SUPREME COURT OF NOVA SCOTIA
Citation: *Ahmed v. Dalhousie University*, 2014 NSSC 330

Date: 20140909
Docket: Hfx No. 424785
Registry: Halifax

Between:

Ibetsam Ahmed

Applicant

v.

Dalhousie College and University

Respondent

DECISION on MOTION to DISMISS

Judge: The Honourable Justice Gerald R. P. Moir

Heard: June 26, 2014

Counsel: Blair Mitchell, for the Applicant
Rebecca K. Saturley and Scott R. Campbell, for the Respondent and Moving Party

Moir J.:

Introduction

[1] Ms. Ahmed was in a food sciences doctoral programme at Dalhousie University, Faculty of Engineering. She claims that the university is liable to her for damages resulting from tortious misfeasance in public office. She sued by way of application.

[2] Dalhousie moves for an order dismissing the proceeding on three grounds. (1) This court lacks jurisdiction to decide anything about "academic matters." They "fall wholly within the jurisdiction of the University and the internal appeal mechanism." (2) This is a case for summary judgment on pleadings because it is plain and obvious that the plea of misfeasance in public office will fail. (3) The proceeding is an abuse of the court's processes.

[3] It is logical to begin with the motion for summary judgment on pleadings. First, I will summarize the pleaded material facts. Then, I will address the contentious issues for potential liability in misfeasance in public office: public function and vicarious liability.

[4] I conclude that this is not a case for summary judgment on pleadings.

[5] I will then discuss Dalhousie's submission that the subjects of Ms. Ahmed's complaints are outside the jurisdiction of this court. There are broad statements in some authorities to the effect that a superior court lacks jurisdiction when a university decides "academic matters". I reject that position on two bases: I follow the Ontario Court of Appeal's rejection. That aside, the principles that are at the roots of the broad statements do not support their generalization.

[6] Finally, I will address Dalhousie's submission that the claim is an abuse of process.

Summary Judgment

[7] *The Pleadings*. On a motion for summary judgment on pleadings, one assumes the pleadings to be true and determines whether, on such a state of facts, it is plain and obvious that the pleaded case will fail. See Rule 13.03, the definition of "statement of claim" in Rule 13.02, and *Geophysical Service Inc. v. Canada (Attorney General)*, 2013 NSSC 240, reversed on other grounds 2014 NSCA 14.

[8] One begins by characterizing the pleading and ascertaining the pleaded material facts. In this case, the pleadings are extensive, forty-one paragraphs. I shall attempt a précis.

- The university was required to provide a supervisor and a supervisory committee for Ms. Ahmed's programme.
- The supervisory committee was required to set examinations.
- Failure meant academic dismissal.
- Controversy developed between Ms. Ahmed and her supervisor.
- The supervisor, rather than the committee, set the examinations.
- Ms. Ahmed failed and was dismissed.
- Ms. Ahmed appealed to the dean, who ordered a re-examination.
- When they were told of the dean's order, the supervisor and every committee member resigned their appointments to supervise Ms. Ahmed.
- Despite the resignation, the former supervisor, not a committee, set new examinations.
- A person unfamiliar with Ms. Ahmed's field of study was appointed to be her marker.
- The marker failed Ms. Ahmed, and she was dismissed again.
- Ms. Ahmed appealed to the Senate Appeals Committee.

- The senate directed yet another re-examination and directed it be set by a new supervisor and supervisory committee.
- A new supervisor was appointed, but resigned.
- Despite the resignation, a dean required the supervisor to continue.
- The third examination was conducted under conditions that violated university policy and practices about eligibility of supervisory committee members, preparation time, intervals between examinations, and accommodation for sickness.
- For a third time, Ms. Ahmed failed and was dismissed.
- Based on the foregoing, Ms. Ahmed alleges that the authority of the supervisors, supervisory committees, and deans were, to the knowledge of the university, "exercised for improper and extraneous purposes".
- The university is vicariously liable for the misfeasance of the supervisors, supervisory committees, and deans.

The pleadings also include statements about Ms. Ahmed's vulnerability and her losses.

[9] *Public Function*. Misfeasance in public office is one of the intentional torts. The claimant must establish "(i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff": *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 32. This is the only cause to which Ms. Ahmed's pleadings refer.

[10] The university argues that the tort is only available against public officers. The university is not a public officer. Neither are the officials and, even if they were, there can be no vicarious liability.

[11] The university refers to the extensive discussion of statutory definitions of "public officer" at paras. 17 to 37 of the *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288 (C.A.). That was not a case of official misfeasance, and the statutory definitions have no application to the present one. Further, the discussion provides no clear indication about whether the supervisor, committee members, and deans were, or were not, public officers.

[12] Dalhousie also relies on the discussion at pp. 840 to 844 of G.H.L. Fridman, Q.C., *The Law of Torts in Canada*, 3rd ed. When placed in context, Professor Fridman's statement at p. 843 that "the defendant must be a public officer" is broad enough to include public corporations: "public bodies" on p. 840, "a public

official or body" on the same page, "the Bank of England" on p. 841, "a municipality" on the same page, and "a federal government department" on p. 842.

[13] Professor Fridman concludes, at p. 844, "The Canadian courts have also held that certain corporate bodies, such as a Crown Corporation and a municipality, are potentially capable of being sued for misfeasance". He goes on to point out the difficulty of proving a malicious state of mind in a corporation, but difficulties of proof are not important on a motion for summary judgment on pleadings.

[14] Ms. Ahmed submits that the point of law decided by *Odhavji Estate* supports a functional, rather than a categorical, approach to official misfeasance. The point settled by that case is summarized by Justice Iacobucci at para. 17:

> … the class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

While the discussion of "The Defining Elements of the Tort" at paras. 18 to 32 often refers to public officials, Justice Iacobucci's ultimate statement of the elements at para. 32 refers to "the exercise of public functions". This element of the tort is about function, not status.

[15] Both parties find support for their opposite positions in *Freeman-Maloy v. Marsden*, [2006] O.J. 1228 (C.A.). The president of York University was sued for

official misfeasance. The Ontario Court of Appeal decided that it was not plain and obvious that the tort is restricted to officials who are so much in the control of government that the *Charter* applies. In my view, the pleadings are strong enough that fact-finding is required on the question of public function. Fact-finding is beyond summary judgment on pleadings.

[16] *Vicarious Liability*. Dalhousie also argues that if the supervisor, committee members, and deans are public officers, it is not vicariously liable. The university submits, "There must be a strong connection between the tortious conduct in question and the duties that the defendant has authorized or required of the tortfeasor." Again, the pleadings are sufficient to call for fact-finding on this point.

[17] *Conclusion on Summary Judgment*. In my assessment, the issues for the judge hearing the application would include the following, and it is not plain and obvious that either will be decided against Ms. Ahmed:

1. Whether Ms. Ahmed has a claim in official misfeasance against Dalhousie University in its own right,
2. Whether, if it is not liable in its own right, Dalhousie University is vicariously liable for official misfeasance committed by its employees or officials.

Jurisdiction

[18] *Argument for Dalhousie*. The university argues that Ms. Ahmed's complaints are "about academic matters". As such, "they are governed exclusively by the internal appeals process that is provided by the Calendar." Consequently, "this Court is without jurisdiction over the subject of this proceeding." During oral argument, the university pressed its position on jurisdiction, and I promised to look closely at the authorities.

[19] The university relies on *Chambers v. Dalhousie University*, 2013 NSSC 430. Ms. Chambers sought judicial review of a Senate Appeals Committee decision about her failing first year law. Justice Duncan determined that the decision was reviewable on the reasonableness standard. *Chambers* applies to judicial review, not tort. Nothing in *Chambers* supports Dalhousie's submission that:

> According to well-established principles and law, Dalhousie must first have an opportunity to review the Decision in accordance with its established (and well known) review mechanism in the Calendar.

[20] The university also relies on *Said v. University of Ottawa*, 2013 ONSC 7186 and the authorities reviewed in it. Dr. Said was an assistant professor in the University of Ottawa Faculty of Medicine. While on academic probation for

sexual harassment, he applied for a promotion to associate professor. He was refused. Apparently (see para. 14), the probation was the reason.

[21] The Divisional Court found a reasonable apprehension of bias, and set aside the refusal. Dr. Said applied a second time. He was refused again. He sued.

[22] Dr. Said argued that his pleadings supported claims in tortious conspiracy, defamation, *Charter* breaches, negligence, and tortious intimidation. Justice Beaudoin struck the claims on grounds related specifically to each cause, but first he determined to strike them on a more general basis. See paras. 25 to 36 on abuse of process. The university says this discussion shows that the law precludes a superior court from entertaining a claim in tort, or for that matter breach of contract or another civil wrong, that involves a course of conduct by a university in the form of a series of academic decisions:

> Put differently [from the discussion in *Said*], internal academic decisions are not a proper subject for first instance adjudication in this Court. The only way that this Court obtains jurisdiction over internal academic decisions of Dalhousie University is by judicial review.

[23] *Authorities that May Suggest General Exclusion*. The decision in *Said* did not turn on jurisdiction. Dr. Said's suit was found to be an abuse of process: para. 19 to para. 36. The abuse came from his attempt to re-litigate decisions made by the university: para. 36. However, Justice Beaudoin did refer, at para. 25, to these

passages from *Dawson v. University of Toronto*, [2007] O.J. No. 591 (S.C.J.) affirmed 2007 OCA 4861:

> Authorities such as *Wong v. University of Toronto*, [1989] O.J. No. 979 (Div. Ct.), affd. [1992] O.J. No. 3608 (C.A.); *Zabo v. University of Ottawa*, [2004] O.J. No. 1499 (S.C.J), affd. [2005] O.J. No. 2664 (C.A.); *Warraich v. University of Manitoba*, [2003] M.J. No. 138 (C.A.); *Re Polton and Governing Council of the University of Toronto* (1976), 8 O.R. (2d) 749 (Div. Ct.); establish that apart from a judicial review function about procedural fairness and natural justice, the court does not have jurisdiction over matters of an academic nature. Where the essential character of the dispute is of an academic nature, the dispute remains exclusively a matter to be dealt with by the school's own procedures provided that the school does not breach the principles of natural justice.
>
> ... Her dispute is a disagreement about academic matters associated with the completion of her doctoral program and according to the authorities, these matters of university affairs are not the subject matter of breach of contract or tort claims.

Justice Perell dismissed Ms. Dawson's action without prejudice to her right to seek judicial review of decisions made by the university. The only stated reason was lack of jurisdiction over "matters of an academic nature": para. 18.

[24] Dalhousie also referred me to *Fufa v. University of Alberta*, 2012 ABQB 594. Justice Marceau distinguished between "claims of an academic nature" made by Mr. Fufa, who was a doctoral student, and "allegations of tortious conduct". He dismissed all the claims, those of an academic nature because "the Court has no jurisdiction" and those in tort because they were "frivolous": para. 43. He said, at para. 24, that claims "back to the Appellant's termination in the doctoral program" were "academic in nature" and, therefore, "the Court has no jurisdiction to

intervene unless … there was a violation of the rules of natural justice or there was tortious conduct."

[25] Justice Marceau in *Fufa* referred to the decision of Justice Browne in *Yen v. Alberta (Advanced Education)*, 2010 ABQB 380. Justice Browne, in turn, referred, at para. 40 of *Yen*, to the decision of Justice Gill in *Rittenhouse-Carlson v. Portage College*, 2009 ABQB 342. Justice Browne quoted the text at paras. 72 to 75 of Justice Gill's decision but, curiously, words got added:

> A student who is registered and paid tuition in a post secondary program is in a contractual relationship with the institution. The student must be taken to know and accept the regulations of the institution in determining academic matters set out in documents such as the university calendar. **Wong v. University of Toronto** (1989), 79 D.L.R. (4th) 652 (Ont. D.C.). Court has no jurisdiction to deal with academic matters.

The words "Court has no jurisdiction to deal with academic matters." do not appear in Justice Gill's decision.

[26] *Even These Authorities Do Not Exclude All Jurisdiction*. A careful reading of the authorities referred to by the Ontario Superior Court in *Dawson* and the Alberta Court of Queen's Bench in *Fufa*, *Yen*, and *Rittenhouse-Carlson* reveals that there is no general exclusion of superior court jurisdiction in "academic matters".

[27] The first thing to notice is that *Rittenhouse-Carlson* and *Fufa* expressly contradict "Court has no jurisdiction to deal with academic matters." See para. 78 of *Rittenhouse-Carlson*, "unless fraud or malice or bad faith on the part of the institution is proven", para 79 "save where the applicant has shown … a flagrant violation of the rules of natural justice", para. 80 "in the absence of a denial of natural justice". See para. 16 of *Fufa*, "in the absence of a flagrant disregard as to the rules of natural justice", and para. 24 "unless … there was tortious conduct".

[28] *The Courts Have Jurisdiction: Ontario Court of Appeal*. Dalhousie referred me to *Gauthier c. Saint-Germain*, 2010 ONCA 309 and submitted that this decision "confirmed that an action may be dismissed or a statement of claim struck where it is little more than an indirect attempt to appeal an internal academic decision". However, the Ontario Court of Appeal also rejected the proposition that a superior court lacks jurisdiction to try cases of breach of contract or tort involving academic decisions and conduct. It also explained why its earlier affirmations of *Wong*, *Zabo*, and *Dawson* did not adopt any generalization about lack of jurisdiction.

[29] Counsel provided me with an English translation of *Gauthier* prepared by Carswell. This was helpful.

[30] The University of Ottawa and two professors were sued by Ms. Gauthier in contract and tort. The university and the professors submitted that "la jurisprudence établit que si la nature véritable du différend est d'ordre scolaire … la Cour supérieure n'est pas compétente": para. 28.

[31] Justice Rouleau disagreed. " Je suis d'avis que la jurisprudence invoquée n'étaye pas le principe avancé par les intimés": para. 29. The rest of the panel, Justices Weiler and Sharpe, concurred with his reasons.

[32] Justice Rouleau began by noting, also at para. 29, "la Cour supérieure se veut un tribunal de compétence inhérente." In the absence of "dispositions législatives ou contractuelles claires et expresses", "la cour est réputée compétente pour se prononcer sur le litige".

[33] Judicial review remains the appropriate option when a person seeks to modify "une décision académique interne prise par les autorités universitaires": para. 30. In that circumstance, the court shows deference but it does not lack jurisdiction: "… la cour … doit être réticente de s'immiscer dans les affaires internes de l'Université, tout en respectant l'indépendance et la discrétion entourant le processus décisionnel ayant cours dans le domaine académique": para 30.

[34] Turning to jurisdiction in contract and tort, Justice Rouleau said at para. 32: "lorsqu'une poursuite allègue des délits civils ou une rupture contractuelle dans le but de recouvrer des dommages-intérêts, il s'ensuit que la cour est compétente pour entendre l'affaire." This holding contradicts Dalhousie's argument on lack of jurisdiction.

[35] The defendants in *Gauthier* relied on the Ontario Court of Appeal decisions affirming *Wong*, *Zabo*, and *Dawson*: para. 33. Justice Rouleau discussed *Wong* at paras. 35 and 36 concluding: "Bref, la question pertinente ne s'articulait pas autour de la nature du différend, mais bien autour de l'existence et du contenu du contrat." The question of jurisdiction was not discussed at the appeal level: para. 35.

[36] *Zabo* was discussed at paras. 42 to 44. The basis for the appeal decision was that "le juge de première instance n'a pas erré en radiant la portion de la déclaration fondée sur la rupture contractuelle, notamment parce que cet aspect était intenable et pouvait faire l'objet d'une radiation distincte en vertu de la r. 25.11": para. 44.

[37] *Dawson* was discussed at paras. 37 to 41. Although the trial judgment was based on broad grounds, the appeal decision was more restricted: *Gauthier*, para. 39. Para. 41 concludes:

> Le principe qui se dégage de *Dawson* n'est donc pas que la cour n'est pas habilitée à trancher des différends de nature scolaire, mais plutôt que la demanderesse dans

> cette cause, s'étant vue refuser son appel interne par l'université, ne pouvait reformuler ce qui était essentiellement la même plainte devant les tribunaux en prétendant, toutefois, qu'elle se fondait cette fois sur un délit civil.

[38] The holding in *Gauthier* is expressed this way at para. 46:

> A mon avis, pour déterminer si la cour est compétente, il est plus révélateur de se pencher sur la réparation revendiquée par le demandeur. Quand une partie cherche à faire renverser la décision académique interne d'une université, la voie appropriée est le contrôle judiciaire. Par contre, si la partie demanderesse allègue les éléments constitutifs d'une cause d'action fondée en délits civils ou en rupture de contrat, tout en réclamant des dommages-intérêts, la cour s'avérera compétente et ce, même si le différend découle des activités scolaires ou académiques de l'université en question.

I accept and adopt this reasoning. Therefore, this court has jurisdiction to entertain Ms. Ahmed's claim against Dalhousie in the tort of official misfeasance.

[39] *Only One, Narrow Branch of Law Supports Any Limit*. Aside from following the holding of the Ontario Court of Appeal in *Gauthier*, an examination of the authorities underlying those that support a general lack of jurisdiction shows that there is no principle of law to support such a proposition.

[40] Pronouncements in the cases supporting lack of jurisdiction refer to distinct fields of law without making it clear whether a distinct field has implications for jurisdiction. In my assessment, only one of these fields has any implication for jurisdiction. The fields referred to are:

- deference to academic decisions on judicial review,
- discretion to refuse judicial review in favour of an adequate, alternative remedy,
- re-litigation as abuse of process, and
- the exclusive jurisdiction of a visitor.

[41] *Deference in Judicial Review*. This field is touched upon in para. 79 of *Rittenhouse-Carlson*, repeated in para. 42 of *Yen* and para. 18 of *Fufa*,

> The Courts are reluctant to intervene in decisions of educational institutions relating to academic evaluation, save where the Appellant has shown that he or she was treated with such manifest unfairness that there was a flagrant violation of the rules of natural justice …

This passage suggests that the review jurisdiction extends to academic decisions in a university, but the jurisdiction is restricted to cases of procedural unfairness and, at that, to "flagrant" cases. I do not think that accords with the discussion at para. 30 of *Gauthier*.

[42] Universities enjoy no special status on judicial review. If the decision is reviewable in the first place, then general principle determines our authority to interfere for procedural unfairness or on account of the reasoning. Hence, Justice Duncan's decision in *Chambers v. Dalhousie University*. As with any other review

of the reasoning in a decision, the standard is established according to the rigors of the *Dunsmuir* analysis. Nothing suggests a special limit on the review jurisdiction for university decisions on "academic matters".

[43] *Alternate Remedy*. *Fufa*, *Yen*, *Tillack v. University of Calgary*, [1983] A.J. 385 (C.A.), which is referred to at para. 38 of *Yen*, and *Naimji v. University of Alberta* (1988), 87 A.R. 357 (Q.B.) each involved a civil suit in tort or contract that was dismissed because there was an internal appeal process for challenging an academic decision at issue in the civil suit. *Yen* at para. 35 and *Naimji* at para. 15 refer to *Harelkin v. The University of Regina*, [1979] 2 S.C.R. 561 in support of the proposition that availability of an academic appeal process precludes a remedy in tort or contract. Respectfully, this is an unwarranted extension of *Harelkin*.

[44] *Harelkin* was about judicial review. The question was whether it was necessary to exhaust remedies by engaging in an internal review before seeking *certiorari* when there was a denial of procedural fairness at first instance. *Harelkin* does not embrace any limit on actions in tort, breach of contract, or other actionable wrongs.

[45] The statement at para. 76 of *Rittenhouse-Carlson* that "The holding of examinations and the conferring of degrees are domestic questions within the

exclusive jurisdiction of the post-secondary institution" is supported by a reference to *Houston v. University of Saskatchewan*, [1994] S.J. 10 (Q.B.). That was also a case about judicial review, not immunity from redress for tort, breach of contract, or other civil wrong.

[46] These underlying authorities are about the subject at para. 77 of *Rittenhouse-Carlson*: "Typically, a student must exhaust the internal appeal procedures available at the post-secondary [institution] before he or she may seek recourse from the Courts."

[47] This court has a discretion to refuse judicial review when there is an adequate alternative remedy: *Kingsbury v. Heighton*, 2003 NSCA 80. An appeal by a student to the university senate may be an adequate alternative remedy: *Harelkin*. The discretion is exercised by weighing relevant factors, which may include the composition of the senate committee, its powers, its likely procedures, a previous finding, expeditiousness, and expense: *Harelkin*, p. 588.

[48] There need be jurisdiction in the first place, if there is a discretion to decline it. How that discretion gets transposed to the inherent jurisdiction for determining actionable causes is not explained in the authorities upon which Dalhousie relies.

In my assessment, it cannot be transposed because it is tied in principle to judicial review.

[49] *Re-litigation as Abuse*. *Fufa* refers at para. 17 to *Yen* at para. 38, which quotes from *Tillack v. University of Calgary*:

> It is also implicit in the procedures that they are to be effective. To say that the appellant may follow them and when he doesn't like the result, go to Court, is to say that the parties deliberately agreed upon a process which would be singularly ineffective. Surely, it is implicit in such elaborate procedures that they were intended as a final adjudication and the mere fact that the Universities Act does not say that in so many words does not mean in our opinion that this meaning should not be implied. Had the appeal process been defective, the appellant may well have been able to have the defects reviewed and corrected and a new and correct process carried out by resort to the appropriate … writs. His time for so doing is long since expired and this action is at most a colourable attempt to obtain that review out of time.

[50] *Tillack* was a student at the University of Calgary. He had "eight main areas of complaint": para. 3. He engaged the university's internal appeal process and lost. He sued "seeking a re-hearing of the grievances which had been submitted to the various parts of the appeal procedure": para. 3.

[51] The primary holding of the Alberta Court of Appeal was put this way, also at para. 3:

> In our view they have already been determined, or, to put it in another way, the appellant has had the judgment of the persons he agreed as a matter of contract were to be the judges of his work.

The secondary ("It is also implicit …") holding is the passage quoted in *Yen* and *Fufa*. It is at para. 4 of *Tillack*.

[52] The decision in *Tillack* was not based on the branch of *res judicata* referred to as cause of action estoppel. It is unlikely the academic appeal panel had any authority to determine a cause or award damages. If it did, the Alberta Court of Appeal would have said so. *Tillack* could not have been based on the other branch, issue estoppel, either. That field of law was well established when *Tillack* was decided in 1983. The court would have mentioned the field if it was being applied. I think this decision is an early expression of a field of law that matured in Canada years later.

[53] Until *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 it was unclear what approach the law would take in Canada to re-litigation when neither branch of *res judicata* applied. There was the possibility of weakening the mutuality requirement in issue estoppel, as in the United States. Canada, through the Supreme Court, chose a more flexible approach to re-litigation.

[54] "Judges have an inherent and residual discretion to prevent an abuse of the court's process", para. 35. Applying the power to prevent an abuse of process to

re-litigation created "an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel": para. 38. So, within the discretion to prevent abuse is "the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process": para. 42.

[55] The discretion to prevent re-litigation applies in various legal contexts: *Toronto* at para. 40. Issue estoppel (para. 33) and the discretion to prevent re-litigation when issue estoppel does not apply (para. 35) extend to findings of fact made by an administrative body acting within its jurisdiction: *Boucher v. Stelco Inc.*, 2005 SCC 64.

[56] To the extent that they refer to this field of law, the decisions relied on by Dalhousie affirm the court's jurisdiction. They apply the court's discretion to prevent abuse of process.

[57] Abuse of process was the explicit basis for the decision in *Said*. Dr. Said was an assistant professor in the Faculty of Medicine at the University of Ottawa. The Dean of Medicine investigated a complaint and found that Dr. Said had sexually harassed a student. An "Administrative Committee" put Dr. Said on probation. At about the same time, Dr. Said applied for a promotion to Associate Professor. A personnel committee unanimously recommended against promotion.

Dr. Said sought judicial review. The Divisional Court found bias because the personnel committee included the dean who had made findings against Dr. Said in the sexual harassment investigation. Dr. Said reapplied. A new personnel committee recommended against promotion for a reason not related to sexual harassment.

[58] Like Ms. Ahmed, Dr. Said did not seek further judicial review, but sued instead. He sought a declaration that the latest decision was not made in good faith and an order granting the promotion. He also sought a declaration that he had not sexually harassed the student. He also sought enormous damages.

[59] At para. 36 of *Said*, Justice Beaudoin accepted the submission "that Dr. Said is not entitled to use the process of this Court by attempting to re-litigate the same facts and allegations raised in the University's internal processes …". "This action is an abuse of process and should be struck on that basis": also para. 36.

[60] Justice Beaudoin's reference at paras. 29 and 31 to *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633 and *Ontario v. Lipsitz*, 2011 ONCA 466 situate his reasons within a field of law that has undergone development in recent years, the same field of which *Tillack* is an early expression.

[61] The discretion to stay a proceeding suggests jurisdiction in the first place. The discretion to stay for abuse does not limit jurisdiction.

[62] *The Visitor*. This field of law was canvassed in great detail in William Ricquier, "The University Visitor" (1977 – 78) 4 Dalhousie L.J. 647. It is the field upon which the primary holding in *Wong* was based. *Wong* is the case that was cited at para. 72 of *Rittenhouse-Carlson*, the paragraph that was quoted at para. 40 of *Yen*, and para. 18 of *Fufa* with the addition of "Court has no jurisdiction to deal with academic matters."

[63] The visitor appears when we trace para. 76 of *Rittenhouse-Carlson*, reproduced in *Yen* and *Fufa*, back to *Houston v. University of Saskatchewan* at para. 16 and from there back to *R. v. University of Saskatchewan, Ex Parte King*, [1968] S.J. 231 (C.A.) affirmed [1969] S.C.R. 678.

[64] Simply put, the founder, and the successors of the founder, of a charity, such as some colleges in England, had the power to provide for the appointment of a visitor. The visitor could settle disputes within the college, and was presumed to do so in accord with the founder's thinking, out of deference to the endowment. There are many decisions in England and Canada about visitors. They speak of the

"domestic" law of the college, almost as an enclave from the general law, and of the visitor's jurisdiction as exclusive, as preclusive of judicial intervention.

[65] Earlier, seemingly absolute, pronouncements about the visitor's exclusive jurisdiction and the courts' lack of jurisdiction may have to be revised or abandoned in light of the modern review jurisdiction and our present understanding of the jurisdiction to determine, and remedy, cases of breach of contract, tort, and other actionable wrongs. I am not concerned with that now.

[66] My point is that, among the fields of law one is able to detect in the decisions relied upon by Dalhousie, the only one that has anything to do with jurisdiction is the visitor. In my respectful opinion, we should not generalize pronouncements about the jurisdiction of visitors into pronouncements limiting jurisdiction in all cases involving "academic matters" between universities and professors, scholars, or students. There is no principle supporting the generalization. In principle, a university is liable when it commits an actionable wrong.

[67] The narrow field of law about visitors does not assist Dalhousie with the claim made by Ms. Ahmed. I doubt that this field can stand against the rights of a

person who has suffered an actionable wrong, but it cannot apply to Dalhousie in any case.

[68] Dalhousie University was created by the enactment of *A Bill to Incorporate the Governors of the Dalhousie College, at Halifax*, S.N.S. 1820-1821, c. 39.

[69] The preamble makes it clear that Lord Dalhousie, in his capacity as Lieutenant-Governor of Nova Scotia, held £9,750 belonging to the Crown and that King George IV had signified that the money "should be appropriated and applied to the use and service of the said College". The province contributed another £2,000. A building had been built on the Grand Parade (now Halifax City Hall) and the balance was in annuities at 3%. They were held by Lord Dalhousie and two others "as an endowment for the use and service of the said College".

[70] The 1820 Act provided for governors, the holders from time to time of various offices, such as the Governor-General, the Lieutenant-Governor, the Chief Justice, and the Anglican bishop: s. 2. It incorporated the governors and gave them powers, including "to make rules and ordinances, touching and concerning the good government of the said College, the studies, lectures, and exercises thereof": s. 3. The rules and ordinances were not to be "repugnant to the Laws and Statutes of the Realm, or of the said Province of Nova Scotia": s. 3. Based on

those provisions, I would say that Dalhousie was founded with money from the Crown, probably the Crown in the right of Great Britain for one part and in the right of Nova Scotia for the other. Further, it was incorporated by legislation. Furthermore, the governors, as the corporation, were empowered to make rules on "academic matters", but they were subject to legislation.

[71] Section 5 of the 1820 Act provided, "That such Person or Persons as His Majesty, His Heirs and Successors, may see fit from time to time to appoint, shall be visitor or visitors of said College." There is nothing more on the subject, no express provision about the visitor's powers. It appears that, under the common law at that time, the visitor could determine disputes about "academic matters" to the exclusion of the courts.

[72] The starting point for legislation governing present day Dalhousie is *An Act for the regulation and support of Dalhousie College*, S.N.S. 1863, c. 24. It named new governors and incorporated them afresh as "the Governors of Dalhousie College at Halifax": s. 1. A governor could only be replaced by the Governor-in-Council under s. 1, except a device was provided for one who made a large endowment under s. 2. The governors had control of the business of the college under s. 4, but "The internal regulation of the said College shall be committed to the Senate Academicus … subject … to the approval of the Governors": s. 7.

[73] "The acts heretofore passed in relation to Dalhousie College are hereby repealed …": s. 9. No provision was made for a visitor. Nor, has a visitor been legislated since.

[74] In *Wong*, the District Court interpreted the *University of Toronto Act* as preserving "visitatorial powers" even though a provision for appointment of a visitor had disappeared from the legislation.

[75] I have to interpret the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2, para. 21. To find continuing statutory authority for a visitor, or the powers of a visitor, would be inconsistent with the plain meaning of s. 9 of the 1863 Act.

[76] As for context, the scheme of the 1863 Act was to replace almost every concept in the 1820 Act with revised concepts for the makeup of the governors, government including a senate, and elevation to a "University" in s. 5. The one remaining concept was freedom from religious tests or subscriptions: s. 3 in 1820, s. 6 in 1863. Purpose, as stated in the preamble to the 1863 statute, suggests a

departure from the old: "to extend the basis on which the said College is established and to alter the constitution thereof".

[77] There is no visitor at Dalhousie University. Therefore, there is nothing that can preclude the jurisdiction of this court.

Abuse of Process by Ms. Ahmed

[78] The university's submission about abuse of process returns to the argument about jurisdiction, "… the Applicant has failed to exhaust the internal remedies that are made available to her by the Calendar." She seeks "to 'jump the queue' " and "to thwart the governing limitation period [for judicial review]". "For these reasons, Dalhousie University respectfully submits that this Application in Court should be dismissed as an abuse of process."

[79] The university filed an affidavit of a Program and Student Services Officer of the Faculty of Graduate Studies, Ms. Wendy Fletcher. She was cross-examined.

[80] The affidavit establishes that Ms. Ahmed was enrolled in the Fall of 2009 in a Ph.D. food sciences programme. The affidavit exhibits the 2012/13 Calendar and refers to regulation 8.3, "Comprehensive Examinations" and regulation XII, "Appeals".

[81] The affidavit shows that the programme of studies was complete in the Spring of 2011 and examinations were administered in September 2011. A letter giving Ms. Ahmed the results is exhibited. It says, "In view of the failure to your four written exams, the members of your Advisory Committee unanimously agree that you cannot continue the Ph.D. program after December 31st 2011, end of the current Fall Term." The academic dismissal is applied "without option to be readmitted".

[82] The letter also says "The other four Faculty members of the Food Science Program, Dr. Tom Gill, Dr. Alex Speers, Dr. Allan Paulson and Dr. Lisbeth Truelstrup-Hansen support this decision." They were not committee members.

[83] Ms. Ahmed appealed. The dean of the Faculty of Engineering was concerned that her examinations were administered with groups of students. He found this irregular and proposed terms for settlement that included removal of the failures from Ms. Ahmed's transcript, new examinations, an external referee to assess the difficulty of the new exam questions with past examinations, and an "external marker". Ms. Ahmed accepted the dean's proposal.

[84] A letter in August 2012 gives Ms. Ahmed the results of the second set of examinations. "I regret to inform you that your registration in the Ph.D. program

has been terminated due to academic failure." Ms. Ahmed appealed, and this time the appeal went to a hearing.

[85] A faculty committee found that Ms. Ahmed was not provided with "a formal supervisor or supervisory committee at the time of her second comprehensive examinations". This was "irregular". The provision of an external referee and an external marker, along with other accommodations, led to these findings:

> - her comprehensive examination questions were reviewed by an external expert who had not been involved in her graduate career, thus minimizing the possibility of any bias or prejudice against her regarding her second set of comprehensive examinations.
>
> - … even though Ms. Ahmed did not have a formal supervisory committee during her preparation time for her second comprehensive examinations, those examinations were properly tailored to her academic background, as described in the "Guidelines for Ph.D. Comprehensive Examinations" document … .
>
> - While the procedure followed in Ms. Ahmed's second examinations was irregular, due mainly to the circumstances surrounding her relationship with her former supervisor and supervisory committee, it was fair in recognizing and following the intent of the Guidelines.

[86] The grounds of appeal included Ms. Ahmed's claim of bias. This was based on her relationship with her supervisor and supervisory committee, their resignation in light of the dean's compromise, and their continued involvement despite resignation. She also claimed that the absence of a supervisory committee

compromised her ability to obtain a fair examination the second time around. These claims were not addressed extensively by the faculty committee.

[87] Ms. Ahmed appealed further to the Senate Appeals Committee. It dealt more directly with the claim of bias, but it concluded that the academic committee had found that the accommodations under the dean's proposal negated bias.

[88] At the Senate level, Ms. Ahmed succeeded on her second ground.

> - The supervisor … is fundamental to a graduate student, not just for thesis guidance but for advice on other aspects of their study program.
>
> - Short of demonstrated wrongdoing or academic failure by the student, the faculty and department have the obligation to provide the student with supervisory support.
>
> - Allowing the student to write her comprehensive exams without such support was not a mere irregularity, … but an unfairness in the application of the mandatory regulations.

Accordingly, the appeal was allowed. Ms. Ahmed was to be "permitted to rewrite her comprehensive examinations after the appointment of a new supervisor and supervisory committee …".

[89] The affidavit shows that the university and Ms. Ahmed agreed on terms for her continuing in the Ph.D. programme. They agreed on a supervisor, the members of a supervisory committee, examination by the supervisory committee, notice of

the materials for examination, and a process for setting examination dates. The terms were accepted by Ms. Ahmed by letter dated April 2, 2013. She wrote examinations in May, failed, and was dismissed.

[90] Ms. Ahmed took issue with the examinations. The supervisory committee was not properly composed, and she was not sufficiently accommodated for a problem with her back.

[91] On the first issue, she maintained that she agreed to the composition "under protest". There is no evidence to support that, and her letter of April 2, 2013 is inconsistent with her present pleadings. On the second issue, the university changed the exam schedule once at Ms. Ahmed's request. A further request was met with a request for a medical opinion and Ms. Ahmed's response that she was "too busy to see a doctor".

[92] I have discussed authorities on abuse of process, re-litigation as abuse, and the discretion to defer to an alternate process. I do not accept Dalhousie's submission that re-litigation or alternate process are sufficient for a stay in the circumstances of this case.

[93] Perhaps Ms. Ahmed's claim includes an attempt to re-litigate one of the findings of the Senate Committee. However, her claim, as pleaded, has a broad

focus. She alleges malice over the whole course of her almost four years at Dalhousie. If she can prove it, she may be entitled to a remedy. Whether or not she is re-litigating one of the Senate findings and, if so, whether the re-litigation amounts to an abuse, are questions to be decided in the broad range cast by the pleadings.

[94] Similarly, Ms. Ahmed's choice not to pursue another appeal may or may not hurt her claim. Again, that needs assessment in the whole of whatever evidence is to be presented.

[95] Ms. Fletcher's affidavit shows a third avenue for inquiry concerning possible abuse. That is the inconsistency between Ms. Ahmed's 2013 agreement before her last set of examinations and her plea of continuing malice. Again, this is an issue for assessment in the whole of the evidence.

[96] It would be premature to stay Ms. Ahmed's application on grounds of abuse. Whether some aspects of her claim are abusive cannot be determined in isolation from the whole of the evidence. For that reason, I decline to exercise my discretion to enter a stay for abuse of process.

Conclusion

[97] The university's motion is dismissed. I am asking our schedulers to reschedule the motion for directions. Counsel may send me short submissions on costs of the motion.

Moir J.