

Court of Queen's Bench of Alberta

Citation: Lethbridge College Board of Governors v. Lethbridge College Faculty Association, 2008 ABQB 316

Date: 20080606

Docket: 0806 00019

Registry: Lethbridge/Macleod

Between:

Lethbridge College Board of Governors

Applicant

- and -

Lethbridge College Faculty Association and Greg Bird

Respondents

Corrected judgment: A corrigendum was issued on July 2, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment
of the
Honourable Madam Justice C.S. Phillips**

I. INTRODUCTION

[1] The Lethbridge College Board of Governors (the "College") applies for judicial review of an arbitration board (the "Board") decision issued December 11, 2007. The Board reinstated Greg Bird (the "Grievor"), a psychology professor, with strict conditions. The Grievor had been terminated on February 7, 2006 "for cause" after the College discovered that the Grievor had been sexually involved with his female students. The College argues that the Board's decision is unreasonable.

[2] For the reasons which follow, the application to quash is denied.

II. FACTUAL BACKGROUND

[3] The Grievor started working at the College as a sessional instructor in 1994. At the time of his dismissal, he was an instructor in psychology and a program leader with administrative responsibilities. The Grievor has a BA in criminal justice, a Master's degree in human science and a Doctorate in educational psychology. He previously worked as a policeman.

[4] The College investigated the Grievor after one of his former students (Student A) filed a written complaint. On February 6, 2006 the college had a labour lawyer conduct an investigatory interview with the Grievor. Prior to answering any questions, the Grievor asked for, and was denied access to, a lawyer; though he was allowed to have a Lethbridge College Faculty Association (the "Association") representative sit in on the meeting. At the arbitration, the Grievor explained that he had asked for a lawyer because he feared that the interview might be used for possible criminal prosecution against him. At the interview, the Grievor denied having anything more than a casual dating relationship with Student A and denied having any type of close personal relationship with two other students, Student B and Student C, although he did admit to knowing them both. The College concluded that he was not telling the truth.

[5] The Grievor was fired on February 7, 2006. On February 9, 2006, the Association filed a grievance against the Grievor's termination.

III. THE HEARING

[6] The grievance was heard by the Board, which was made up of Mr. A Ponak, the chair; Mr. R. Franklin, the College's nominee and Mr. T. Sway, the Association's nominee.

[7] At the hearing of the grievance, the Grievor admitted to not telling the truth at the February 6, 2007 interview and to having had sexual relationships with Students A, B and C. The evidence of witnesses and documentary evidences (largely emails) taken off the Grievor's computer corroborated his admissions. As earlier noted, he denied the relationships at the investigatory interview of February 6, 2007 around alleged harassment because he was concerned about being charged criminally. The Board made the following findings of fact:

- The Grievor's relationship with Student C started in the summer/early fall of 1994 when Student C took the Grievor's class. It lasted for 18 months. It was sexual in nature. The Grievor knew Student C prior to her taking his class. Student C took a second course from the Grievor during the currency of the relationship and the Grievor evaluated her. This relationship was not disclosed to the College.
- The Grievor's relationship with Student B started early in 2004 and ended about eight months later. It was sexual in nature. The Grievor knew Student B before

she took a class from him. Shortly after the end of the relationship, Student B took three more classes from the Grievor. Student B received grades of A plus in two of the courses she took from the Grievor, grades well above her usual performance. This relationship was not disclosed to the College.

- The Grievor's relationship with Student A started in the fall of 2004 when she took a class from him. It ended in March or April of 2005. It was sexual in nature. Student A struggled academically following her break-up with the Grievor. In particular, she withdrew from class and experienced difficulties completing the academic term. After the relationship was over, the Grievor completed a graduation audit form for Student A. This form authorizes graduation and confirms that sufficient courses have been taken. This relationship was not disclosed to the College.

[8] A psychologist, Dr. Kerry Bernes, testified at the grievance hearing. He had consulted with the Grievor after the Grievor was notified that he was under investigation. The psychologist opined that the Grievor had been suffering from a major depressive disorder for several years. The disorder impaired his judgment. The Grievor had made a full recovery and the chances for a relapse were low. Dr. Bernes admitted that the tests which indicated that the Grievor was suffering from a depressive disorder were administered following and could have been influenced by the Grievor's termination.

IV. THE BOARD'S DECISION

[9] The Board released its decision on December 11, 2007. It is reported at [2007] A.G.A.A. No. 67 (Alta.Arb.Bd.) (QL). To determine whether or not dismissal was the appropriate remedy, the Board applied the three-part test set out in *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162* (1976), [1977] 1 C.L.R.B.R. 1, 5:

First, has the employee given just and reasonable cause for some form of discipline by the employer; if so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

[10] The Board's authority for applying the *William Scott* test and for substituting reinstatement for dismissal can be found in the collective agreement at Articles 8.6.6.5 and 8.9:

8.6.6.5. The Arbitration Board has the authority to: ... make such other directive, varying the penalty as it considers fair and reasonable having regard to the terms of this Agreement.

8.9 Where a Faculty member has been dismissed, the Arbitration Board may direct the Board to reinstate the Faculty member and pay to him a sum equal to his salary loss by

reason of his suspension or dismissal or such lesser sum, as in the opinion of the Arbitration Board, is fair and reasonable.

[11] If the collective agreement had not contained a provision giving the Board authority to apply the *William Scott* test, it could have relied on s. 2(j) of the *Model Provisions Regulation*, A.R. 53/2004, enacted pursuant to the *Post Secondary Learning Act*, S.A. 2003, c.P-19.5 :

2. Where an agreement referred to in section 87(1) or 96(2) of the Act does not contain procedures respecting the settlement of differences between parties arising from the interpretation, application or operation of an agreement, as the case may be, as contemplated by section 87(3)(b), 4(e) or 5(d) or section 96(3)(b), the agreement is deemed to contain those of the following provisions in respect of which it is silent:

...

- j. if the arbitrator by the arbitrator's award determines that an employee has been discharged or otherwise disciplined by an employer for cause and this agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator may substitute any penalty for the discharge or discipline that the arbitrator considers just and reasonable in all the circumstances.

[12] The Board concluded that the Grievor's conduct warranted discipline for three reasons:

1. The Grievor took advantage of his position to commence personal relationships with students in his class that, in each case, became sexual soon after they completed his class;
2. The Grievor was in a conflict of interest by failing to disclose these relationships when two of the students took subsequent courses from him and he had administrative authority over the third student; and
3. The Grievor was in breach of trust of his professional responsibilities because his actions had a harmful, or potentially harmful impact on the educational progress and achievements of all three students.

[13] The Board concluded that the appropriate discipline was not dismissal. In deciding that dismissal was not appropriate, the Board considered that:

1. The College did not have an express policy governing instructor-student relationships and faculty should not be dismissed for breaking unwritten rules in areas where the line between right and wrong could be ambiguous;

2. A dismissal was set aside for more serious conduct in the case of *Okanagan University College and Okanagan University College Faculty Assn.* (1997) 64 L.A.C. (4th) 416; and
3. There was a low risk of the Grievor re-offending, if he was reinstated with proper conditions.

[14] Aggravating factors included: that the Grievor had relationships with multiple students; that the Grievor had initially lied about the relationships; and that the Grievor's actions showed some premeditation.

[15] Mitigating factors included: the Grievor's long service and strong teaching record; that the Grievor ultimately took responsibility for the relationships; that there was no express policy on faculty-student relationships; that the Grievor was suffering from a depressive disorder; and that the lack of reinstatement would end the Grievor's career as a college professor.

[16] The Board made no explicit finding that the Grievor was remorseful or apologetic, but did note, at para. 110, that "[t]he Grievor had apologized at the investigative interview and expressed remorse" and at para. 146 that "the Grievor now knows the rules – students are off-limits" and furthermore at para 148 "the Grievor took responsibility for his conduct at the arbitration, acknowledged wrongdoing, and accepted that his behaviour must change."

[17] The Board decided that the appropriate discipline was an unpaid suspension of two years, two months and 21 days. The Board concluded that *unpaid* suspension was appropriate because the Grievor had not been forthcoming at the first investigatory interview. The Grievor's reinstatement was subject to several conditions:

1. The Grievor is not to date or have sexual relations with any student of the College.
2. Should the Grievor date any former student of the College within one year after the student has left the College, the relationship must be disclosed to the Grievor's immediate supervisor (or some other person designated by the College).
3. Should a student in the Grievor's class or under the Grievor's supervision be a person with whom the Grievor has had a close personal relationship in the past, the relationship must be disclosed to the Grievor's immediate supervisor (or some other person designated by the College).

[18] The College's nominee dissented from the Board's decision.

V. POSITIONS OF THE PARTIES

[19] The College is requesting that the Board's decision be quashed. It suggests that the appropriate standard of review is reasonableness. It argues that when reviewed on a standard of

reasonableness, the Board's three reasons for finding that dismissal is not appropriate cannot be upheld.

[20] The Association is requesting that the Board's decision be upheld. It agrees that the appropriate standard of review is reasonableness. It argues that when reviewed on a standard of review of reasonableness, the Board's reasons for finding that the dismissal is not appropriate should not be overturned. The Association also argues, as a preliminary issue, that the dissenting employer nominee's reasons should not be considered as part of the decision.

VI. PRELIMINARY ISSUE

[21] As a preliminary issue, the Association argues that the dissenting reasons of the employer College's nominee should not form part of the record or the decision under review. The Association points to Article 8.6.6. of the collective agreement which states:

The decision of the majority is the award of the Arbitration Board and is final and binding upon the parties and any persons bound by this Agreement. If there is no majority, the decision of the Chairman governs and shall be deemed the award of the Arbitration Board.

[22] In the result, the Association submits the award of the Board should only comprise the decision of the majority and therefore the majority decision, and not the dissenting reasons, is a part of the Court's record for its review. The Association also points to Rule 753.13(1) of the *Alberta Rules of Court* A.R. 338/83. It sets out that:

753.13(1) On receiving the application for judicial review endorsed in accordance with Rule 753.12, the person from whose *decision* or act relief is claimed shall return forthwith to the office mentioned therein the judgment, order or *decision*, as the case may be, together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter and the notice served upon him with a certificate endorsed thereon in the following form:

“Pursuant to the accompanying notice, I hereby return to the Honourable Court the following papers and documents, that is to say

- (a) the judgment, order or *decision*, as the case may be, and the reasons therefor;
- (b) the process commencing the proceedings;
- (c) the evidence taken at the hearing and all exhibits filed;
- (d) all other papers or documents touching the matter...”
(Emphasis added)

[23] Given the definition of “decision” in the collective agreement, the reference to “the decision” in Rule 753.13(1) and the findings in the cases of *Manitoba Telephone System v. Greater Winnipeg Cablevision Ltd.* (1984), 26 Man. R. (2d) 173 (C.A.), para. 25 and *United Food and Commercial Workers International Union, Local 342P-2 v. Dawn Food Products (Canada) Ltd. et al.*, 259 Sask R. 49, 2005 SKQB 11, paras. 9-11, I have concluded that I will follow the general rule “...that if reasons are to constitute part of the record, only the majority reasons should be included”: see *Manitoba Telephone System v. Greater Winnipeg Cablevision Ltd.* (1983), 23 Man.R. (2d) 263 (Q.B.), para.11. Accordingly, the decision of the majority forms part of the record for this Court’s review. The dissenting reasons of the College’s nominee do not form part of the record and will not be considered.

VII. THE STANDARD OF REVIEW

A. The New Approach: *Dunsmuir*

[24] The Supreme Court of Canada recently revised the law on the standard of review in the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9. The result of *Dunsmuir* is that there are now only two standards of review: correctness and reasonableness. This change was achieved by collapsing the standards of patently unreasonable and reasonableness *simpliciter* into one standard. The majority reasons that the two standard approach is preferable because it was difficult to distinguish between the patently unreasonable and reasonableness *simpliciter* standards and because the standard of patent unreasonableness sometimes appeared to require the Court to uphold unreasonable decisions.

[25] When the Supreme Court of Canada collapsed the three standards of review into two, the majority made it very clear that “[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts. . .” para. 48. The majority also made it clear: “. . .deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.” para. 48 and “Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.” para.49. In drafting these reasons, I have remained cognizant of these directions.

B. Defining the Two Standards

[26] According to the majority in *Dunsmuir*, at para. 47, a court that is reviewing a decision based on the reasonableness standard should ensure that the tribunal’s decision is justified, transparent and intelligible. In its brief, the Association offered the following definitions of these terms:

Black’s Law Dictionary (5th ed.) defines “justification”, in part, as: “Justification means explanation with supporting data.” Funk & Wagnalls New Standard Dictionary (1947) defines “transparency”, in part as “the property of being transparent” and “transparent” as “easy to see through or understand.” Webster’s Encyclopedic Dictionary (1988) defines

“intelligibility”, in part as “the quality or state of being intelligible”, and “intelligible” as “that can be understood... that can be perceived by the intellect.”

[27] The reasonableness standard also requires that the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law,” para. 47; where defensible is defined, in part, as “justifiable; supportable by argument”: see *The Canadian Oxford Dictionary*, 1st ed., s.v. “defensible”. In other words, the reasonableness standard requires a court to determine whether a tribunal’s decision is reasonable both in terms of the reasoning and the outcome.

[28] A court that is reviewing a decision based on the correctness standard will “undertake its own analysis of the question” and then decide whether or not it agrees with the determination of the tribunal, para. 50.

C. The Standard of Review Analysis

[29] As noted in *Dunsmuir*, the majority rejects the “pragmatic and functional approach” as the appropriate method of determining what standard of review should be used. Instead, the majority sets out a new, but related, two-step “standard of review analysis,” para. 62:

... First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[30] The majority provides a non-exhaustive list of the “factors” to be considered under the second step of the “standard of review, at para 64:

The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Applying the Standard of Review Analysis

[31] Both parties agree that the reasonableness standard applies here. I agree that this is the proper approach, whether you proceed under the first or second step of the “standard of review analysis.”

[32] As per the first step of the analysis, the degree of deference required in this situation has already been determined. Labour arbitrators who are deciding if dismissal is the appropriate

employer response to employee misconduct are regularly granted a high level of deference on judicial review: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, para. 38. In the case before me, although the Board, which was comprised of labour arbitrators, was governed by the *Post Secondary Learning Act* and not the *Labour Relations Code*, R.S.A. 2000, c.L-1, the scenario is very much akin to what labour arbitrators face on a regular basis in deciding and deliberating on employee misconduct cases. The first step suggests that reasonableness is the appropriate standard.

[33] Even if the four factors set out in the second step are examined, reasonableness is still the appropriate standard. The collective agreement between the College and the Association contains a “final and binding” privative clause. The purpose of the Board is to “secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer.”: see *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28, para.18; *Toronto (City) Board of Education*, para. 36. The questions at issue are factual determinations under the legal test proscribed in *William Scott*. In the case before this Court, of concern is the application by the Board of Article 8.9 of the collective agreement. Labour arbitrators are recognized as having special expertise: see *Dunsmuir*, para. 55. All of these factors point to reasonableness being the appropriate standard.

[34] In *Dunsmuir*, Binnie J. wrote a concurring decision in which he suggests that under the reasonableness standard, reviewing courts will still show varying degrees of deference to different administrative decision-makers, paras. 135-139. The College suggests that the Board’s decision should be given a lower level of deference, while the Grievor and the Association argue for a higher level of deference.

[35] It is my view that by injecting varying degrees of deference into the two-standard model, this Court would be reintroducing the standards of patently unreasonable and reasonableness *simpliciter*. In addition to the difficulties with these two standards highlighted by the majority in *Dunsmuir*, Binnie J. voices concern with the length, expense and complexity added to the judicial review process by arguments over the appropriate standard of review at para. 133:

People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court’s attention focussed not on their complaints, or the government’s response, but on lengthy arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer’s preparation and court time devoted to unproductive “lawyer’s talk” poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face

a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong “standard of review” was selected. A small business denied a license or a professional person who wants to challenge a disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features. (Emphasis in original)

[36] In light of the majority’s clear instructions that there should only be *two* standards of review, their cogent reasons for making this decision and Binnie’s concerns set out above, this Court holds that any discussion of the appropriate and varying degrees of deference should be avoided, if at all possible. The facts of this case militate in favour of a standard of reasonableness as defined by the majority decision in *Dunsmuir*.

VIII. ANALYSIS OF THE DECISION

[37] The standard of reasonableness in *Dunsmuir* requires us to look at both the tribunals reasoning process and the outcome.

A. Reasoning

[38] The College attacks the Board’s reasoning on a number of grounds by pointing to potential inconsistencies. In urging the Court to overturn the Board’s decision, the College argues at para. 80 of its brief:

[T]hat it is not asking the court to second-guess findings of fact or credibility or to reassess evidence given before the board. The College is asking the court to review the conclusions of the board and to ascertain whether an arbitration tribunal, acting reasonably, could have reached those conclusions in light of the evidence, the findings of fact and the principles espoused by the board. (Emphasis in original)

[39] In the result, the College submits that the Board’s reasoning is not justified, transparent and intelligible. On review, I am not convinced that any of the points raised by the College amount to inconsistencies. If, however, they do amount to inconsistencies, they fall within a coherent line of reasoning such that they are justified, transparent and intelligible.

1. NO EXPRESS POLICY

[40] The Board found that dismissal was inappropriate because the College did not have an express policy governing instructor-student relationships and faculty should not be dismissed for breaking unwritten rules in areas where the line between right and wrong could be ambiguous.

[41] The College points out that, in deciding that the Grievor's conduct was worthy of discipline, the Board held that the Grievor should have realized that his position as their instructor precluded him from showing any romantic interest in his students. To quote the Board: "the conflict of interest in this situation is obvious; no "bright line" test is needed," para. 124. Additionally, the College asks this Court to infer that the only reason the Grievor was untruthful about his relationships with his students when initially questioned is that he did realize the conduct was wrong or, alternatively, that he must have known that the conduct was wrong because of his background as a police officer and his training in psychology.

[42] The College suggests that the findings and inferences in the preceding paragraph are inconsistent with the Board deciding that dismissal was inappropriate, in part, because there was no written policy on instructor-student relationships.

[43] I cannot agree with the College's assertions.

[44] First of all, I am not prepared to make factual inferences that differ or go beyond those made by the Board. The Board had the opportunity to hear all the evidence, weigh it and then make factual determinations. It was in a better position than this Court is to make those determinations.

[45] Moreover, when reviewing a decision on a reasonableness standard, it is not this Court's place to overturn the tribunal's factual determinations. The College relies on the case of *Toronto (City) Board of Education* as an example of where, on judicial review, the Supreme Court of Canada found that an arbitration board's findings of fact were patently unreasonable. In that case, the grievor was a teacher who had brought a human rights complaint against the Board of Education for systemic discrimination. While the human rights hearing was ongoing, the grievor wrote very threatening letters to the Chairman of the Board of Education. The grievor was fired and grieved his dismissal. At the grievance hearing, the arbitration board accepted testimonial evidence that the grievor was not capable of fulfilling his duties as a teacher and medical evidence that the grievor was likely to reoffend. The board was also apprised of an additional letter sent by the grievor to the Chairman after his dismissal. While less abusive and threatening than the earlier letters, this letter continued to exhibit an all-consuming bitterness. Despite the evidence, the board reinstated the grievor subject to stringent monitoring and summary dismissal if the previous conduct was repeated, because they found that his misconduct was temporary in nature. Ultimately, the Supreme Court of Canada held that there was *no* evidence on which to base this finding, rather all the evidence before the board *directly contradicted* its finding. The board's decision was quashed.

[46] In the present case, the majority of the Board can point to evidence to support why it found dismissal to be an excessive form of discipline, which should be substituted with reinstatement. In reaching the decision to reinstate the Grievor, the Board noted it had no evidence on which to find the Grievor at the time of the occurrences had acted in a coercive manner or even was the initiator of these sexual relationships with students A, B, C or had acted in a predatory way. Nor did the Board have any evidence that the Grievor began having sex with

these students while they were in his class. The Board did have evidence on which to find that the Grievor at the time of the occurrences did not realize that carrying on sexual relationships with students A, B, and C was wrong. As set out in greater detail in para. 48 below, the Board had evidence the Grievor was given mixed messages whether under any circumstances a faculty-student relationship would be appropriate, when there was no express policy governing instructor-student relationships in place. Furthermore, the Board had before it the Queen's University Faculty Collective Agreement (Exhibit 25) which seemed to contemplate that such relationships may occur, focusing on disclosure, not prohibition. Finally, the Board had the positive report of the psychologist, Dr. Berne, before it and the acknowledgment of the Grievor at the arbitration hearing that he took responsibility for his conduct, that he was wrong and that his behaviour must change. This was all properly before the Board and considered by it. Unlike the situation in *Toronto (City) Board of Education* where the evidence before the tribunal directly contradicted its finding, in this case the Board made factual inferences that are supportable by the evidence presented at the arbitration hearing.

[47] Second, I do not see any inconsistency between the Board finding that the Grievor should have known that his conduct was wrong and that the lack of a clear policy was a mitigating factor. The Board made the comments about what the Grievor should have known when deciding whether or not his conduct was disciplinable and the comments about the lack of a policy when deciding whether or not his conduct warranted dismissal. At each step in the *William Scott* test it was open to the Board to weigh the different factors as it saw fit.

[48] Furthermore, the propriety, or lack thereof, of sexual relationships between faculty and students is not as clear-cut as the College would have us believe. The evidence before the Board was that the Grievor had been given conflicting advice about what an appropriate faculty-student relationship would consist of. Early on in his career, at a 1995 new faculty orientation, he was told by a dean of the College, that there was no policy prohibiting relationships with students and that professional responsibility should be kept separate and that the instructor and student should be discrete. In addition, at the time the Grievor started at the College, a faculty member and a student were openly dating. During the arbitration process, he was informed that he should have been disclosing his relationships to the administration. Given this background, I find nothing inconsistent with the Board's finding that the Grievor's conduct was wrong, that he should have known that it was wrong, but that it occurred in the context of ambiguously defined boundaries and in the absence of an express policy, which is one reason why the Board found the misconduct not to be serious enough to warrant dismissal.

2. EXCESSIVE RELIANCE ON OKANAGAN UNIVERSITY COLLEGE

[49] The Board was persuaded by the outcome in *Okanagan University College*. In that case, an art professor at Okanagan University College was suspended for a year after it was uncovered that he had been sexually involved with two students. The sexual relationships with the two students were consensual. Both students were under the supervision of the grievor professor either in a class or the studio at the time the relationships began and one student took a subsequent class from the grievor professor. The professor used his position to develop the

relationships, and his conduct was found to amount to a breach of trust in his role as a college professor. He did not disclose the relationships to his employer. Furthermore, Okanagan University College, although it had a sexual harassment policy, had not developed a policy in regard to consensual sexual relationships between students and teachers.

[50] The College argues that the Board placed too much emphasis on this case. The College tries to differentiate the case based on the “lack of maturity and training” of the professor as compared to the Grievor, the “less egregious” behaviour of the professor, and because in *Okanagan University College* the arbitration board’s decision implemented the recommendation of a internal discipline committee, which is not the case here.

[51] The Association argues that *Okanagan University College* is not distinguishable on the facts. The professor in *Okanagan College* was 32 years of age at the time he engaged in his relationships. The Grievor was 29, 39 and 40 years of age at the time of his relationships. There is no evidence that the professor in *Okanagan College* lacked the background, maturity or training to assess the wrongfulness of his conduct. The Association also points out that the Board was aware of the role played by the recommendation of the internal discipline committee in the *Okanagan University College* decision.

[52] I do not find that the Board’s reliance on the *Okanagan University College* decision was in any way excessive or unreasonable. It was open to the Board to be persuaded by the *Okanagan University College* decision. More importantly, there is no evidence that the Board decided to reinstate the Grievor based solely on the *Okanagan University College* decision. The Board provided in-depth and cogent reasons for its decision, only one aspect of which was reliance on the *Okanagan University College* decision.

[53] At this point, I will address one issue that was raised in oral argument before me. Counsel for the College pointed out that the Board had differentiated the conduct of the Grievor from that of the professor in *Okanagan University College* based on the fact that it found the Grievor was not predatory, in that although the Grievor may have been opportunistic, “the evidence does not show that he selected certain students for seduction; see para. 145 of the Board’s decision. The professor in *Okanagan University College*, on the other hand, was noted by the Board to have followed a certain pattern of seduction, which the College said the Board inferred amounted to predatory behaviour. Later on, the Board held, at para. 149, that the “certain degree of premeditation evident in [the Grievor’s] relationships with students A and C” was an aggravating factor in his misconduct. Counsel for the College suggests that it is inconsistent to find on one hand that the Grievor was not predatory but on the other hand to find that there was a certain degree of premeditation evident in his relationships with Students A and C.

[54] I disagree. “Predatory” and “premeditated” are not synonyms. According to *The Canadian Oxford Dictionary*, predatory is defined as

- 1 (of an animal) preying naturally upon others.
- 2 (of a corporation, country, individual, etc.) plundering or exploiting others.

See *The Canadian Oxford Dictionary*, 1st ed., s.v. “predatory”.

[55] On the other hand, *The Canadian Oxford Dictionary*, defines “premeditate” as “think out or plan (an action) beforehand.” *The Canadian Oxford Dictionary*, 1st ed., s.v. “premeditate”. Premeditated conduct is the result of forethought. Predatory conduct requires something more, the exploitation or manipulation of a more vulnerable party. There is nothing inconsistent in the Board finding that the Grievor gave some thought to his relationships before the fact but that his conduct was not exploitative or manipulative, in other words, not predatory. Though it does not excuse the Grievor’s misconduct, it should also be pointed out that, unlike in *Okanagan University College*, Students A and C had significant roles in the initiation of their relationships with the Grievor. In particular, the Board found at para. 148, that “with respect to both Student A and Student C, the evidence shows that [the Grievor] was as much the pursued as the pursuer”, a finding which has not been challenged by the College.

3. Low Risk of Re-Offending

[56] The Board found that there was a low risk of the Grievor re-offending, if he was reinstated with proper conditions

[57] The College points out that the Grievor required “considerable” prompting at the Board hearing before agreeing that he would not reoffend. The College asks the Court to infer that answers given by the Grievor at the arbitration hearing show that he still does not understand that intimate relationships with students are off limits. The College also suggests that the Board would have not placed conditions on the Grievor’s reinstatement unless it recognized that there was a considerable risk that he would reoffend. In any event, the College asks how it is to enforce these conditions, especially since the relationship with Student C was not discovered until 10 years after the fact.

[58] I am unprepared to make any of the inferences that the College urges upon me, for the reasons set out above in paras. 44 to 46. Furthermore, I too am satisfied, as was the Board, that the conditions imposed on the Grievor in his reinstatement are capable of being enforced. The Board, having heard all of the evidence and having the benefit of the psychologist’s low risk assessment before it, would not have imposed those conditions on the Grievor if it had thought them not to be enforceable.

B. Outcome

[59] The College urges that the reinstatement of the Grievor with strict conditions after 2 years, 2 months and 21 days without pay is, in light of the facts and the law, not a defensible outcome. I cannot agree.

[60] Counsel for the Association put before me two cases in addition to *Okanagan University College* where sexual relationships between instructors and students have resulted in penalties that fall short of dismissal.

[61] In *Government of British Columbia and British Columbia Government Employees' Union* (13 December 1990) Vancouver A372-90 (B.C.Arb.Bd.), a deputy sheriff, who had off-duty, consensual sexual intercourse with four female trainee deputy sheriffs, was reinstated with compensation for lost wages. In that case, the majority was, at 10:

... unable to find that the Employer proved that, “sexual relationships between students and instructors were against Justice Institute Standards of Conduct” in any sense which would support discipline. In particular, no written or published rules existed which prohibited or restricted off-duty relationships between instructors and trainees...

[62] In *School District No. 62 (Sooke) v. Sooke Teachers' Assn.*, [1995] B.C.C.A.A.A. No. 260 (B.C. Arb. Bd.) (QL), a 45 year-old high school teacher had a sexual relationship with a 19-year-old student in the school in which he was teaching, but not a student in his class. The student was found to have initiated the relationship. The teacher was reinstated without compensation for lost wages. There the arbitration board stated at para. 133 of its decision:

133. A review of the various decisions relied on by the parties reveals the extent to which the particular facts determines [sic] the result. We agree with the Employer's submission that the reasoning in the line of cases involving theft in the retail food industry and the patient abuse cases apply by analogy to acts of sexual misconduct alleged against teachers. However, we do not agree that sexual misconduct will compel dismissal as the only appropriate penalty. In fact, as the authorities relating to teachers discloses [sic], sexual misconduct by teachers has attracted a broad range of penalties based upon the particular facts. . .

[63] These cases do not dictate that reinstatement with or without compensation for lost wages will be the disciplinary result for a teacher who has had a sexual relationship with a student, but they do set out that reinstatement with or without compensation may fall within the appropriate range of outcomes, depending on the facts of a case.

[64] Having reviewed the case law, the majority's reasons, the facts of this case, and considered the submissions of the parties, this Court holds that in this case, reinstatement without compensation and with strict restrictions is a defensible outcome.

CONCLUSION

[65] It is not the role of a reviewing court to reweigh the evidence or to substitute the Board's decision with a result that it considers to be more reasonable. This Court must give deference to the Board's decision.

[66] None of the points raised by the College leads me to conclude that the Board's decision is unreasonable. On the contrary, it was well-considered and balanced. The Board's reasons were

justified, transparent and intelligible and nothing presented before this Court suggests that the decision falls outside the range of possible, acceptable outcomes, which are not defensible.

[67] The Board was well within its ability to substitute the Grievor's reinstatement with strict conditions for dismissal as it had considered reinstatement fair and reasonable given the circumstances. In any event, the effect of the Board's decision is that the Grievor was suspended from the College for 2 years, 2 months and 21 days without pay, albeit he has been employed outside of the educational industry for most of that time but now is currently unemployed. This suspension of the Grievor from the College is not an insignificant penalty for his misconduct, which could be said to fall outside the range of possible, acceptable outcomes, all as described and defined in *Dunsmuir*.

[68] The College's application for judicial review is dismissed and the December 11, 2007 decision of the majority of the Board is upheld. The Respondents will have their costs and reasonable disbursements.

Heard on the 7th day of April, 2008.

Dated this 30th day of May, 2008.

C.S. Phillips
J.C.Q.B.A.

Appearances:

William J. Armstrong, Q.C.
for the Applicant, Lethbridge College Board of Governors

William J. Johnson, Q.C.
for the Respondents, Lethbridge College Faculty Association and Greg Bird

**Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice C.S. Phillips**

A Corrigendum has been filed to correct the date on the first page of the judgment. The judgment date reads: 20080530 and it should be 20080606.