

**UNIVERSITY OF TORONTO STUDENTS' UNION  
APPELLATE BOARD**

**BETWEEN:**

**Michael Samakayi**  
Appellant  
and  
**Elections & Referenda Committee**  
Respondent

*Samakayi v. ERC (CRO Ruling #1)*

**Hearing:** March 23, 2019

**Written reasons:** March 26, 2019

**Panelists:** Andrew Kidd (Chair), Jacob Eidinger, Arumuga Ganesan, Teodora Pasca, Andy Yu

**Appearances:**

Michael Samakayi and Ammara Wasim, for the Appellant  
Anne Boucher and Tyler Biswurm, for the ERC

Appeal from Ruling 1 (March 18, 2019) of the Elections & Referenda Committee, upholding Ruling 1 of the Chief Returning Officer. Appeal allowed.

The following is the judgment delivered by

THE BOARD —

Introduction

1. Mr. Samakayi is deaf and requires ASL interpretation for interactions with others, including during meetings and campaign-related activities. He is seeking candidacy for the position of Vice-President (VP) Equity of the University of Toronto Students' Union (UTSU). The Chief Returning Officer (CRO) of the UTSU, who knew Mr. Samakayi needed ASL interpretation, determined that he did not fulfill the nomination requirements, and so could not run as a candidate in the election scheduled for March 2019. However, Mr. Samakayi maintains that he could not fulfill the nomination

requirements only because the UTSU failed to reasonably accommodate him, given knowledge of his disability. The UTSU maintains that it fulfilled any duties it had.

2. This case raises three issues. First, did the UTSU reasonably accommodate Mr. Samakayi up until the CRO's decision to find him ineligible for candidacy? Second, did the UTSU provide procedural fairness in Mr. Samakayi's appeal of the CRO's decision to the Elections & Referenda Committee (ERC)? Third, was the ERC's decision in dismissing Mr. Samakayi's appeal reasonable?
3. We allow Mr. Samakayi's present appeal of the ERC's decision to this Board. We do so on the basis of our answers to the second and third questions. The ERC's decision failed on both procedural and substantive grounds, where each of these failures provides a standalone basis for quashing the decision. Since each of these grounds suffices to dispose of the appeal, it is unnecessary to decide the substantive question of whether the UTSU reasonably accommodated Mr. Samakayi up until the CRO's decision, and we decline to do so.

#### Facts and Prior Proceedings

4. On March 7, 2019, Mr. Samakayi communicated his need for accommodation by means of ASL interpretation to the CRO, with respect to the All Candidates' Meeting, in-person campaigning, and the debate. The CRO responded that the UTSU would provide ASL interpretation for the official UTSU events—the All Candidates' Meeting, the debate, and the UTSU meeting in April—but not for campaigning. The CRO explained that Mr. Samakayi could claim valid expenses for booking ASL interpretation.
5. The nomination period opened on Monday, March 11, at 9:00 am, and closed on Friday, March 15, at 5:00 p.m. The next day, Saturday, the CRO e-mailed Mr. Samakayi to inform him that his nomination would not be proceeding because he had collected an insufficient number of valid signatures. Art. III(4)(b) of the *University of Toronto Students' Union Elections Procedure Code* (EPC) requires that candidates provide 100 valid signatures. Although Mr. Samakayi provided over 100 signatures, only 95 of them were valid.
6. Mr. Samakayi appealed the CRO's decision to the ERC. On Sunday, March 17, at 6:22 p.m., the Chair of the ERC contacted him by e-mail and invited him to attend the hearing of his appeal, which was scheduled for the next day at 6:00 p.m. No mention was made in the e-mail of any possible ASL interpretation at the meeting, although the Chair of the ERC clarified to the Board following the hearing that her intention had been to book ASL tele-interpretation. She also noted that Mr. Samakayi had used this type of service before when he sat on committees as a Woodsworth College Director.

7. Mr. Samakayi responded to that invitation at 11:22 p.m. He provided written submissions to support his appeal but did not respond to the Chair's invitation in person. At the hearing before the Board, Mr. Samakayi and the current VP Equity, Ms. Ammara Wasim, indicated that Mr. Samakayi could have pleaded his case if he had been accommodated. Mr. Samakayi provided further clarification in an e-mail that, given the late notice, he believed it would have been impossible to book ASL interpretation and so did not see the point in attending in person.
8. The ERC met as scheduled on Monday, March 18. Mr. Samakayi's appeal was the sole issue on the agenda. The CRO was not present, but provided a short written defence of her decision. The Chair read both this statement and Mr. Samakayi's written submissions to the committee. Following some debate, the committee voted to uphold the CRO's decision. This decision was not unanimous, and one member abstained. In a departure from past practice, the committee did not issue formal written reasons for the decision, but did make the minutes available.
9. Mr. Samakayi appealed the ERC's decision to this Board under Bylaw XVIII(9). We granted leave to appeal on March 20. We also suspended the election for VP Equity until the resolution of the appeal. We heard the appeal on March 23.

### Issues

10. This case raises three issues:
  1. Did the UTSU reasonably accommodate Mr. Samakayi up until the CRO's decision to find him ineligible for candidacy?
  2. Did the UTSU breach its duty of procedural fairness to Mr. Samakayi in his appeal of the CRO's decision to the ERC?
  3. Was the ERC's decision in dismissing Mr. Samakayi's appeal reasonable?
11. As indicated above, we allow Mr. Samakayi's appeal to this Board on the basis of our answers to the second and third questions, where our answer to each of these questions suffices to dispose the appeal in his favour. It is accordingly unnecessary to answer the first question, and we decline to do so.
12. In his written submissions, Mr. Samakayi also raised arguments under s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11*, and under the *Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11 (AODA)*. While we need not address these arguments to resolve the appeal, we note that the principles outlined in both

s. 15 of the *Charter* and s. 1 of the AODA are reflected in the UTSU's Mission Statement, its Purposes, and, most importantly, its newly passed Accessibility Policy. The Preamble to that Policy states that "[t]he UTSU is committed to fulfilling their requirements under the Accessibility for Ontarians with Disabilities Act." As we make clear below, the principles of respect for individual rights and the elimination of discrimination should have applied throughout these proceedings.

#### Issue 1: Guidance on Whether the UTSU Reasonably Accommodated Mr. Samakayi Up Until the CRO's Decision

13. This was the key substantive issue in dispute between the parties, and both parties focused their submissions on this issue. Although we decline to resolve the issue, it is well within this Board's mandate to clarify the applicable principles and provide future guidance. We take this opportunity to do so in light of the contentious nature of this issue.
14. First, the ERC repeatedly asserted in its oral submissions that it had no duty to consider reasonable accommodation unless the person requiring it specifically requests a certain accommodation. This claim contradicts the UTSU's own policies. Under s. 3 of its Accessibility Policy, the UTSU is required to "consider and implement, *without request*, upon it being reasonable to do so" [emphasis added], various accommodations for "all events, campaigns, and activities." Art. II(2)(b) of the EPC requires that all elections be administered in accordance with the Accessibility Policy.
15. Second, the ERC claimed that it would be inappropriate for the Board to cite unwritten principles in determining how the UTSU should conduct itself. The implicit suggestion is that the UTSU's written principles do not impose obligations that it failed to meet. This too is in error. The UTSU's conduct in this case should have been governed by no less than the UTSU's own written principles. This Board is empowered to consider written principles within the UTSU's own Bylaws and other written policies.
16. Besides the Accessibility Policy, the UTSU is governed by its Bylaws: the EPC states that, "[w]here this Code is in contradiction of the Union Bylaws, the Union Bylaws will prevail": Art. II(1)(b). The Bylaws (and the UTSU's Letters Patent) outline the Mission Statement (p. 4) and Purposes (p. 5), where these inform and constrain the UTSU's conduct. For example, the Mission Statement states that the UTSU aims "[t]o safeguard the individual right of the student, regardless of... physical ability" (principle 1) and "[t]o endeavor to bring about a fundamental redistribution of power so as to permit substantially greater participation by students in making those decisions which affect their lives" (principle 4). Similarly, the Purposes state that the UTSU aims "to work towards building an environment free of systemic societal oppression": s. 2(g).

17. Further, this Board may also consider principles of law beyond the immediate text of written provisions. In Canadian administrative law, there is no such thing as absolute or unconstrained discretion, irrespective of the written text of empowering provisions. All administrative decisions are subject to review for reasonableness: *Roncarelli v. Duplessis*, [1959] SCR 121; *Baker v. Canada (Minister of Immigration)*, [1999] 2 SCR 817. In *Baker*, the Supreme Court of Canada affirmed the *Roncarelli* principle that, even where an administrative decision-maker has broad statutory authority, “discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law”: para. 53.

#### Issue 2: The ERC Violated Mr. Samakayi’s Right to Procedural Fairness

18. We allow the appeal on the ground that the ERC violated Mr. Samakayi’s right to procedural fairness with respect to his hearing on the appeal of the CRO’s decision.

#### *Procedural Fairness Requirements*

19. The EPC sets out in detail the procedural rights of candidates appealing decisions of the CRO to the ERC. Art. VI(3)(f)(iii) allows them to “attend the ERC meeting at which their appeal will be considered,” “make oral statements and/or deliver a written statement to present their case,” “have the opportunity to address... [the CRO’s] arguments, and answer questions from ERC members.”
20. These procedural rights must be read in light of the Accessibility Policy, which came into force on March 7, 2019, the same day as the current version of the EPC. The Accessibility Policy requires the UTSU to provide reasonable accommodations in conducting its activities, which includes meetings of the Board *and its committees*, including sign language interpretation: ss. 3(a)(ii), 2(b)(ii). Again, s. 3 holds that the UTSU must consider and implement reasonable accommodations without request.

#### *The ERC’s Conduct*

21. In effect, by choosing to schedule the meeting in less than 24 hours, the ERC made it impossible for Mr. Samakayi to exercise his procedural rights under Art. VI(3)(f)(iii) with the necessary accommodation. It was not reasonable to expect Mr. Samakayi to be able to book his own ASL interpreter with less than 24 hours to spare.
22. As noted above, the Chair of the ERC clarified in an e-mail following the hearing that she had intended to book ASL tele-interpretation. We take that assertion at face value. However, that intention, which was never communicated to Mr. Samakayi, cannot by itself discharge the ERC’s duty of procedural fairness. Simply because he had been

provided with such services in the past was not reason for him to assume that they would be provided this time.

23. Indeed, Mr. Samakayi made clear at the hearing that from his point of view, the UTSU's approach during this election had been to refer him to the University's accessibility services. At the very least, the ERC should have made it clear to Mr. Samakayi that they would provide accommodation for him at the meeting. We note that Mr. Samakayi submitted that it would have been "impossible" to book interpretation on such short notice, although we cannot make a finding on this point with the limited evidence available.

### *Conclusion*

24. In sum, the ERC heard the appeal of the CRO's decision without regard to Mr. Samakayi's procedural rights and accommodation requirements. Given its own Accessibility Policy and the EPC, the ERC failed to provide a procedurally fair hearing.

### Issue 3: The ERC's Decision was Unreasonable

25. Another basis for allowing the appeal is on the ground of the unreasonableness of the ERC's decision.

### *Standard of Review and Reasonableness*

26. As this Board's jurisprudence has established, the standard of review applicable to reviewing ERC decisions is reasonableness: *Demand Better v. ERC (Ruling 020)* (24 April 2017) at paras. 20–24; *We the Students v. ERC (Ruling 022)* (24 April 2017) at paras. 15–16.
27. Reasonableness is a deferential standard that involves showing that the decision under review is justifiable, transparent, and intelligible, and that it falls within a range of reasonable outcomes which are defensible with respect to the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. At the same time, reasonableness "takes its colour from the context": *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.
28. Although reasonableness review assesses both the reasons and the result together in a single organic exercise, the reasons must show that the decision-maker grappled with the substantive live issues: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 14, 9.
29. In considering the reasonableness of the ERC's decision, it is relevant to consider whether "[the ERC] misapplied the relevant Bylaws and/or Policies, or otherwise

breached the principles of fundamental justice”: Bylaw XVIII(9)(a); *We the Students* at para. 15.

*The ERC’s Reasons and the UTSU’s Bylaws and Accessibility Policy*

30. Here, because the ERC did not release other written reasons for its decision, we take the minutes of the ERC’s meeting on March 18, 2019 at 6:00 pm to be the reasons for its dismissal of Mr. Samakayi’s appeal from the CRO’s decision. There, Ms. Anne Boucher, President of the UTSU, stated that “all discussions and Committee deliberations must be public and may not enter camera,” as required under the EPC: Art. VI(3)(f)(iii). Accordingly, we take the minutes to be a complete written record of the ERC’s reasons.
31. A substantive live issue in this case was the applicability of the UTSU’s Bylaws and Accessibility Policy to the UTSU’s conduct with respect to Mr. Samakayi. This speaks to the substantive issue of whether the UTSU reasonably accommodated him in seeking candidacy for the VP Equity position. While this Board declines to resolve this issue on this appeal, the ERC itself was obliged to consider the issue.
32. However, there is no evidence that the ERC duly considered the applicability of its own Bylaws and Accessibility Policy. Although the ERC discussed whether the UTSU reasonably accommodated Mr. Samakayi, the discussion was confined to the specific requests he made respecting the All Candidates’ Meeting, the Executive Debate, and the Annual Ratification Meeting. There was no consideration of whether the UTSU had to provide reasonable accommodation on its own initiative, as the Accessibility Policy requires. There was no consideration of how the UTSU’s Mission Statement and Purposes should inform the UTSU’s conduct.
33. Accordingly, the ERC failed to consider a substantive live issue. The issue was relevant to determining whether Mr. Samakayi should have been approved as a candidate despite his failure to provide 100 verified nominations, as required under Art. III(4)(b) of the EPC. Although the fact that he failed the strict nomination requirements is not in dispute, that fact does not settle the substantive issue of whether the UTSU met its duty to provide reasonable accommodation. During the nominations period, a potential reasonable accommodation was to allow for the collection of signatures online rather than in person. It is our understanding that Ms. Wasim communicated this possibility to Ms. Boucher, although this was apparently not communicated to the CRO. Another potential reasonable accommodation was to relax the strict nomination requirements in this case.
34. As several members of the ERC implicitly conceded in their meeting minutes, the ERC did retain some discretion on how to apply the 100-signatures rule. Mr. Tyler Biswurm stated that “the only grounds to overturn the decision are the committee’s decision on the

effect the surgery had on Samakayi's ability to collect signatures." Ms. Boucher stated that she did not see a reason to overturn the CRO's ruling "based on the circumstances of surgery," implying that those circumstances could be taken into account (even if rejected) despite being outside the scope of the written rule. The issue of accommodation and in particular the Accessibility Policy was relevant to how this discretion should have been exercised.

35. We make no finding on whether Mr. Samakayi's surgery was a significant factor preventing him from meeting the nomination requirements. We also make no finding on whether relaxing the requirements for him, for various reasons, would amount to reasonable accommodation. Rather, the point is that, given knowledge of his disability, the UTSU was obliged to consider, on its own initiative, reasonable accommodations, including the possibility of relaxing the requirement for him due to the circumstances of this case. See *Moore v. British Columbia (Education)*, 2012 SCC 61 at paras. 52, 70.
36. We appreciate the UTSU's insistence on the need to consistently uphold clear nomination requirements. Nonetheless, the facts and applicable principles in this case may call for a more flexible approach, and should inform the scope and exercise of the ERC's discretion when considering how to apply the nomination requirements.
37. Quite aside from the Accessibility Policy, we note that the anti-discrimination law jurisprudence in Canada is clear. Discrimination can be in either intent or in effect: *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 174; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at 25 [*Meiorin*]. Further, reasonable accommodation can require relaxing clear requirements: *Meiorin* at paras. 62–68, 72–83; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at paras. 21–22, 32–44.
38. Among the considerations worth bearing in mind are the following: Mr. Samakayi communicated his disability and need for accommodation to UTSU; his surgery and lack of ASL during the nominations period likely made it harder for him to acquire signatures; the nominations period was shorter this year than in previous years; and he nonetheless secured over 100 signatures, although fewer than 100 of them were valid. Further, all this must be viewed in light of the UTSU's own governing principles.

### *Conclusion*

39. The ERC failed to consider the substantive live issue of whether it had reasonably accommodated Mr. Samakayi in light of the UTSU Bylaws and Accessibility Policy. That failure leads us to find that the ERC's dismissal of the appeal was unreasonable. In

this context, the decision was not justifiable, transparent, and intelligible, as required by *Dunsmuir*: para. 47.

### Disposition

40. We allow the appeal on the ground that the ERC violated Mr. Samakayi's right to procedural fairness, and on the further ground that the ERC's decision was unreasonable.

### Remedy

#### *Rescinding Our Earlier Directive*

41. On March 20, 2019, the Board issued a directive to the UTSU requiring, *inter alia*, that the VP Equity election be immediately suspended and specifying amended timelines for campaigning and voting pending the resolution of Mr. Samakayi's hearing. We issued this directive in response to requests for guidance from the UTSU, and out of concern that not postponing the election until the matter was resolved would significantly prejudice Mr. Samakayi whether or not we ruled in his favour.
42. At present, in light of information the UTSU has provided about the cost of holding an additional election, we rescind ss. 3 and 4 of our Directive that specified new election dates. In place of those sections, we direct that the VP Equity election shall take place at the same time as the by-election scheduled for April 2019.

#### *Quashing and Remittance*

43. The usual remedy for a breach of procedural fairness is to quash the administrative decision under review (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 645) and remit the matter back to the decision-maker for reconsideration (*Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 at 862–863). This remedy is consistent with the remedies available for a finding of unreasonableness: *Canada (Attorney General) v. Shakov*, 2017 FCA 250 at para. 82.
44. Accordingly, we direct the ERC to re-hear Mr. Samakayi's appeal of CRO Ruling #1 and reconsider the decision to deny Mr. Samakayi the opportunity to run in the VP Equity election. In the re-hearing, the ERC must consider the Mission Statement and Purposes outlined in the UTSU Bylaws and the Accessibility Policy. The ERC must also meet its duty of procedural fairness, so it must provide Mr. Samakayi with the reasonable opportunity to be present and reasonable accommodation.
45. The meeting shall be held as soon as possible, and shall be scheduled so as to allow Mr. Samakayi to appear with an interpreter and any other persons he desires to have present

to advocate on his behalf. Additionally, the CRO shall either attend the meeting in person or provide a detailed written explanation to “explain the reasons for their original decision,” as required under the EPC: Art. VI(3)(f)(iii). The meeting must be scheduled at least five (5) days before the start of the VP Equity voting period in April to allow Mr. Samakayi the appropriate length of time to campaign as a candidate if the ERC rules in his favour.

*Appeal allowed, decision quashed.*