

Case Name:
University of British Columbia (Re)

Between
The University of British Columbia (the
"University"), and
University of British Columbia Faculty Association
(the "Faculty Association")

[2004] B.C.L.R.B.D. No. 331

BCLRB Decision No. B330/2004

Case No. 51448

British Columbia Labour Relations Board

G.J. Mullaly (Vice-Chair)

October 26, 2004.

(39 paras.)

Counsel:

Donald J. Jordan, Q.C., for the University

Allan E. Black, Q.C., for the Faculty Association

DECISION OF THE BOARD

I. INTRODUCTION

1 The University applies under Section 99 of the Labour Relations Code (the "Code") for review of an arbitration award issued by Marguerite Jackson, Q.C. (the "Arbitrator") on April 15, 2004 (the "Award"). When the University's President, Dr. Martha Piper (the "President"), did not recommend that Dr. Lance Rucker be promoted to Professor, the Faculty Association filed a grievance (the "Grievance"). The Arbitrator allowed the Grievance. The University maintains that her Award is contrary to principles expressed or implied in the Code.

II. BACKGROUND

2 Dr. Rucker is an Associate Professor in the Department of Oral Sciences, Faculty of Dentistry at the University. He became eligible to be considered for promotion to the rank of Professor in 2001. The Faculty Association brought the Grievance when the President decided not to recommend Dr. Rucker's promotion.

3 The appointment of faculty members of the University is subject to the provisions of the University Act, R.S.B.C. 1996, c. 468 (the "University Act"). Section 27(2)(g) of the University Act provides that, subject to Section 28 the University Act, the University's Board of Governors has the power to appoint professors. Section 28(3) of the University Act provides, in part, that members of the University's faculty "... must not be promoted ... except on the recommendation of the President." Section 29(2)(a) of the University Act gives the President of the University the power to make such a recommendation.

4 The University and the Faculty Association are party to an "Agreement on Conditions of Appointment for Faculty" (the "Agreement"). It specifies, in Article 3.07(b), the criteria for appointment to the rank of Professor. They include "sustained and productive scholarly activity".

5 Article 1 of the Agreement defines "scholarly activity":

"Scholarly activity" means research of quality and significance, or in appropriate fields, distinguished, creative or professional work of a scholarly nature, and the dissemination of the results of that scholarly activity.

6 Article 4 of the Agreement specifies what will count as evidence of scholarly activity for the purpose of decisions regarding appointment, reappointment, tenure and promotion. It provides that:

Evidence of scholarly activity varies among the disciplines. Published work is where appropriate, the primary evidence. Such evidence as distinguished architectural, artistic or engineering design, distinguished performance in the arts or professional fields, shall be considered in appropriate cases. In professional or clinical studies scholarly activity may be evidenced by research on or the creation of

- (a) significant applications of fundamental theory; or
- (b) significant forms and applications of professional or clinical practice. Work with professional, technical, scholarly or other organizations or with scholarly publications which falls within the definition of scholarly activity may also be considered. Judgment of scholarly activity is based mainly on the quality and significance of an individual's contributions.

7 Article 13 of the Agreement sets out the procedure for appealing decisions regarding appointment, reappointment, tenure and promotion. Such a decision may be appealed to an arbitration board on two grounds: that it was unreasonable or arrived at through procedural error. Article 13 also provides that if an arbitration board finds that a decision about appointment, reappointment, tenure or promotion was "unreasonable" it "... shall reverse the decision ...".

8 The Faculty Association maintained the decision not to recommend Dr. Rucker's promotion was both unreasonable and arrived at through procedural error. The University conceded that a procedural error had been made but disputed that the President's decision not to recommend the Dr. Rucker's promotion had been unreasonable.

9 The Arbitrator found that the President's decision not to recommend the Dr. Rucker's promotion was unreasonable. She concluded that:

In light of my finding that on the evidence the decision of Dr. Piper was unreasonable, that decision is reversed and becomes a determination that recommends Dr. Rucker's promotion. (Award, p. 24)

III. POSITIONS OF THE PARTIES

10 The University states that the Award is contrary to principles expressed or implied in the Code for four reasons:

1. The Arbitrator read out portions of the Agreement when making her decision;
2. The Arbitrator exceeded her jurisdiction by failing to interpret the Agreement in a manner consistent with the University Act, R.S.B.C. 1996, c. 468;
3. The Arbitrator exceeded her jurisdiction by failing to interpret the Agreement in a manner consistent with the Charter of Rights and Freedoms; and
4. The Arbitrator granted a remedy that was "unreasonable, arbitrary and capricious" given the evidence before her.

11 In view of the conclusions I have reached, I will not set out the position taken by the Faculty Association except to note that, in addition to disputing the merit of arguments made by the University, it disputes the University's entitlement to make its first three arguments at this stage since those arguments were not made to the Arbitrator. The University does not dispute the Faculty Association's contention that it did not make the first three arguments to the Arbitrator but it submits that its arguments are "embraced by the caveat" that the Board will allow a party to make new arguments if they arise from the arbitrator's reasons in an unanticipated way. I have serious reservations about whether the University's first three arguments do arise from the arbitrator's reasons in an unanticipated way. Nevertheless, I prefer to adjudicate this application by deciding whether the University's arguments have merit.

IV. ANALYSIS AND DECISION

STANDARD OF REVIEW

12 The Board has a limited supervisory role under Section 99 of the Code. The Board summarized that role in Health Employer's Association of British Columbia, Letter Decision BCLRB No. B439/98:

The Board's jurisdiction to review an arbitrator's award under Section 99 is limited to a supervisory role in ensuring that the express and implied provisions of the Code and the requirements of a fair hearing are met: British Columbia Tran-

sit, BCLRB No. B54/97. An award will be given a sympathetic reading: Western Mines, BCLRB No. 81/76, [1977] 1 CLRBR 52. The Board will give deference to an arbitrators [sic] factual findings, assessments of credibility, and the weight assigned to the evidence: Unisource Canada Inc., BCLRB No. B162/94. Even though the Board may have arrived at a different outcome, it will not interfere with an award where the principles on which the analysis is based are sufficiently expressed: The Board of School Trustees District No. 46 (Sunshine Coast), BCLRB No. B389/94 (Reconsideration of BCLRB No. B100/93).

FIRST GROUND OF REVIEW

13 The University submits that the Arbitrator's interpretation of Article 4.03 reads out the "threshold step" described in it, i.e., determining in every case whether it is appropriate that published work be the primary evidence of scholarly activity. Instead, according to the University, the Arbitrator interpreted Article 4.03 to mean that an individual's publication record is not the primary means of evaluation in any case put forward as a professional case:

Under the arbitrator's interpretation of Article 4.03, as long as a case is put forward as a professional case then the alternative means of assessment set out in the Agreement and the Guide are employed and the publication record is no longer the primary means of evaluation. This approach ignores or reads out the threshold step described in Article 4.03 which is to determine whether this is a case in which it is appropriate that published work be the primary evidence of scholarly activity. ...

14 This is not an accurate characterization of the Arbitrator's reasoning. Although it is clear from that reasoning that she did not agree that in Dr. Rucker's case it was appropriate to take published work as the primary evidence of "scholarly activity", it is also clear that she did not find the President's decision to be unreasonable because the President had taken published work to be the primary means of evaluation. The Arbitrator found the President's decision to be unreasonable because she found as fact that the President had ignored or excluded from consideration other evidence of "scholarly activity":

Dr. Piper was only prepared to accept one way by which the test of "scholarly activity" could be met and that was by publications in peer reviewed journals. Article 4.03 says that in appropriate cases other evidence "shall be considered". As noted earlier, that other evidence includes "distinguished performance in ... professional fields". This is not to say that Dr. Rucker's scholarly publications - and there were a number - could not be considered. But the parties have agreed in article 4.03 that this is not the only evidence of "scholarly activity".

The definition of "scholarly activity" in article 1.01 includes within it the following two components: one, distinguished, creative or professional work of a scholarly nature; and, two, the dissemination of the results. The dissemination is part of the definition of "scholarly activity" as is the reference to "work of a scholarly nature". It follows that the type of evidence - other than published work - that the parties have agreed in article 4.03 can be used to establish "scholarly activity" in

appropriate cases is evidence that satisfies both components that are included within the definition of that term.

Dr. Piper failed to consider that other evidence in assessing the fundamental question of "scholarly activity". Her decision was unreasonable as she acted contrary to, or ignored, the agreement between these parties. It is obvious from Dr. Piper's decision and from her viva voce evidence that she did not consider the possibility of evidence of scholarly activity other than peer reviewed publications. A decision is unreasonable when evidence that the parties have agreed should be considered is ignored or excluded from consideration. Dr. Piper was obligated under the terms of the agreement to consider evidence beyond that of peer reviewed publications. She did not.

It was evident from Dr. Rucker's testimony and his curriculum vitae that in addition to his publication record, he has presented papers and reports at meetings at numerous regional, national and international level invited lectureships. I note that Dr. Piper agreed in cross-examination that presentation at such conferences was one way to disseminate professional work.

In the case of Dr. Rucker there was an amplitude of evidence of "distinguished performance" in the professional field of dentistry including research on and the creation of significant forms and applications of professional practice.

Dr. Piper's decision was unreasonable. It was unreasonable because it was based on her view that professional work of a scholarly nature can only be evaluated by its dissemination in peer review journals. That was the foundation for Dr. Piper's decision as spelled out in her letter and there was nothing in her viva voce testimony that suggested otherwise.

Dr. Piper failed to properly interpret and apply the relevant criteria in accordance with article 4.03. She failed to apply the definition of "scholarly activity" appropriate for a professional case. Her reason for not recommending Dr. Rucker's promotion was not tenable. I find that on the evidence Dr. Piper's decision was unreasonable. (Award, pp. 18, 19, 20 and 21, emphasis added)

15 In its submissions to the Board, the University provides an account of the President's testimony that does not accord with the findings of fact made by the Arbitrator. According to the University "Dr. Piper testified she believed [Dr. Rucker's] professional contribution had been outstanding. However, as this was a case where peer review was appropriate, she looked to his publication record as the primary evidence with which to assess his professional and scholarly contribution ...". (emphasis added).

16 The Board described the extent of the deference it accords to an arbitrator's findings of fact in *Fording Coal Ltd.*, Letter Decision BCLRB No. B372/95:

Absent extraordinary circumstances, the Board will not interfere with an Arbitrator's findings of fact or the conclusions drawn from the evidence. Further, the Board has consistently maintained that it will not interfere with an Arbitrator's assessment of the credibility of witnesses ...

Where an arbitrator's findings of fact amount to a violation of the principles of natural justice the circumstances may justify the Board's interference. There is also a requirement that the arbitrator's decision reveal his or her reasoning process ...

Finally, there must be at least some evidence to support the Arbitrator's evidentiary conclusions. In those rare circumstances where the Board will review an arbitrator's findings of fact, it relies upon the test articulated by the Supreme Court of Canada in *Stein v. The Ship Kathy "K"* (1975), 62 D.L.R. (3d) 1 (S.C.C.), which requires a "palpable and overriding error". (see also *Western Canada Steel, IRC No. C185/91* (Reconsideration of *IRC No. C242/90*); and *The Board of School Trustees of School District No. 46 (Sunshine Coast)*, supra, pp. 18-19. (pp. 5-6)

17 In this case the University has not even alleged, let alone demonstrated, that the Arbitrator made a "palpable and overriding error" when she found that the President did not consider evidence of scholarly activity other than peer reviewed publications when deciding whether to recommend Dr. Rucker's promotion. In this regard I note that the University's submissions to the Board are not accompanied by a statutory declaration disputing any of the Arbitrator's findings of fact.

SECOND GROUND OF REVIEW

18 The University's second ground of review is that the Arbitrator exceeded her jurisdiction by failing to interpret the Agreement in a manner consistent with the University Act.

19 Section 28(3) of the University Act provides:

- (3) A member of the teaching staff of the University or of any faculty of the University must not be promoted or removed except on the recommendation of the President.

20 Section 59 of the University Act sets out the powers of the President of the University. Section 59(2)(a) provides that the President has the power:

- (a) to recommend appointments, promotions and removal of members of the teaching and administrative staffs and the officers and employees of the University.

21 The University maintains the Arbitrator "... interpreted her remedial authority in a manner that directly conflicts with an express grant of power in the University Act". It submits:

Under the University Act, the power to recommend promotion, tenure and reappointment is vested in the office of the President. It is a personal grant of power to the individual holding that office, in this case Dr. Piper. The effect of the arbitrator's remedial order is to direct the President to exercise her discretion in a particular manner. She is directed to make a recommendation contrary to the recommendation she made in good faith pursuant to her statutory authority. The effect of the order denies the President the opportunity to reconsider her decision and to determine whether she can recommend promotion as an exercise of her discretion free from coercion. (emphasis added)

22 The University submits that the Arbitrator was required to harmonize the University Act's personal grant of power with the requirement in Article 13.07(c) of the Agreement that unreasonable decisions be reversed'. According to the University, to harmonize the University Act and the Agreement the Arbitrator had to interpret "reverse" to mean only "revoke" or "annul" thus leaving the President free to reconsider her decision and again decide whether to recommend promotion.

23 I do not agree with the University that the effect of the Arbitrator's remedial order is to direct the President to exercise her discretion in a particular manner. The Arbitrator did not direct or require the President to do anything. The effect of the Award is only that the President's unreasonable decision to not recommend a promotion is deemed to be the recommendation of that promotion.

24 More importantly, I do not accept the University's contention that the Agreement has to be read in a way that harmonizes it with the provisions of the University Act. Instead, the authorities stand for the proposition that unless the University Act clearly excludes the operation of the Agreement, the University Act must be read in such a way that harmonizes it with the Agreement.

25 In *B.C.G.E.U. v. British Columbia (Government Personnel Services Division)* (1987), 12 B.C.L.R. (2d) 97 [1987] B.C.J. No. 391 the Court of Appeal considered how a statute could clearly exclude the operation of a collective agreement. In that case the Court was concerned with s. 73(2) of the Forest Act, R.S.B.C. 1979, c. 140 which gave a Regional Manager of the Government's forest service a discretion to contract out the work of forest service scalers. The Government and the BCGEU later entered into a collective agreement that provided that the Government would not contract out any work if that would result in the laying-off of employees covered by the collective agreement (including the scalers). When some of the scalers were laid off because the Government contracted out their work, the BCGEU grieved. An arbitration board dismissed the grievance on the basis that the collective agreement could not fetter the Regional Manager's discretion to contract out work. The BCGEU appealed and the Court of Appeal allowed the appeal:

... No doubt the Legislature could exclude s. 73(2) from the collective bargaining process as it has done with a number of other subjects by s. 13 of the Public Service Labour Relations Act. Thus, for example, the principle of merit and its application in the appointment and promoting of Employers is excluded (s. 13(a)). That exclusion has not been made in this case.

The question, in my view, is what the effect is on legislation then in existence when the Employer agrees in the collective bargaining process to restrict the right to contract out. The decision of the Supreme Court of Canada in *Durham Regional Police Association* is authority for the proposition that the existing leg-

isolation must be read in such a way as to harmonize with the collective agreement unless the operation of the latter is clearly excluded ...

Chief Justice Laskin, speaking for the Supreme Court of Canada, said at page 714:

The supersession of s. 24(6) by a post-enacted provision for collective bargaining still leaves s. 24(6) operative in respect of members of the police force who are not under a collective bargaining relationship with the Board of Commissioners of Police ...

Paraphrasing Chief Justice Laskin, I would say that Article 24 still leaves s. 73(2) operative for those instances where the exercise of the discretion would not result in the laying off of forest service scalers.

26 The Government has not excluded Section 59(2)(a) of the University Act from the collective bargaining process. The Agreement provides that decisions of the President about the promotion of members of the Faculty Association are subject to review by an arbitrator, and reversal if they are found to be unreasonable. I find that the Agreement still leaves Section 59(2)(a) operative when the President's exercises her discretion in a reasonable way. Accordingly, I find that Section 59(2)(a) of the University Act can be harmonized with the Agreement.

THIRD GROUND OF REVIEW

27 The University's third ground of review is that the Arbitrator exceeded her jurisdiction by failing to interpret the Agreement in a manner consistent with the Charter of Rights and Freedoms. Its argument for this ground of review is brief:

The effect of the arbitrator's remedial order is to direct the President to exercise her discretion in a particular manner. She is directed to make a recommendation contrary to the recommendation she made in good faith pursuant to her statutory authority. The effect of the order denies the President the opportunity to reconsider her decision and to determine whether she can recommend promotion as an exercise of her discretion free from coercion.

The arbitrator's order violates the President's freedom of expression by requiring her to make a recommendation to the Board of Governors as if it were her own, which she might not otherwise make and which might not reflect her assessment or opinion of Dr. Rucker's suitability for promotion. (emphasis added)

28 I do not accept this characterization of the Arbitrator's remedial order. Having found that the President's decision not to recommend the Dr. Rucker's promotion was unreasonable, the Arbitrator reversed that decision. She did not direct or require the President to do anything. The effect of the Award is only that the President's decision is deemed to be a decision to recommend the Dr. Rucker's promotion. The President remains free to hold and express any opinion she wishes on the matter.

FOURTH GROUND OF REVIEW

29 The University's fourth ground of review is made in the alternative. It submits that if the Arbitrator had the jurisdiction to reverse the President's decision, she "... improperly exercised her discretion to do so in the circumstances of this case." The University's argument relies on the provisions of Article 13.07 of the Agreement and the fact that at the arbitration it acknowledged that there had been a procedural error made during the consideration of the Dr. Rucker's application for promotion.

30 Article 13.07(b) of the Agreement provides that when an arbitration board determines that a procedural error has resulted in a wrong decision it has a discretion. It can direct that the matter be reconsidered commencing at the level of consideration at which the error occurred or "decide the appeal on the substantive merits" if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration.

31 In contrast, Article 13.07(c) of the Agreement gives an arbitration board no discretion if it determines that a challenged decision was unreasonable. It provides that:

When unreasonableness is a ground of the appeal the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable; otherwise it shall dismiss the appeal. (emphasis added)

32 Finally, and somewhat puzzlingly, Article 13.07(d) of the Agreement provides:

When procedural error and reasonableness [sic] are grounds of appeal a Board may exercise any of the powers conferred by (b) and (c) above. (emphasis added)

33 In this case the Faculty Association relied on procedural error and unreasonableness as grounds of appeal (Award, p. 3). The Arbitrator decided that the issue of how to best deal with the University's acknowledged procedural error could not be properly answered until the issue of the issue of unreasonableness had been addressed (Award, p. 12). After doing that the Arbitrator concluded:

I have determined that Dr. Piper's decision was unreasonable. These parties have agreed in article 13.07(c) that where a decision is found to be unreasonable it shall be reversed by the arbitration board. Although article 13.07(d) appears to provide that this board could exercise one of the options set out in article 13.07(b) since a procedural error has also occurred, in my view it would be inappropriate to do so in this case. In light of my finding that on the evidence the decision of Dr. Piper was unreasonable, that decision is reversed and becomes a determination that recommends Dr. Rucker's promotion. It follows that it is unnecessary to deal with the procedural error. (Award, pp. 23-4, emphasis in the original)

34 The University submits that the Arbitrator:

... refused to remit the matter to the President with directions to apply what the arbitrator determined was the proper criteria without providing any basis as to why it would not be appropriate to do so in this case ...

An arbitrator's discretionary remedial power is not absolute and must be exercised within legal limitations. Discretion must be exercised reasonably and in good faith, taking into account only relevant considerations and the decision must not be arbitrary or capricious. The University submits that in selecting the remedy of reversal in the circumstances of this case and absent any reasoned basis as to why the matter could not be remitted to the President the arbitrator has exercised her discretion unreasonably and in an arbitrary or capricious manner. In so doing the arbitrator lost jurisdiction and the remedy imposed is contrary to principles express or implied in the Code.

35 Article 13.07(d) appears to give an arbitration board a remedial discretion to do something other than what it is required to do under Article 13.07(c) when, in addition to being unreasonable, a challenged decision is also found to have been the result of procedural error.

36 The University's fourth ground of review involves the claim that, given the reason the President's decision was found to be unreasonable-what it describes as "... simply ... applying the wrong criteria" - the Arbitrator exercised her remedial discretion unreasonably and in an arbitrary or capricious manner by not remitting the decision to the President.

37 I do not agree with this characterization of the Award. On a sympathetic reading of it, it is clear that the Arbitrator did not simply conclude that the President had applied the wrong criteria; the Arbitrator also concluded that when all the relevant evidence is considered the Faculty Association had established that Dr. Rucker had engaged in sustained and productive scholarly activity.

38 Moreover, given the provisions of the Agreement, there is evidently a rational connection between the breach found and the remedy issued. Had the President's decision only been unreasonable, then, by virtue of Article 13.07(c) of the Agreement, the Arbitrator would have had no discretion to remit it to the President, regardless of why she found it to be unreasonable. Given that fact (which the Arbitrator noted), I find that she did not act in an unreasonable, arbitrary or capricious manner when she declined to exercise any discretion she may have had because the President's decision was both unreasonable and the result of procedural error.

V. CONCLUSION

39 For the foregoing reasons I find that the University has not demonstrated that the Arbitrator committed any reviewable errors and accordingly, its Section 99 application is dismissed.

G.J. MULLALY, VICE-CHAIR