Applicant's Reply to a Response Form 3

Application information

Tribunal File Number: 2022-51511-I

Name of Applicant: Marcin Pęski

Name of Each Respondent: University of Toronto Faculty Association

1. Identify the page or paragraph number of the Response where the new matter is raised and then explain your reply to this new matter. If you need more space please attach another sheet of paper. Number each additional page.

1A. What is the new matter raised in the Response? (page or paragraph number)

The Respondent raises several new legal issues as well as some facts. I respond to all new issues and facts in the attached Schedule A.

1B. What is your reply to this new matter? If you will submit a version of the facts different from that set out in the Response *and which was not included in your Application*, describe these facts here.

I respond to all new issues and facts in the attached Schedule A.

2. Signature

By signing my name, I declare that, to the best of my knowledge, the information that is found in this form is complete and accurate.

Name: Marcin Pęski

Signature:

Date: 01/06/2023

Schedule A

Marcin Pęski's Reply

HRTO File No. 2022-51511-I

1. **Summary**

2. Following the rules of proceedings, this Reply will only address new facts or legal issues raised by the Respondent.

3. The Response pursues a number of different legal arguments, some of which are irrelevant, some of which make non-existing legal distinctions, some of which conflict with other ones. It contains substantive and easy-to-check factual errors. It makes claims about my Application that do not correspond to what is actually written in the Application, almost as if my Application was not read that carefully.

4. Most disappointingly, the Response explicitly refuses to deal with the core of my Application: the majority of events described in my Application, including the most egregious ones, are not addressed or engaged in a meaningful way.

5. The Respondent claims that they need more time for investigation to be concluded, that they reserve the right to amend their Response later. Later when? My first complaint was two years ago, in May 2021, two years ago. The internal complaint that started this process was submitted in January 2022, seventeen months ago. Since then, I haven't been given any idea how the Respondent is going to treat my complaint. How much longer do I need to wait for my complaint to be taken seriously?

6. The rest of my Reply is organized around the Respondent's arguments. For clarity, I list them in a table below, where I also briefly summarize my response:

    a. "I disagree" - I believe that the law favors my position,

    b. "false" - the Respondent makes factually false statements,

    c. "irrelevant" - the argument has no bearing on this Application,

    d. "inconsistent" - the line of reasoning is contradicted by other claims by the Respondent

Response	**Reply**
The Application is inconsistent with protection of substantive equality.	I disagree, inconsistent
The application is premature as it is a subject of an internal investigation.	I disagree, inconsistent
There was no discrimination.	I disagree, inconsistent
The Respondent has no knowledge about the email to the Chair.	false
Harms are excessive, remote, and speculative.	I disagree
The substance of the Application is outside of the Tribunal's jurisdiction.	I disagree, false, irrelevant
The Respondent is not responsible for unmoderated listserv and they have no tools to discipline Council members.	false, irrelevant
The Applicant engaged in discriminatory behavior.	false, irrelevant
The Respondent is not vicariously liable for the conduct of its members and officers.	I disagree

7. I end with two requests regarding summary hearing.

8. **<u>"The reverse discrimination claim is inconsistent with protection of substantive equality."</u>**

9. The Respondent claims that my Application is inconsistent with Tribunal's mandate to advance substantive equality and it amounts to reverse discrimination (74, 78).

10. I disagree with this argument.

11. The Respondent confuses concepts. Reverse discrimination is a term used to describe discrimination against members of a dominant or majority group, in favor of members of a minority or historically disadvantaged group. The “reverse discrimination” argument necessarily relies on the existence of a disadvantaged comparator group.

12. My Application is not a reverse discrimination claim, as I do not offer a comparator group. The human rights jurisprudence does not require a comparator group for claims based on stereotyping, prejudice, and targeted personal harm, like mine.

13. None of the cases brought up by the Respondent is relevant for my case. For example, Galuego vs Spectrum Health Care 2016 HRTO 1367) is a reverse discrimination claim. The dismissal relies on a bona fide employment requirement, but it also engages substantive equality argument: an employment schedule where women, but not men, work with female patients indirectly leads to an increase in overall substantive equality.

14. This case does not apply to my Application. The Respondent does not have a special program or bona fide job requirement, which allows members of less advantaged groups for race- or gender-based insults or slanderous accusations on members of privileged groups. If such a program or a requirement existed, it would not lead to an overall increase in substantive equality. Nobody benefits if one member of the community refers to another one as “heart-warmingly paranoid and tautological, like Winnicott's worst-case scenario baby” or to throw public and unfounded accusations of sadism and violence. In fact, such programs or social norms, if existed, would harm values like freedom of speech, free exchange of ideas, and open debate that are important for quasi-parliamentary governance systems like UTFA.

15. In MacLean v The Barking Frog (2013 HRTO 630), the Tribunal does not rely on an increase in substantive equality, and instead it points out that the discriminatory treatment is too minor to lead to substantive discrimination. In particular, there was no prejudice or stereotyping.

16. The Respondent mischaracterizes Lindsay v TDSB (2020, HRTO 496), where the decision is not based on whether a stereotype is used against a historically marginalized group. Instead, the Tribunal finds that the alleged stereotype is non-existent in Ontario or Canada.

17. To further undermine the Respondent’s position that stereotypes cannot be used to discriminate against men, note that a gender-based stereotype is used as a specific example on the OHRC website to explain that the Code protects men and women equally.

18. In my Application, I explained two gender-based stereotypes that are repeatedly invoked against me. I gave multiple examples of these stereotypes in the North American cultural area, including a 2020 Toronto Star opinion “Murderous white men and the work of white women” written by prof. J Taylor, the officer of the association and one of the individuals mentioned in my Application. The stereotype of “men hate women bosses” was, among

others, widely discussed during the 2016 US presidential campaign and used to explain gender voting patterns in that election. I also explained how harmful those stereotypes, when applied to me, are to both my personal dignity, the way I am thinking about myself, and to my personal and professional reputation. The Respondent chose not to engage with my explanations.

19. It is important to understand the social context of the events. In this case, it is the university setting, where all UTFA members are employed, and where, very likely, me and most all of the Council reps will develop and conclude their professional careers. The university setting is much more liberal, progressive, with politics much more to the left, where ideas of #MeToo movement and "believe women" penetrated much more widely than in the general population. Even if stereotypes of predatory "murderous white men" are not dominant in the wider society, they are very much well-known in the university setting.

20. I note that the Respondent does not contest the applicability of the stereotypes.

21. The gender-based accusations of sadism and violence towards women and a claim that I am unable to work with others go beyond a mere stereotype and they impose a direct burden on my reputation and threaten my professional career.

22. I note that the Respondent claims that the Application is inconsistent with substantive equality, while also admitting that it does not have a good understanding of the events because its internal investigation is not yet concluded. These are two conflicting positions and I do not understand how the Respondent can offer both of them at the same time.

23. <u>"The application is premature as it is a subject of an internal investigation."</u>

24. The Respondent claims that the precedence should be given to the internal investigation and that the Application should be stayed until the Investigation concludes.

25. I oppose any stay.

26. The Respondent is required to respond to all allegations in my Application within 35 days (see HRTO Rules of Procedure 8.1 and 8.2). None of the circumstances enumerated in 8.2 and 8.2.1 that justify stay do not apply.

27. The main reason why I decided to submit HRTO application in December 2022 is because delay and lack of communication led me to lose faith that the internal investigation will be fair and concluded in any reasonable time.

28. The Respondent admits that the internal process was initiated by a formal complaint on 22 January 2022, 17 months ago (44), which, in turn, followed a series of complaints made in May/June 2021. At each point, I fully cooperated with whatever procedures the Respondent asked me to follow, and responded to all requests and questions immediately. The Respondent is solely to blame for the delay.

29. The Respondent claims that the investigation was postponed by two factors: (a) the initial lack of a complaint policy, and (b) by some "structural and operational challenges" that the Respondent encountered when they adopted such a policy. (61)

30. In my January complaint, I informed the Respondent that there exists no anti-discrimination and harassment policy and requested that the Respondent come up with one. The Respondent adopted the Anti-Discrimination Policy in June 2022. The Policy sets the time frame for an investigation to be undertaken and an investigation report written at ninety (90) days after the investigator is hired. Even ignoring the delay with hiring the investigator, this would mean October-November 2022.

31. The Respondent ignored my questions about the timeline of the investigation, including in October 2022 and April 2023. (The Respondent did not even acknowledge receiving these emails.)

32. The Respondent does not explain the nature of the "structural and operational challenges". (61) The Respondent has never informed me about the "challenges" or that the investigation is paused.

33. In the Response, the Respondent clearly says that at this point, the investigation is paused indefinitely (60). The Respondent has never informed me about that as well.

34. Additionally, the Respondent seems to believe that the current Policy "is not working" and that it "cannot currently be implemented because of its misalignment with UTFA's governance structure." (The last two statements were made by prof. A. Siddiqi, UTFA Equity Chair, in the UTFA Council on 18 May 2023, not to me directly.) Essentially, the Respondent admits internally that they still do not have a functioning anti-discrimination policy. The Respondent has never informed me about any of that as well.

35. The request to give precedence to its own investigation until the Respondent figures out its internal challenges is perplexing. It does not make any sense. It's cruel, unfair, and very disturbing.

36. The Respondent request to give precedence to its internal investigation over the HRTO process is not consistent with its own Policy that gives it right to "suspend a process under the Policy if it is satisfied that the complaint is, in whole or in part, the subject matter of any civil, criminal, administrative or other proceeding until such proceeding (including all rights of appeal) has been completed" (14b, see also 37).

37. To summarize, The Respondent admits that their investigation is paused and no timeline for restarting is offered. The Respondent admits that they have no functioning anti-discrimination policy under which the complaint can be treated

38. "There was no discrimination."

39. The Respondent chose not to engage with almost any events described in the core of my complaint. The Respondent attributes it to incomplete internal investigation and it

says that any discussion of the events in my Application would prejudice the investigation.(66) The Respondent also explains that it has no access to details of the investigation because the investigation is “Independent.”(63)

a. For some reason, the Respondent chooses to discuss two events from my complaint (recognition of Montreal massacre and prof. Taylor’s email to my chair) without waiting for the outcome of the investigation. No reason why these two events are treated differently is given.

40. I respectfully request that the Tribunal reject the explanation that the Respondent must have waited for the results of the independent investigation before it prepared Response.

41. The Respondent is obliged to respond to all allegations within 35 days by Section 8.1 of the HRTO Rules of Procedure.

42. The Respondent claims that they are not privy to facts from my Application (90). All the facts/events described in my Application took place on Council listservs, hence they were in possession of the Respondent since the time they took place. I have submitted a complete description of the facts on 8 March 2022 and further repeated them to the investigator on 22 and 30 August 2022.

43. The Respondent gave no reason why the investigation could not be concluded before submitting the Response. In any case, the Respondent could have asked the investigator for a preliminary report.

44. The Respondent in numerous places (for example, 5 and others) claims that I have not pleaded any factual basis that UTFA actions or inactions were connected to my identity. That’s false. In fact, my Application contains a large body of evidence, all electronic communication, as a factual basis. The Respondent makes a choice to ignore this evidence.

45. <u>The UTFA has no knowledge of the email to the Chair</u>

46. The Respondent says that they have no knowledge of prof. Taylor’s 30 Nov 2021 email to the Chair of Economics (the Email) (94).

47. This is false. The Respondent has been informed about the existence of the Email on three different occasions:

a. The Respondent was informed in an email on 20 Jan 2022, which was sent before the same-day Council meeting. In that communication, I asked for a fair investigation of the circumstances of the Email. During the meeting, prof. Taylor was to be re-appointed as the Chair of Membership. The debate on the re-appointment motion was an opportunity to ask her about the Email. However, following a motion of the Executive member, the debate on the reappointment

motion was cut short. As a result, the question was not asked. I got no response to my inquiry regarding the Email.

b. The information was included in a formal list of allegations, 8 March 2022. When in the follow-up meeting I asked about the Email, I was assured that it will be a subject to the investigation.

c. The information was provided to investigators, 22 and 30 Aug 2022. I was given every impression that the investigators will ask prof. Taylor for the Email.

48. Although I have informed the Respondent on three different occasions, the Respondent never told me that they "have no knowledge" of this email and they expect me to produce it. At each point, the expectation was that prof. Taylor will be asked about the Email during the investigation.

49. When my Chair told me about the Email from prof. Taylor, I asked him if I could see it. He was uncomfortable doing it because of (a) privacy of his own communication and (b) potential inter-university issues (both he and prof. Taylor were/are the University of Toronto employees.) I did not press the issue as doing so, and forcing my Chair to choose between his relationship with me and his relationship with prof. Taylor will harm the professional relationship I have with him.

50. The Respondent is responsible for the actions of its officers (see Section 46.3(1) of the Code), including any communication that the Respondent's officers had with my employer regarding my participation in the association activities.

51. I notice that the Respondent does not explicitly deny that the communication with my employer took place. I request that the Respondent figure out what exactly is their position: did they send an email to my Chair or not? If they did, I request that they present it as a document.

52. If the Respondent denies that such a communication took place, I will take this denial to my Chair and ask him, once more, to produce the email. But doing so is costly to me.

53. <u>"Harms are excessive, remote, and speculative"</u>

54. The Respondent says that the harms I allege are excessive, remote, and speculative.

55. I strongly disagree.

56. The context of the reputational damage made by public email by prof. J. Taylor and subsequent message from prof. T. Zoric is the fact that all Council reps, including me, are employees at the University of Toronto. Many Council representatives are also important members in the University of Toronto hierarchy, including former Chairs, members of the Governing Council, etc.

57. The University policies and culture strongly supports collegial and civil engagement, and it condemns and punishes discrimination and harassment. This context is formed by the following University of Toronto policies:

    a. UofT Statement on Equity, Diversity, and Excellence: "Our support for equity is grounded in an institution-wide commitment to achieving a working, teaching, and learning environment that is free of discrimination and harassment as defined in the *Ontario Human Rights Code*. In striving to become an equitable community, we will also work to eliminate, reduce or mitigate the adverse effects of any barriers to full participation in University life that we find, including physical, environmental, attitudinal, communication or technological."

    b. Employment Equity Policy: "Subject to University policies on academic freedom, all staff are responsible for the encouragement of behaviour, language and attitudes which will create a favourable University environment, free of discriminatory actions and stereotyping."

    c. Policy on Sexual Violence and Sexual Harassment: "All members of the University of Toronto ("the University") community should have the ability to study, work, and live in a campus environment free from Sexual Violence, including Sexual Assault and Sexual Harassment…. " where Sexual Violence is defined as **"**Any sexual act or act targeting a person's sexuality, gender identity or gender expression, whether the act is physical or psychological in nature, that is committed, threatened or attempted against a person without the person's consent."

58. The accusations of me being sadistic or violent towards women, not being able to work collegially imply that I violate the above policies. This essentially destroys any opportunity of advancement I have in the university. This is not remote, but very real.

59. "The substance of the complaint is outside of the Tribunal's jurisdiction. "

60. The Respondent claims that the need to preserve its core values, academic freedom and freedom of expression made it unable to restrain the speech of its Members (106).

61. I plead that

    a. neither in theory nor in practice academic freedom or freedom of expression are the core values for the Respondent, and

    b. Even if they were, the Response should not ignore their obligations to protect civil speech free from discrimination and harassment that are explicit in its own policies.

62. The Respondent claims that academic freedom and free speech are among their core values (25, 26). To justify the claim, the Respondent quotes the University of Toronto's Statement of Institutional Purpose and Article 5(1) of the Memorandum of Agreement, as well as a book about American universities.

63. These assertions are irrelevant as they apply to universities in general and the University of Toronto in particular. (For example, unlike some other parts of the MoA, article 5(1) applies only to the University.) Similarly, the Tribunal jurisprudence that says that “it is not within its jurisdiction to address issues of social, political, or academic debate on a university campus” does not extend to vocational associations.

64. Instead, the Respondent is an independent labor organization, not bound in any way by the U of Toronto policies and regulations. None of its founding documents, neither its Constitution or Bylaws, nor, any of its policies, refer to academic freedom or internal freedom of expression.

65. Emphatic assertions that freedom of expression is at core value of the Respondent, that it is not able to manage the Council debates, that the members are encouraged to share ideas openly and debate is encouraged (105), that the Respondent does not manage speech or conduct of the Council members (104), or that the protection of the right of its members to deliberate openly and without fear of reprisal is pivotal to its very existence (27) are very surprising to me. They contradict my own experience and the experience of my multiple colleagues, fellow Council members,

    a. Who were told on many occasions that they talk to much, they speak out of line, or they speak too little,

    b. Who were criticized for writing too many emails, or that they take too much time speaking in the Council,

    c. Who were criticized for bringing up publicly available information like newspaper articles commenting on association issues,

    d. Whose comments were regularly erased from the Council minutes,

    e. whose comments and questions during the Annual General Meeting were censored,

    f. Whose communication with their constituents was regularly monitored,

    g. Who were strongly encouraged to send officially approved message to their constituents, and who were aggressively criticized for writing their own messages with their own perspective, as a result of which criticism they were subject to sometimes abusive communication from their peers and superiors,

    h. Who were criticized for running their own opinion polls to contact their constituents because such polls were not officially approved by the Respondent,,

    i. Who were censured by the association for refusing to reveal private information, etc.

66. I recognize that freedom of expression is very important for proper functioning of the quasi-parliamentary governing body, the Council. I am proud to say, I tried my best to

make the best use of it. As the Respondent admits, in my 5 years on the Council, I was one of the most active, engaged, and outspoken participants (17). Contrary to what the Respondent wrote ("Contrary to the impression advanced by the Applicant, he was … active participant in …. debates". (34)), I have clearly described my Council activities in my Application (see the bottom of page 8).

67. The claims of a protection of freedom of expression and open debate are even more surprising when every single time that my race and gender was brought up, it was associated with a criticism of me exercising my right to speak:

    a. 25 May 2021, in her "malicious non-compliance email", prof. Taylor complains about "white males" who write "voluminous emails of protest and incredulity",

    b. On Sep. 26 2021, prof. Rena Helms-Park wrote "Marcin Peski and other men …. I, too, feel victimized by pettifogging and sophistry …"

    c. On Oct 20 2021, prof. Helms-Park complains about "the sheer quantity and frequently questionable attacks" that would not be directed if the UTFA President was a man.

    d. On Feb 23 2022, prof. Marshall wrote "Once again I note for the record this example of gendered bullying and aggression from one of a handful of men who know who they are" to criticize me for bringing up a publicly known but never-before-mentioned HRTO complaint filed against the UTFA President.

    e. None of the comments above are about the form of my speech or the language I used. They are about the existence of the speech.

68. Contrary to what the Respondent is suggesting, the events described in my Application are not social or political debates or exploration of ideas, but harmful and damaging claims and assertions about a particular individual and his gender and race. Although they were made in the context of the governance and policy debates that are fairly typical for a labor union, this context does not affect their abusive and individualized nature.

69. Even within the University context, I strongly reject the claim that academic freedom and freedom of expression is inconsistent with prohibition of hateful, discriminatory, or harassing speech. The University of Toronto "aspires to achieve an environment free of prohibited discrimination and harassment and to ensure respect for the core values of freedom of speech, academic freedom and freedom of research. (see UofT Statement On Prohibited Discrimination And Discriminatory Harassment. The University sees the freedom of expression and prohibition of discrimination go together as discrimination and harassment stifles open debate.

    a. Although this statement describes the UofT policy and it does not apply to the Respondent, I am mentioning it to point out that the UTFA members, who are also the UofT employees, are familiar with the idea that academic freedom not

only co-exists with, but it is strengthened by prohibition of harassment and discrimination

70. Additionally, the Respondent is explicitly obliged to protect its members from discrimination and harassment by a number of policies. The Respondent is a member of Canadian Association of University Teachers, which describes the limits to academic freedom in this way: "Academic freedom in Canada is a contractual right of academic staff that is limited by the law, including prohibitions against harassment, discrimination and hate speech. Academic freedom is not a defense against such illegal activity."

71. The Article 16 ("Civility") of the Respondent's Bylaws says: "16.1 Members of Council and all of its Committees and subcommittees have a duty to respect the rights of other members and to engage in discussion of Association business in a civil manner and in accordance with the rules of procedure as set out in Robert's Rules of Order". Additionally, Policy and Procedure for Internal Harassment and Discrimination Complaints (the Anti-Discrimination Policy) adopted in June 2022 says "The University of Toronto Faculty Association ("UTFA") is committed to ensuring that all UTFA meetings, events, and communications are free of harassment and discrimination."

72. Despite the assertion that the Respondent is "fully seized" of its obligations to the Code and the protection of academic freedom and freedom of expression, the Respondent analysis focuses on its claims about protection of academic freedom and freedom of expression. That's inconsistent with the fact that the former, not the latter, are explicitly contained in its foundational documents.

73. I find the Respondent's admission of lack of action (41), inability (40), and unwillingness (106) to stop discrimination and harassment, and an attempt to justify it by academic freedom and freedom of expression needs (42, 43, 104) as an unfortunate confirmation of the Form 1 assertion that the Respondent does not have a proper culture of human rights and does not understand its obligations under the Code.

74. <u>"UTFA is not responsible for unmoderated listserv," "there is no disciplinary action that the Association could have taken vis a vis its Council members"</u>

75. The Respondent says that "UTFA does not manage or otherwise police the conduct of its members or officers on expressly unmonitored email/electronic fora or among members of its Committees". (8, see also 104-106)

76. These claims are false. They are utterly perplexing. There is no sense in which the claim that email communications is "unmonitored" and not "policed" nor "managed" has any relation to the real world. Regardless, whether communications using the Respondent electronic fora are monitored or policed or not is irrelevant for this Application.

77. "Unmonitored":

    a. The Officers of the association, including the President, are active and frequent participants in all communications sent to council_a@utfa.org and

council_b@utfa.org, to which they belong. They read emails, and they respond regularly. There is no sense in which this communication is “unmonitored”.

b. Other UTFA communications are monitored as well. During the 30 Nov 2022 interaction, I expressed surprise that the President participated and responded in a thread on a Membership committee email list.

c. Further, the President actively monitors communication between elected Council reps and their constituents using their constituency email lists. On at least four different occasions, my colleagues were surprised to discover that their emails to constituents were read and publicly criticized by the President.

78. “UTFA does not manage or otherwise police”:

a. The assertion that the Respondent is not able to manage the Council debates is contradicted by its own admission (30) that it actually tried to curtail the use of listserv. (This assertion could be further contradicted by a claim that “UTFA repeatedly implored all Council members to engage …and encouraged moderation”(40), but, unfortunately, the last claim is false. It is immediately contradicted by statements in 41 or 104-106. As I have documented in my Application, numerous requests to the Respondent to step in and to assert civility in Council communications were ignored.)

b. The Respondent actively manages the form and the content of the communication between the Council reps and their constituencies. Between October 2021 and January 2022, the Membership Chair prof. Judith Taylor wrote 3-4 emails (“protocols”) that the Council reps were advised to forward to their constituents. Although ostentatiously the emails were a recommendation only rather than a requirement, those who refused were later criticized in a public email to their constituents. For example, prof. Sabl was accused in an email sent by the Membership Chair to his constituency for not forwarding her emails for “gendered” reasons.

c. On numerous occasions, the President and other members of the Executive sharply criticized the Council reps’ own communication with their constituents. The sometimes public criticism was about the reps running their own polls to learn the opinion of their constituents, or the way that they expressed their own views on Council matters, or employment conditions. In a few cases, the reps were instructed how to speak and how not. In at least two occasions, the public criticism generated sometimes very abusive communication from some of the addressees.

d. Some Council reps, like me, resorted to using ways of communicating with their constituents that are not controlled by the Respondent to avoid monitoring and constant management.

79. The question whether the Respondent “monitors, manages and polices” its electronic platforms is irrelevant for this Application. The Code and the Respondent’s own Bylaws and policies make the Respondent responsible to keep its communication free of discrimination and harassment. The fact that the Respondent claims that it does or should not do it is a damning admission of not understanding their own human rights obligations. It is also a confirmation of the claim from my Application that the Respondent does not have a culture of awareness of its human rights obligations.

80. The Respondent also says that “ there is no disciplinary action that the Association could have taken vis a vis its Council members to address the behaviour complained of by the Applicant” (9).

81. The claim is false and irrelevant.

82. Many elected bodies in vocational associations, or trade unions have rules that allow them to discipline their own members. In UTFA, all Council representatives are subject to Article 16 “Civility” of the UTFA Bylaws, which says that 16 (“Civility”) of the Respondent’s Bylaws says that “16.1 Members of Council … engage in discussion of Association business in a civil manner and in accordance with the rules of procedure as set out in Robert's Rules of Order” (ROR). According to the ROR, discipline could include a request to apologize, censure, fine, suspension, or expulsion. Although the Respondent is correct that the ROR discipline can only be given by the whole Council, this does not relieve the responsibility of the Respondent from investigating complaints, producing reports and making recommendations to the Council, including initiating motions to request apology, censuring, etc.

83. In any case, the Respondent’s claim is irrelevant because I have never asked to discipline any member. All I had consistently asked is that the Respondent affirms civility and prohibits language that is discriminatory and harassing.

84. In the case of the events I described in my Application, perhaps it was not necessary to discipline. Instead, it would have been enough not to promote a member, and not to create an impression that aggressive discriminatory and harassing behavior against political opponents will be rewarded with important positions and influence.

85. <u>“The Applicant engaged in discriminatory behavior”</u>

86. The Respondent claims that I have engaged in disruptive, disrespectful, or even discriminatory behavior. The Respondent presents a single piece of evidence to support these claims: an email by prof. Bale and two others. The Respondent does not explain what is their intention with making these allegations and how they are related to my Application.

87. I categorically deny these allegations. They are false. They are also highly disturbing and vexatious. Due to a fundamental error made by the Respondent, the single documentary evidence does not support their claim. Moreover, whether the allegations are correct or not, they are irrelevant for this Application.

88. The Respondent wrote “Applicant’s interactions … were often criticized as being uncivil, disrespectful and discriminatory … “ (37) and that I was accused of discriminatory conduct by my colleagues (78). This is false, very disturbing and vexatious. I have been criticized often (see numerous examples in my Application), but nobody mentioned any “discriminatory” aspect of my behavior. I know nothing about any such thing. The Respondent has not provided any evidence for these bald assertions.

89. Similarly, the assertions that I was “repeatedly asked … to refrain … ” (37) or that “Numerous efforts were made by … peers to refrain from his disruptive and gendered style… ” (38) are false, disturbing and vexatious. The Respondent has not provided any evidence for these bald assertions.

90. The Respondent wrote “Applicant was … eye-rolling, sneering, and laughing” (37). I admit that I might have laughed and, although I am not sure, I might have also rolled my eyes. I did not sneer (though, as ESL, I am not sure what it means.)

    a. If laughing or eye-rolling is evidence of disruptive, disrespectful, and discriminatory behavior, pretty much every single member of the Council would be guilty. Due ot Covid restrictions, all Council meetings in 2020-2022 took place on Zoom conference calls, with up to 80 people attending. Some had their cameras off. Even those who had cameras on felt a different sense of privacy when being in their own home, often watching the Council proceedings on a laptop or a phone with a very limited ability to see details of individual facial expression.

    b. For me, an additional circumstance was that all the Council meetings took place during 3-5pm, when I had a responsibility to bring my kids home from school, feed them, and prepare them for their afternoon activities. (During pandemic years 2020-2022, after-school care was not available in my area.) What the Respondent interpreted as laughing at the Respondent, it was very possibly me having a conversation with my children.

    c. The Respondent is very well aware of my family situation. In fact, together with all other Council members who had responsibilities for elementary school children (all of them, coincidentally, men), we asked the Respondent for some sort of accommodation. Our request was ignored.

91. Continuing the previous claim, the Respondent wrote ““Numerous efforts were made by … peers to refrain from his disruptive and gendered style… An illustrative example is the email … by J. Bale… ”

    a. This is false! <u>The quoted email is not about me</u>. The email says “Those at the meeting will recall repeated **interruptions of the Speaker(1)**, interruptions that impeded the effective flow and timeline of the meeting. Interruptions that effectively silenced others in the meeting by their intensity and venom. There were hurtful statements in the chat by **<u>a member</u>** of Council **accusing the President of talking too much(2)**. After a presentation by the EquityCommittee regarding a survey they are designing, instead of

respectful engagement regarding epistemological, ontological or methodological issues about the survey design which could have led to a helpful, productive conversation to support the work of the Committee, **we heard questions that were actually in the form of a personal attack impugning the expertise, intent and integrity(3)** of one of the Committee members. To compound this insulting behaviour, this member **cautioned the Council Speaker not to interrupt him(4)**, turning the attention of the meeting on himself rather than the matter at hand, and in effect undermining the work of the Association."

b. The email is about an unnamed "member" who is nevertheless identified by (extremely misleading) description of his actions (1)-(4). (The email contains a factual mistake, as it was Membership, not Equity, Chair who talked about a survey.) If the Respondent read my Application carefully, they would have noticed that this email is a part of submitted evidence; the circumstances and the defamatory attack on my colleague prof. Sabl are described in my Application (E4 of Form 1, p 22, also App. O).

c. If anything, the email is an example of ruthless and instrumental use of accusations of misogyny against political opponents: misleading or false statements about an unnamed yet identifiable member, public unjustified accusations, no possibility of defense, creating a perception of frustrated majority, etc. Three months later, two of the authors of the letter became members of the Executive, i.e., paid positions of leadership in the association.

92. If the Respondent continues to make false, disturbing and vexatious statements about my behavior, I request strict documentary evidence. In particular, I request that the Respondent presents

    a. Every single email that is sent from or to any …@utfa.org email account that refers to me or behavior of any Council member in any way,

    b. All minutes, including unofficial ones, and all notes prepared or taken by the Respondent's staff or Officers during Council meetings during July 2020- June 2022. During each Council meeting, the Respondent's staff is taking extremely detailed notes. (The President admitted the existence of such notes during one of Council meetings, though she refused to share them.)

    c. In general, any single document in the possession of the Respondent that refers to me in any way.

93. Finally, whatever is the Respondent's intention with making these completely false and upsetting assertions, they remain unrelated to my Application. Even if the Respondent received any complaints about me, the Respondent admits that they have never contacted me about such complaints, and never initiated any process (40). For the purpose of my Application, such complaints may as well as have not existed.

94. <u>"UTFA is not vicariously liable for the conduct of its members and officers. "</u>

95. The Respondent claims that it is not vicariously liable to a member of the Association for the conduct of its Officers in the course of UTFA's business (114).

96. I believe that the Respondent is very much liable.

97. I encourage the Respondent to read Section 46.3(1) of the Code: "For the purposes of this Act, ... any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization."

98. <u>"The Code grounds of discrimination in relation to membership in a vocational association were not engaged."</u>

99. The Respondent claims that I could not be discriminated against on the basis of membership in a vocational association. The Respondent relies on a distinction between being a member of the association, and a member who holds an elected position as a Council representative.The Respondent claims that my membership in the association was not subject to adversarial treatment (70). Instead, all incidents described in the application stem from the interactions in the Council, which is the 60-person quasi-parliamentary governing body of the association (71).

100. I plead that the distinction is irrelevant for the purpose of establishing whether the Code grounds of membership in the vocational association were engaged.

101. The membership in the association involves obligations and rights. One of the rights is described in 4.4(i) of the Constitution: "the active members of the Council shall be elected by the regular members of the Association in their respective constituencies for a term of three years commencing on July 1st of the year of election and shall be eligible for re-election."

102. The right to represent colleagues in the Council cannot be separated from the right to be a member of the association. Any member of the association who does not have a right to run in election and represent their colleagues in the Council, would not have full membership rights in the association, and, as such, they could be discriminated against on the grounds of membership in a vocational association.

103. The distinction between regular members and members who hold elected positions never played any role in relevant past decisions of the Tribunal, like Szyluk v United Food and Commercial Workers Canada, Local 1000A, [2009] OHRTD No 898, 2009 HRTO 902, or Homonnay v Canadian Union of Public Employees (National), [2009] OHRTD No 1642, 2009 HRTO 1691. In both of those cases, the applicants were elected trade union representatives who claimed discrimination stemming from their work as elected representatives. In the first case, the Tribunal recognized that the applicant faced

a discrimination on the grounds of membership; in the second, the Tribunal found for the applicant in an interim decision.

104. The distinction plays no role in the Respondent's own Anti-Discrimination policy.

105. <u>Other mistakes/errors</u>

106. For the record, I collect here claims or statements from the Response that are factually incorrect in an easy to check way. This should not in any way mean that I agree with all the remaining statements in the Response:

107. The Respondent claims that the Working Group on Civility recommended in March 2021 adopting Robert's Rules of order (30). In fact, Robert's Rules have always governed the Council meetings (see Article 16 of the UTFA Bylaws) and the Working Group recommendation was to institute workshops for the Council reps .

108. "Individuals identified by the Applicant as having acted improperly towards him were known … to actively support the successful candidate". (35) Apart from being irrelevant, it is not correct. Most of the events described in my Application, including the Jan 2022 internal complaint, took place long before the presidential campaign. Before late Feb/March 2022, I didn't know who would support which candidate. I didn't even know if there would be elections as nobody was, formally or informally, declared as a candidate. In fact, at the time, I had reasons to believe that one of the future surrogates of the winning side would run against the current President.

109. "On March 8, 2022, the Applicant filed an internal complaint …" (57). That's not correct, and it is also contradicted by 44. I filed my internal formal complaint on 22 Jan 2022 (which, in turn, followed a series of formal and informal complaints in May/June 2021). Because the UTFA did not have a complaint policy at that time, it took the Respondent some time to figure out the form that my complaint should take. But the Respondent's lack of policy is not my fault.

110. The Respondent asserts that I am a "cis-gendered white man of European ancestry." For the record, I have never identified myself as "cis-gendered". I encourage the Respondent to stick to the facts they know and not to engage in speculations based on common stereotypes.

111. <u>Requests</u>

112. I respectfully request that, in a summary decision, the Tribunal

a. Subject to me establishing prima facie discrimination, recognizes that the Respondent failed to show that there was no substantive discrimination,

b. Rejects the Respondent arguments in

i. The substance of the Application is outside of the Tribunal's jurisdiction,

ii. The Respondent is not responsible for unmoderated listserv and they have no tools to discipline Council members,
iii. The Applicant engaged in discriminatory behavior,
iv. The Respondent is not vicariously liable for the conduct of its members and officers.

113. In order to justify (a), I understand that any discrimination case involves two key questions (i) Prima facie discrimination: Was there differential treatment within an enumerated social area in which protected characteristic was a factor? and (ii) Substantive discrimination: Did differential treatment impose a burden? I am responsible for establishing the prima facie discrimination, and, if I am successful, it is on the Respondent to show that the differential treatment did not lead to substantive discrimination.

114. As I discuss above, the Respondent argues that substantive discrimination did not happen. However, because the Respondent does not engage with the individual facts of my case, the only argument they provide is necessarily a general one: They argue that it is, in principle, impossible to substantively discriminate against a white male on the grounds of race and gender. They claim that recognition of such a discrimination is inconsistent with protection of substantive equality.

115. If the Tribunal accepts the Respondent's view, then there is nothing else we need to discuss and the whole process can be significantly shortened and significant costs can be avoided. In particular, we can sort out the case in a brief summary hearing. I believe that the Respondent will agree with my position.

116. If, on the other hand, the Tribunal agrees that substantive discrimination against a white male in the social and historic conditions presently in Ontario is practically possible, I respectfully ask the Tribunal to recognize the fact that the Responder failed to respond to my particular allegations as an admission that the Respondent does not have a good response. In such a case, I respectfully request that the Tribunal accept the demonstration of prima facie discrimination as sufficient evidence for discrimination, without further need of discussing substantive discrimination.

117. For (b), I respectfully request that the Tribunal recognizes the four arguments made by the Respondent as irrelevant (or obviously wrong, in the case of the last one). There is a cost of discussing Council freedom of expression culture and the behavior of individual Council representatives, including the members of the Executive or me. Such discussions will be necessarily long, they will involve extensive discovery process, and they will be costly for the Respondent, me, and the Tribunal, in many different ways. A summary decision that none of these discussions can affect the decision in this Application could be very helpful.

Signed

Marcin Pęski