CITATION: Asa v. University Health Network, 2016 ONSC 439
DIVISIONAL COURT FILE NO.: 301/15
DATE: 20160122

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., H. Sachs and Varpio JJ.

BETWEEN:	
SYLVIA ASA and SHEREEN EZZAT Applicants	*Brian Moher*, for the Applicants
– and –	
UNIVERSITY HEALTH NETWORK Respondent	*Eric R. Hoaken* and *Larissa C. Moscu*, for the Respondent
	HEARD at Toronto: December 1, 2015

H. SACHS J.:

Introduction

[1] The Applicants are internationally renowned cancer researchers. In October of 2014, an Investigation Committee (the "Committee") concluded that they had committed three forms of research misconduct within the meaning of the Respondent's Research Policy. Specifically, the Committee found that the Applicants falsified and fabricated images in a number of research articles and that they failed to comply with journal authorship policies for manuscript publication. As a consequence of these findings, the Applicants' research activities were suspended on a temporary basis while further allegations of research misconduct were investigated.

[2] The Applicants appealed the Committee's decision and the sanction to the Respondent's President and CEO, Dr. Peter Pisters. Dr. Pisters dismissed their appeal in March of 2015.

[3] The Applicants seek to judicially review Dr. Pisters' decision and request that this court quash that decision and direct that the matter be sent back for a redetermination in an oral hearing before an appropriately constituted committee or tribunal.

[4] In opposing the Applicants' application, the Respondent submits that Dr. Pisters' decision is not a decision for which judicial review is available. In the alternative, it submits that the decision was reasonable and that the process leading up to the decision was procedurally fair.

[5] For the reasons that follow, I find that Dr. Pisters' decision has the public law character needed to attract the attention of judicial review and that the process leading up to that decision was procedurally fair. However, to the extent that Dr. Pisters' decided that the Applicants committed research misconduct in the form of fabrication and falsification, his decision and that of the Committee must be quashed. To the extent that that decision upheld the findings of the Committee in respect of research misconduct in the form of a failure to comply with journal authorship policies ("Material Non-Compliance"), the decision was a reasonable one.

[6] With respect to sanction, I would remit the matter back to Drs. Charles Chan and Christopher Paige (the representatives of the Respondent who made the original sanction decision) for a reconsideration of the appropriate sanction, given that the only form of research misconduct that the Applicants have committed is that of Material Non-Compliance.

Factual Background

The Parties

[7] The Applicants are world-class researchers, authors and presenters in the field of Endocrine Oncology, specializing in the early detection, diagnosis and treatment of cancer. They have been engaged in clinical practice and medical research at UHN for many years. Their research has led them to publish hundreds of scholarly works, including articles and textbook chapters.

[8] The Respondent ("UHN") is a multi-site, public hospital that exists pursuant to the *University Health Network Act, 1997*, S.O. 1997, c. 45 ("*UHNA*"). UHN is also subject to provisions of the *Public Hospitals Act*, R.S.O. 1990, c. P.40 ("*PHA*"). Funding for UHN comes from the Ministry of Health and Long-Term Care, as well as private and third party sources.

Research Misconduct Policy

[9] Since at least 1996, the Tri-Agency Council (a group of three government institutes that regularly fund research in Canada) has required all institutions that receive Council funding to adopt, among other things, a "policy on integrity in research" that includes a "description of what constitutes misconduct".

[10] In compliance with this requirement, the UHN implemented the Research – Responsible Conduct of Research Policy (the "Research Policy") in 2011. Prior to 2011, UHN relied on a policy from the University of Toronto.

[11] The Research Policy did not create a new offence of research misconduct; as researchers at UHN have always had to adhere to applicable standards of research. These standards include the policies of the academic or scientific journals to which a researcher may submit papers for publication.

[12] The Research Policy codifies standards and sets out a two-step process to address allegations of research misconduct: (1) an inquiry is launched to determine if there are "reasonable grounds to proceed to an investigation", and (2) if there are sufficient grounds to proceed, a formal investigation committee is formed.

[13] Appeals from findings of these investigation committees are decided by the CEO of UHN. The applicable provision of the Research Policy is as follows:

> The respondent may **appeal** the application of this policy and the appropriateness of any disciplinary sanction to the CEO or, in the case of a respondent covered by the Medical Staff By-laws, following procedures outlined in the Medical Staff By-laws (emphasis in original).

Initial Inquiry into the Applicants' Research Practices

[14] On September 19, 2012, the *American Journal of Pathology* raised concerns with Dr. Ezzat over two papers he had written for the journal. When Dr. Ezzat's response did not satisfy the journal's concerns, the editor informed the University of Toronto.

[15] In November of 2012, various members of the UHN and University of Toronto community received emails from an individual named "Clare Francis". The emails directed readers to a website entitled "Science Fraud". The website made allegations of research misconduct against the Applicants, namely that six research articles they oversaw include images that were "falsified and/or fabricated."

[16] Soon after these allegations were made, the Applicants met with various members of the senior leadership at UHN. The Applicants were informed that UHN's Research Integrity Advisor, Dr. Richard Weisel, would lead an inquiry to determine if these allegations merited a formal investigation. Dr. Asa asked for such an inquiry on November 8, 2012.

[17] Dr. Weisel's inquiry revealed that the allegations had enough merit to launch a formal investigation.

Formal Investigation

[18] On November 25, 2012, UHN informed the Applicants that an investigation committee of three scientists would be looking into allegations of research misconduct in six different research articles. On November 29, 2015, the Applicants were informed that "Clare

Francis" had made additional allegations and so the Committee would now be reviewing 24 articles that the Applicants had co-authored with former or current members of their research laboratories.

[19] In light of these allegations, the Committee decided to first review a sub-set of seven articles (later expanded to nine), with the rest of the articles being investigated by a "phased approach". The Applicants agreed with and requested such an approach.

[20] Between the commencement of the formal investigation and the release of the Committee's final report in late 2014, the parties discussed the allegations a number of times. These discussions included the Applicants making oral and written submissions and responding to a draft report. At all times throughout the process, the Applicants were represented by counsel.

[21] The Committee also interviewed researchers and co-authors that the Applicants worked with to produce the impugned articles. At least one co-author acknowledged responsibility for the discrepancy in the images in two of the papers that were the subject of the first phase of the investigation and noted that the Applicants were not made aware of the alteration in the images that were published.

Report from the Investigation Committee

[22] After 22 months of investigation, the Committee released its final report on October 15, 2014 (the "Report"). In the Report, the Committee made the following findings:

> The Committee considers the intentional manipulation of images by any form of enhancement that removes or adds data, resulting in the misrepresentation of primary data, as well as the inaccurate labelling of images (all of which are described in this report) to constitute **Falsification.** Specifically, any irregularity that prohibits the primary data from being accurately represented was considered by the Committee to be Falsification.
>
> The Committee also considers the intentional and undisclosed addition and removal of bands in images, the repurpose or reuse of controls and experimental bands to construct "new" composite figures as well as the relabeling of data such that they no longer represent the original experiment or now represent a part of an experiment to which they did not belong to constitute **Fabrication.** Specifically, the construction of new material that cannot be replicated, regardless of the validity of the source data used to construct that new material, was considered by the Committee to be Fabrication.
>
> The images published must be actual images of the experiment as performed, with alterations disclosed in the figure legend, and limited to those accepted by the journal publication policy and

according to the standards of the scientific community. **The Committee considers the repeated failure of Drs. Ezzat and Asa to comply with these standards for manuscript preparation, including the inability to provide the primary data to match published images and the failure to disclose alterations according to the journal authorship policies to constitute Material Non-Compliance under the Policy.**

The Committee also considers the instances of inconsistencies and misinformation in responses provided by Drs. Ezzat and Asa during the investigation process to constitute material failure to comply with accepted professional and accountability standards.

In the publications reviewed, the Committee noted that multiple instances of falsification, fabrication and material non-compliance occurred between 2002 and 2012. **Further, Dr. Ezzat was the only author that contributed to all of these publications, while Dr. Asa contributed to all but one of these publications. The evidence available to the Committee does not permit it to make a determination about how all of the identified irregularities occurred or who in particular caused them to occur. It is also not clear whether, or to what extent, these irregularities arose as a result of inadequate supervision by the authors or other research staff (such as Dr. Zhu) who were involved in preparing the images in question. Despite the Committee's inability to determine who was responsible for creating each of the identified irregularities in the images, the fact that such irregularities persisted over a 10-year period during which time there were changes in personnel working in Drs. Ezzat's and Asa's labs suggests that there are systemic flaws in the way their laboratories are run, managed and supervised.**

On the basis of the evidence it has reviewed, **the Committee has concluded that Research Misconduct** within the meaning of the Policy **has occurred**, and specifically, that **Falsification, Fabrication and Material Non-Compliance have occurred.**

Although Drs. Ezzat and Asa insist that the identified irregularities do not affect the validity of the scientific conclusions in the papers containing the images, the Committee has not reached any conclusion, nor is it necessary for it to do so, concerning whether and to what extent the identified irregularities in the images affect the findings and conclusions of the papers in which the images appear. **The Policy does not require that there be and such connection between Research Misconduct and the validity or**

> **outcomes of the research in respect of which the Research Misconduct has occurred** (emphasis added).

The Sanction Decision

[23] On October 22, 2014, Drs. Chan and Paige wrote to the Applicants and advised them that they, as the Vice President of Research and the Vice President of Medical Affairs at UHN, were obligated to decide on the appropriate disciplinary or remedial actions to take in response to the Report (the "Sanction Decision"). They decided that, "having regard to the **extent** of the Policy violations committed, and the length of time over which they occurred" (emphasis added), the Applicants' research activities would be suspended effective November 5, 2014. They also advised the Applicants that a final decision about whether to permanently suspend their research activities would be made after the investigation into the remaining 17 papers had been completed.

The Appeal Decision

[24] The Applicants filed an appeal with the CEO of UHN on January 30, 2015. They argued that the findings of the Committee were not justified since: they were unaware of the discrepancies in the impugned articles; the discrepancies had no effect on the articles' conclusions; and they had no intent to commit, or knowledge of, the Research Misconduct.

[25] Dr. Pisters, the CEO of UHN, released his appeal decision on March 3, 2015 (the "Decision"). In the Decision, he upheld the conclusions of the Report by finding that the Committee correctly applied the Research Policy. He then upheld the Sanction Decision by finding that it was reasonable. Key sections of the Decision are as follows:

> The primary thrust of the argument you have made about the application of the Policy relates to whether its definitions of specific types of research misconduct require findings of intent to deceive. While I understand the position you have advanced, and while I have considered it carefully, I am unable to accept it, for several reasons.
>
> First, **although it is true that the IC did not make a finding that you had engaged in intentional deceit,** it appears that the IC was unable – based on the nature of the evidence presented to it – to reach any definitive conclusion about whose specific actions or conduct had caused the irregularities to be present in the images in question. Although you have suggested that one particular member of your laboratory was responsible for all of the identified irregularities, the IC did not make this finding (and it appears from my reading of the Report that it specifically declined to do this). **Accordingly, to the extent that you are suggesting that the IC concluded that you had <u>not</u> engaged in conduct designed to**

> **deceive or even mislead, I do not believe that is a fair reading of the Report.**
>
> Second, the language in the Policy makes it apparent that not all instances of research misconduct, including some of those found by the IC to exist here, require the intention to deceive. The argument you have advanced does not appear to give sufficient consideration to the specific wording of the Policy, nor to the practical result that your argument, if accepted, would have. **Specifically, if intent to deceive was required in every case, it would be impossible to find research misconduct even in circumstances where inaccurate or misleading reporting of research results were due to an ongoing and egregious failure of researchers to exercise appropriate leadership and oversight of those working under their supervision.** Not only would this be a perverse result, it is one that is inconsistent with the clear wording of the Policy. Although you appear to be suggesting that the defining of research misconduct in a way that does not require proof of an intent to deceive makes the Policy anomalous or an outlier in the scientific community, I cannot and do not accept that contention (emphasis added).

[26] With respect to the sanction, Dr. Pisters stated:

> The first question I must consider is whether Drs. Chan and Paige have relied upon or applied any improper or irrelevant considerations in reaching their conclusion about the recommended sanction. I have concluded, after reviewing the detailed listing of factors they took into account, that they have not. All of the listed factors are, in my opinion, both appropriately considered and substantiated by the findings expressed in the Report…
>
> The second element of my consideration of the sanction is an assessment of whether there has been an appropriate balancing of the competing interests that are at stake here. Your interests, understandably, involve being permitted to continue your research activities with a minimum of disruption and in having the findings of the IC impact you as minimally as possible. **The competing considerations or factors are the protection of the interests of potentially affected stakeholders (including the University and the granting agencies which funded some of the research in question), the need for a strong public pronouncement by the UHN regarding its commitment to excellence and rigour in research,** and the creation of disincentives for others in the UHN research community to do anything other than adhere to the highest standards of conduct in research. One of the factors further

> affecting the balancing of these interests is the fact that an investigation into 17 additional papers, of which you are both co-authors, is currently pending and has, I understand, been placed on hold to await the outcome of this investigation. It is to be noted that the proposed sanction is interim in nature and is potentially subject to change based on the outcome of the remaining portion of the investigation.
>
> In the circumstances, I cannot conclude that the recommended sanction of suspension pending completion of the investigation into the additional papers is unreasonable. In fact, I believe it is the most appropriate way of balancing the competing interests that are engaged here. While I note your concern that, given the prospect of a further lengthy investigation, the suspension may in reality amount to a permanent cessation of your research activities at UHN, I believe efforts can be made to avoid this concern becoming a reality. I will therefore direct those at UHN who are responsible for leading the investigation to do whatever is necessary to complete the process as expeditiously as possible (emphasis added).

Can the Decision Be Judicially Reviewed?

[27] The remedy that the Applicants seek is an order quashing the Decision. As the Court of Appeal for Ontario found in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481, at para. 32, the jurisdiction to make such an order:

> … does not depend on whether the decision is an exercise of a statutory power of decision. Rather, the jurisdiction provided by s. 2(1)1 of the *JRPA* turns on whether the…decision is **the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied** (emphasis added).

[28] Relying on the decision of the Federal Court of Appeal in *Air Canada v. Toronto Port Authority*, [2013] 3 F.C.R. 605, the Court of Appeal for Ontario explained that there are a number of factors "relevant to the determination of whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law" (*Toronto Port Authority*, at para. 60). These factors include:

- the character of the matter for which review is sought;
- the nature of the decision-maker and its responsibilities;
- the extent to which a decision is founded in and shaped by law as opposed to private discretion;
- the body's relationship to other statutory schemes or other parts of government;

- the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of the public law remedies;
- the existence of a compulsory power;
- an 'exceptional' category of cases where the conduct has attained a serious public dimension (as summarized in *Setia*, at para. 34).

[29] At paragraph 60 of *Toronto Port Authority*, Stratas J.A. defines the "exceptional" category of cases as those: "[w]here a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public…"

[30] A recent case where one such "exceptional" matter was found is *West Toronto United Football Club v. Ontario Soccer Assn.*, [2014] O.J. No. 4773. By recognizing the ability of the Ontario Soccer Association to determine the eligibility of the province's thousands of soccer players, Nordheimer J. reasoned that this control had a significant and serious effect over a broad segment of the population, at paras. 23-24:

> I have set out the factors that I view as relevant to this case. With respect to those factors, I note that the OSA controls the playing of competitive soccer in Ontario. **While the parties disagree over the precise numbers, there are about 500,000 players under the control of the OSA. Put simply, you cannot play competitive soccer in this Province without subjecting yourself to the authority of the OSA. When one factors into the mix the families and friends of soccer players, the number of people impacted by decisions of the OSA increases into the millions.**
>
> Considering those realities, the actions of the OSA have a very broad public impact and it is correspondingly charged with very public responsibilities. The OSA is charged with ensuring that soccer is played in an organized and fair manner in this Province. Given the increased interest in soccer, and the importance that many people place on being able to play this sport, especially among young people, there is a very large public dimension to what the OSA does. The OSA also clearly exercises a 'compulsory power' over a 'defined group'. **Further, while I would not rely solely on the residual category as providing jurisdiction in this case, it could be reasonably said that the OSA has a very serious effect on the interests of a broad segment of the public.** I am therefore satisfied that the activities of the OSA fall within the purview of public law, at least insofar as it makes decisions fundamental to the sport that it governs (emphasis added).

[31] In this matter, the Decision is one concerning the Applicants' ability to continue performing cancer research, research that affects the medical protocols used in the treatment of cancer for the people of Ontario. For example, as noted in the Applicants' materials, their work has led to the creation of "the largest and only Pathology Department that included all sub-specialized areas of pathology, relied on by 22 other

hospitals across Ontario." The public interest in the Decision is further emphasized by Dr. Pisters when, in reviewing the Sanction Decision, he speaks to the competing interests at stake, including the "need for a strong public pronouncement by the UHN regarding its commitment to excellence and rigour in research."

[32] Additionally, the decision-maker is the CEO of UHN. UHN is a corporation without share capital established under the *UHNA*. Pursuant to s. 4 of that Act, one of the objects of the corporation is the establishment and operation of research facilities and the maintenance and operation of priority programs for cancer research. Thus, the decision at issue concerns one of UHN's core, public functions.

[33] UHN is also a public hospital. As such it is governed by the *PHA*. Under the *PHA*, the Minister of Health and Long-Term Care has the power to supervise and control all aspects of the hospital.

[34] Finally, the Research Policy, the policy pursuant to which the Decision was rendered, is a policy that was mandated by a group of three government agencies that regularly fund research in Canada.

[35] Taken together, all of these factors make the decision one that does come within the purview of public law. As such the decision is one that can be judicially reviewed.

Standard of Review

[36] The Applicants submit that since UHN is uniquely regulated by its own statute, the legislative objectives in the *UHNA* require the Decision to be reviewed on the standard of correctness.

[37] The Respondent argues that since Dr. Pisters was not deciding a question of law, but rather deciding a question of fact within a discretionary framework, the Decision should be reviewed on the standard of reasonableness.

[38] As the Supreme Court of Canada enumerated in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 55: "A question of law that is of 'central importance to the legal system … and outside the … specialized area of expertise' of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62)."

[39] The threshold needed to transform a question of law into one of "central importance to the legal system" is rarely met due to the need for significance that transcends the particular factual and legal context at issue: see *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at paras. 26-27.

[40] In light of this needed centrality and importance, the Applicants' submissions must fail. By premising their argument on the unique nature of the *UHNA*, the Applicants have demonstrated that the Decision does not touch on a central aspect of the legal system as a whole. Rather, the Decision is an application of facts within a highly specialized, regulatory regime.

[41] The Decision will, therefore, be reviewed on the standard of reasonableness.

Procedural Fairness

[42] In oral submissions, the Applicants were clear that they were not making an argument that their rights to procedural fairness were violated. In spite of this fact, their request for relief includes a request that "the matter be wholly re-determined, in an oral hearing."

[43] This is not a case where the decision turned on credibility, thereby necessitating an oral hearing.

[44] The Applicants were advised, in writing, of the nature and scope of the allegations against them. They were advised when those allegations were expanded. They, with the assistance of counsel, engaged with the Committee and participated fully in the investigation, including by making oral and written submissions. They reviewed the Committee's draft report and made comments on it. They were notified of the final report and appealed that decision. They made appeal submissions and reply submissions.

[45] Given that neither the Committee nor Dr. Pisters were making a quasi-judicial decision pursuant to a statutory scheme and no specific procedures were prescribed, the Applicants were awarded the procedural fairness to which they were entitled.

[46] Further, the Applicants participated fully in the investigation and the appeal without ever once suggesting that an oral hearing was necessary. A court may exercise its discretion to refuse a prerogative remedy where the applicant failed to raise any concerns at the time of the proceeding under review: see, for example, *Stetler v. Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal)*, 76 O.R. (3d) 321 (C.A.).

Was the Decision Reasonable?

[47] Under the Research Policy, Research Misconduct is defined as including falsification, fabrication, plagiarism and Material Non-Compliance with accepted standards and regulations.

[48] Fabrication is defined as "Making up data, source material, methodologies, findings or results, including graphs and images, and recording or reporting them."

[49] Falsification is defined as "Manipulating, changing or omitting research materials, equipment, processes, data or results, including graphs and images, without proper acknowledgment such that the research is not accurately represented in the research findings, conclusions or records".

[50] Material Non-Compliance with accepted standards and regulations is defined as:

> a. material failure to correct non-compliance with relevant federal or provincial statutes or regulations for the protection of researchers, human subjects, or the public or for the welfare of laboratory animals; b. material failure to correct non-compliance with other legal or UHN requirements

> that relate to the conduct of research; c. material failure to conform with accepted professional and academic standards and practices with respect to scientific rigor, accountability, honesty, fairness and professional integrity.

[51] The Applicants appealed the Committee's findings of fabrication and falsification on the basis of the fact that they were unaware of the discrepancies in the published images, that, despite these discrepancies, none of the alterations changed the results or conclusions in any way and that they had no intent at any time to falsify or fabricate data.

[52] With respect to the Applicants' submission that to be guilty of falsification or fabrication the discrepancies must be shown to have changed the results or conclusions, the Committee quite properly found that the Research Policy does not contain this requirement.

[53] However, with respect to the argument about lack of knowledge or intent, the Applicants point out that the Committee's decision is clear – they found no evidence that the Applicants knew of any falsification or fabrication and no evidence that would rise to the level of wilful blindness that such practices were occurring in their laboratories.

[54] In response to this submission, Dr. Pisters states: "Accordingly, to the extent that you are suggesting that the IC concluded you had **not** engaged in conduct designed to deceive or even mislead, I do not believe this is a fair reading of the Report." (emphasis in original)

[55] If, by making this comment, Dr. Pisters was suggesting that the Applicants were under any obligation to demonstrate that they had **not** engaged in conduct designed to deceive or mislead, the statement is an unreasonable one. The Applicants had no such onus. At all times, the onus was on the UHN to demonstrate that they had engaged in research misconduct.

[56] I agree with Dr. Pisters that not all instances of research misconduct require an intention to deceive. However, the Respondent, in its submissions on this point, did not argue that the Applicants could be found guilty of Research Misconduct in the form of falsification or fabrication without demonstrating an intent to deceive or knowledge that the conduct was occurring or wilful blindness. Rather, it stated that the Committee only found the Applicants guilty of Research Misconduct in the form of Material Non-Compliance with accepted standards and regulations, not on the basis of falsification and fabrication.

[57] In support of this argument, the Respondent pointed to the appeal submission that the Applicants made to Dr. Pisters. In that submission, the Applicants wrote: "The Investigation Committee found us guilty of research misconduct on the basis of material non-compliance with accepted standards and regulations." Thus, according to the Respondent, even on the Applicants' own understanding, the Committee did not find the Applicants guilty of falsification or fabrication.

[58] What this submission ignores is both the clear wording of the Committee's decision and the Committee's response to the Applicants' appeal submission. In its decision, the Committee states:

> On the basis of the evidence it has reviewed, the Committee has concluded that **Research Misconduct within the meaning of the Policy has occurred, and specifically, that Falsification, Fabrication and Material Non-Compliance have occurred** (emphasis added).

[59] In their response to the Applicants' appeal submissions, Drs. Paige and Chan (the members of the Investigation Committee that imposed the sanction) wrote:

> The IC found that Drs. Ezzat and Asa, as senior authors on the papers in question, had failed to comply with the applicable standards for manuscript preparation and that, accordingly, **in addition to 'falsification and fabrication'**, there had been 'material non-compliance' under the Policy (emphasis added).

[60] Dr. Pisters found that the Committee had correctly applied the Research Policy. Such a finding is troublesome. Specifically, Dr. Pisters failed to consider the Committee's finding that: "The evidence available to the Committee does not permit it to make a determination about how all of the identified irregularities occurred or who in particular caused them to occur." If the evidence did not permit the Committee to determine who engaged in falsification and fabrication, then the evidence does not support a finding that the applicants engaged in those specific forms of misconduct. Thus, to the extent that the Committee found that the Applicants had committed Research Misconduct in the form of fabrication and falsification, that finding was an unreasonable one and to the extent that Dr. Pisters' decision upheld that finding, his decision was also unreasonable.

[61] With respect to Material Non-Compliance, the Committee found that there were repeated instances over a number of years where the images published were not "actual images of the experiment as performed, with alterations disclosed in the figure legend, and limited to those accepted by the journal publication policy and according to the standards of the scientific community." The Committee also found that "the repeated failures of Drs. Ezzat and Asa to comply with these standards for manuscript preparation, including the inability to provide the primary data to match published images and the failure to disclose alterations according to the authorship policies, to constitute Material Non-Compliance under the policy."

[62] Finally, the Committee found that the "instances of inconsistencies and misinformation in responses provided by Drs. Ezzat and Asa during the Investigation process to constitute material failure to comply with accepted professional and accountability standards."

[63] According to the Committee, these multiple instances occurred during the 10-year period between 2002 and 2012; Dr. Ezzat was the only author who contributed to all of the publications where the altered images appeared and Dr. Asa had co-authored all but one of these publications. While Dr. Zhu admitted to being responsible for altering some of the images, he was not the co-author of all the articles where the altered images had

appeared. Furthermore, throughout the 10-year period at issue, there had been different personnel working in Drs. Ezzat and Asa laboratories. According to the Committee:

> Despite the Committee's inability to determine who was responsible for creating each of the identified irregularities in the images, the fact that such irregularities persisted over a 10-year period during which time there were changes in personnel working in Drs. Ezzat's and Asa's labs suggests that there are systemic flaws in the way their laboratories are run, managed and supervised.

[64] Dr. Pisters upheld this conclusion. The question to be addressed on this appeal is whether the inference that there were systemic flaws in the way Drs. Ezzat and Asa ran their laboratories, which in turn led to the publication of articles with altered images that they co-authored, was a reasonable one that was available to the Committee on the evidence it had before them. In my view, it was.

[65] Given this, and given the fact that the multiple instances of image alterations were clearly not in accordance with the publication standards of the journals in which the articles were published, nor in accordance with the standards of the scientific community, it was also reasonable for the Committee to find that the Applicants had committed Research Misconduct in the form of Material Non-Compliance. As Dr. Pisters recognized, researchers such as Drs. Ezzat and Asa, who run laboratories and are the principal investigators and co-authors of publications coming out of those laboratories, have a responsibility to exercise appropriate leadership and oversight of those working under their supervision.

[66] The Applicants correctly point out that the Research Policy does allow for "due latitude" to be given "for honest errors, honest differences in methodology, interpretation or judgment, or divergent paradigms in science". However, the Committee made a specific finding, which was available to them on the evidence it had before them, that the alterations that had occurred could not be ascribed to any of these factors. According to the Committee, they were deliberate alterations that could not be justified. As such, they constituted "genuine breaches of the integrity of the research process", precisely the type of conduct that the Research Policy is aimed at controlling and sanctioning.

[67] For these reasons, I find that Dr. Pisters' decision to uphold the Committee's finding of Research Misconduct in the form of Material Non-Compliance was a reasonable one.

The Sanction Decision

[68] In upholding the Sanction Decision, Dr. Pisters considered whether Drs. Chan and Paige "relied upon or applied any improper or irrelevant considerations in reaching their conclusion about the recommended sanction." In the Sanction Decision itself, Drs. Paige and Chan make it clear that they took into account the **extent** of the Research Policy violations that they had found that the Applicants had committed. In their view, those

violations included fabrication and falsification, findings which I have found to be unreasonable.

[69] It is not possible to know whether, absent the findings of falsification and fabrication, Drs. Chan and Paige would have imposed the same sanction. Therefore, the question of sanction should be remitted to them for reconsideration in light of the findings of this court.

[70] In this regard, we reject the Respondent's position that the Sanction Decision should be remitted to Dr. Pisters for reconsideration. Under the Research Policy, his role is to review the decisions that have been made at first instance, not to make those original decisions. Once Drs. Chan and Paige have had the opportunity to reconsider their decision in light of the reasons of this court, this new decision will also be subject to review by the CEO.

Conclusion

[71] For these reasons, the application for judicial review is allowed on the question of falsification and fabrication, as well as the sanction. The Decision that the Applicants had committed Research Misconduct in the form of falsification and fabrication is set aside. The Decision that the Applicants had committed Research Misconduct in the form of Material Non-Compliance is upheld. The question of the appropriate sanction is remitted to Drs. Chan and Paige for reconsideration in light of the findings of this court.

[72] As per the agreement of the parties, the Applicants are entitled to their costs of this application, fixed in the amount of $20,000.00.

MARROCCO, A.C.J.S.C.

H. SACHS J.

VARPIO, J.

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SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., H. Sachs and Varpio JJ.

BETWEEN:

SYLVIA ASA and SHEREEN EZZAT

Applicants

– and –

UNIVERSITY HEALTH NETWORK

Respondent

REASONS FOR JUDGMENT

H. SACHS J.

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