultimately continued with the Tribunal proceeding to its end as it appeared there was nothing further we could do on behalf of our clients, other than continue with the proceeding. It is my belief that any further requests for relief from the extreme time pressure would have prejudiced the Applicants even further.

Penalties Sought by University

106. All Complainants were ordered to submit their remedy demands early in the hearing by January 6, 2012 pursuant to Procedural Order #6, at page 84 of the Record.

107. As it was solely a Respondent in each of the 002 and 003 Complaints, the University was not invited to, nor did it ever advise that it was seeking any remedies against the Applicants in accordance with the Order.

108. During his oral closing submissions in the 002 Complaint on June 5, 2012, Mr. Avraam submitted the University's position that removal of some of the Applicants was appropriate. The University also filed written submissions on June 10, 2013, submitting that some of the Applicants should receive termination and others should receive

suspensions. A copy of the written remedy submissions filed with the Tribunal in the 003 Complaint are attached hereto as Exhibits "A", "B", "C", "D" and "E".

109. Notably, the Mr. Avraam was permitted by the University to file both initial and reply submissions on remedy on behalf of the University.

110. Mr. Hopkins, Mr. Fletcher, Mr. Collins and I as counsel for the various Applicants objected to the University's submissions on remedy during the oral closing submissions and in written remedy submissions.

111. Furthermore, and more importantly, it was the position of counsel for the Applicants that the fact that the University was recommending penalties to the Tribunal so that the Tribunal may recommend those same penalties back to the University to carry out amounted to an abuse of process. Had we been alerted to the University's intention to make such a request from the outset we would have been able to address these issues of abuse of process, natural justice and procedural fairness prior to the close of proceedings and before the Tribunal rendered its merits decision. Rather, we as counsel for the Applicants were forced to expend already limited pages in our remedy submissions to address the University's unreasonable and unfair position after the release of the Tribunal's merits decision, and when it was too late to prevent the University from filing their remedy request. Our opposition to the University's written remedy submissions can be found at pages 1 to 3 of Exhibit "C" attached hereto.

112. Therefore, the effect of the University's remedy submissions (both in substance and in timing) on the Applicants was much more prejudicial than any remedies sought by the individual 003 Complainants.

113. I make this affidavit in support of the Applicants' Notice of Application for Judicial Review and for no other or improper purpose.

SWORN BEFORE ME at the City of TORONTO, in the Province of Ontario, on December 23, 2014.

Commissioner for Taking Affidavits

TAEMEE PARK

CATHERINE MILNE