Al-Bakkal v. De Vries, 2003 MBQB 198 (CanLII)

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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	COUNSEL
GHASAQ AL-BAKKAL,	)	
Applicant,	)	Applicant: Veronica L. Jackson
- and -	)	Respondents: Walter L. Ritchie, Q.C. and Maria L. Grande
DR. JOHANN de VRIES and THE UNIVERSITY OF MANITOBA, through its Academic Body, THE SENATE OF THE UNIVERSITY OF MANITOBA, through one of its established Councils being THE DENTAL FACULTY COUNCIL,	)	
Respondents.	)	Judgment delivered: August 27, 2003

SINCLAIR J.

I. THE ISSUES

[1] This is an application by the applicant Ghasaq Al-Bakkal ("the applicant") in which the following relief is sought:

An excellent review of the law with respect to matters involving grievances between students and a university is contained in the case of ***Polten v. University of Toronto*** (1975), 59 D.L.R.(3d) 197 (Div. Ct.). The dispute here arose as a result of a doctoral student's refusal to change his thesis and the university's eventual rejection of his formal paper. The judgment of Weatherston, J., is regularly cited as authority for the non-interventionalist approach of the courts towards such disputes. The court held that the standards for a University degree and the assessment of a student's work are so clearly vested in the university that the courts have no power to intervene merely because it is thought that the standards are too high, or that the student's work was inaccurately assessed. However, the prerogative writs of certiorari and mandamus are available to a student who has been denied natural justice in respect of his examinations. The university has been entrusted with the higher education of a large number of the citizens of the province. This is a public responsibility that should be subject to some measure of judicial control.

[46] In ***Mikkelsen v. University of Saskatchewan***, [2000] S.J. 115 (Q.B.), Rothery J stated:

¶15 The guiding principles for the court were succinctly outlined by Barclay J in ***Houston v. University of Saskatchewan*** reflex, (1994), 117 Sask.R. 291 (Q.B.). In summary, the holding of examinations or conferring of degrees are domestic questions within the exclusive jurisdiction of the university. The court has no jurisdiction to intervene. However, the prerogative writs of certiorari and mandamus are available to a student denied natural justice in academic matters.

[47] In ***Kane v. Board of Governors of U.B.C.*** 1980 CanLII 10 (SCC), (1980), 110 D.L.R.(3d) 311 (S.C.C.), the court quashed a decision of the Board of Governors of the University of British Columbia where the president of the university answered questions of members of the Board about the suspension of a professor at a time when neither the professor nor his counsel were present. The court held that an accused person must be given "a real and effective opportunity to correct or meet any adverse statement made". Dickson J., for the majority, stated, at pp. 321-322:

The following propositions, in my view, govern the outcome of this appeal:

1. It is the duty of the Court to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a university, sitting in appeal, pursuant to legislative mandate. The board need not assume the trappings of a Court. There is no lis inter partes, no prosecutor and no accused. The board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case. ...

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman, L.J., said (***Ridge v. Baldwin et al.***, [1962] 1 All E.R. 834 at p. 850 (C.A.)), is only 'fair play in action'. In any particular case, the requirements of natural justice will depend on 'the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth': per Tucker, L.J., in ***Russell v. Duke of Norfolk et al.***, [1949] 1 All E.R. 109 at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake: ***Abbott v. Sullivan et al.***, [1952] 1 K.B. 189 at p. 198; ***Russell v. Duke of Norfolk***, supra, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views': ***Board of Education v. Rice et al.***, [1911] A.C. 179 at p. 182 (H.L.); ***Local Government Board v. Arlidge***, supra, at pp. 133 and 141.

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellate authority must not hold private interviews with witnesses (de Smith, *Judicial Review of Administrative Action*, 3rd ed. (1973), p. 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party

> must, in the words of Lord Denning in ***Kanda v. Government of Federation of Malaya,*** [1962] A.C. 322 at p. 337, 'know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ... whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.' ...
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> 6. The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so: ***Kanda v. Government of Federation of Malaya,*** supra, at p. 337. ... We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[48] In ***Carson v. University of Saskatchewan***, [2000] S.J. 500 (Q.B.), Allbright J states:

> ¶28 Courts have traditionally been reticent to interfere with grievances involving students and a university, particularly where those grievances are "purely domestic questions" as opposed to matters involving an educational institution's "public duties". Generally, matters within the exclusive jurisdiction of an educational institution should only be reviewed by a court of competent jurisdiction if such matters were not determined in accordance with the principles of natural justice, and only matters touching upon the educational institution's public duties and not domestic matters are reviewable by the courts.

[49] In this case, I am satisfied that this is not simply a situation where the student is challenging an academic assessment. In this case, she is challenging the process by which she has been assessed in her course and, in particular, challenges the Faculty's application of the ruling of the Senate Appeals Committee of December 22, 2002.

[50] I am satisfied that the Faculty's re-evaluation as directed by the Senate Committee was flawed in that the Faculty acted unfairly and with bias against the applicant when it conducted a total re-evaluation when the Senate Committee's apparent direction was to re-evaluate her grade taking into account the additional 5% wrongly deducted from her final mark. I am also satisfied that the re-evaluation was unfair, as it was based on considerations not in place at the time of her assessment at the end of the course work in June 2002 (Dr. Mazurat had totally changed the basis of his assessment) and that it was heavily biased against her by unproven allegations of cheating propounded against her by her class instructor. I am also of the view that the Faculty's failure to provide the applicant with a copy of the student letter of August 2002 referred to by the Dean at the Senate hearing was grossly unfair to the applicant.

[51] In the ordinary course of events, the proper course for the court to follow would be to refer the matter back to the University for re-hearing or re-evaluation with guidance from the court's findings and conclusions. However, in this case, I am satisfied that doing so is neither appropriate nor necessary.

[52] I am satisfied that, while the Senate Committee erred when it allowed the Faculty to advance a new basis for failing the applicant in its submission of October 1, 2002, and when it failed to clearly reject that submission, it came to a proper decision that was well within its jurisdiction when it ordered that the applicant be re-evaluated taking into account the work completed within the extension period. While the Senate Committee could have directed the Faculty that it could not formulate another reason to fail the applicant since her appeal to have the 5% returned to her had succeeded, one would have thought that such a direction need not have been made. Given the negativities that existed between the persons involved in this case, however, the Committee might well have been advised to have done so, for that has been the greatest concern in this case.

[53] Therefore, I need not refer the matter back to the Senate Committee for re-consideration for, in my view, they did the right thing, at least insofar as reinstating the applicant's 5% was concerned. I am

also satisfied that it would not be appropriate to refer the matter back to the Faculty with directions, as the Faculty has displayed clear bias against the applicant.

[54] In some of the cases, judges have declined to refer a matter back to a university after concluding that the university officials to whom the matter might normally be returned had shown they were incapable of fairness to the student. In ***Healey v. Memorial University of Newfoundland***, [1993] N.J. 62 Nfld. (S.C.), Barry J. declined to refer a matter back to the university for reconsideration. He stated:

> I have concluded it would be impossible in the circumstances of this case to ensure that there would be an unbiased rehearing if I remit the matter to the Senate for a de novo hearing. All of the members of Senate were supplied with the transcripts of evidence before the Executive Committee, evidence which I conclude is not reliable because of the lack of procedural safeguards provided Healey. I believe members of Senate have to have formed opinions, on the basis of that unreliable evidence, which will prevent a fresh, impartial, analysis of the evidence on a rehearing. See, ***Hajee***.
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> I find therefore, that the appropriate remedy is for me to allow the application of Healey and to order that an injunction issue to the University to readmit him to his medical studies. I do this with considerable hesitation because I recognize that my decision impacts upon the ability of the Faculty of Medicine to assess his professional qualifications before he is accepted into the profession of medicine. However he is now only about to commence third year studies. There will be further opportunities to fairly and properly assess him before final admission to the profession. But that assessment will have to be carried out without consideration of the specific matters that were the subject of complaint in this case and without consideration of the unreliable evidence before the Executive Committee.

[55] In ***Mikkelsen*** (*supra*) Rothery J declined to send a matter back for reconsideration and stated:

> ¶ 33 In ordinary circumstances, upon finding a breach of natural justice on the basis of a denial to be heard, the court would quash the decision of the tribunal and order that the matter be heard according to law. In this case, it would mean that Mikkelsen would be entitled to know the response of the Dean and be given an opportunity to respond to the Dean's submissions to the Bylaws Committee. However, this is no ordinary case. There are facts unique to this application that require the court to consider the request by Mikkelsen's counsel that she be permitted to complete the first year law school programme, rather than repeat the appeal process.

[56] I believe I can deal with this matter without having to refer it to anyone at the University or elsewhere. I admit that I had contemplated referring the question of evaluating the applicant to another body; however, I already have an evaluation upon which I feel I can safely rely. In June 2002, Dr. Mazurat declined to pass the applicant, he said, because she had failed to perform her clinical work on time and therefore she received 20 out of 40 for her clinical component and a final grade of 57%. He was directed by the Senate Appeals Committee to in effect give her back the 5% he had deducted, which gave her 25 out of 40 for her clinical work and a final mark of 62%. Both of those are passing marks for the course. His subsequent efforts to maintain that she did not pass for other reasons flies in the face of his own evaluation of June 2002. It has no bearing on my decision.

[57] I therefore conclude that further reconsideration of the applicant's grade in course 102.309 by the Faculty is unnecessary. She has succeeded in her appeal process and the Faculty must respect that. If there is a suggestion that the applicant lacks the requisite skill and training for fourth year, it should be apparent that, as a student facing another year of studies, any deficiencies in her abilities will become apparent and will be the subject of further assessments.

[58] Accordingly, the applicant is entitled to the following orders:

(i) a declaration that the applicant has attained a final mark of 62% in course 102.309 in the Faculty of Dentistry at the University of Manitoba and has therefore achieved a passing grade in the course;

(ii) a declaration that the applicant has achieved a GPA of at least 2.0 for her third year, which entitles her to pass into her fourth year of studies;

(iii) an order directing the Faculty of Dentistry to permit the applicant to register in her fourth year of studies, assuming she complies with all other university requirements;

(iv) a declaration that the decision(s) of the Faculty Council of June 24, 2002, as they relate to the applicant are no longer operative; and

(v) an order quashing the directives contained in the Dean's letter of January 7, 2003.

[59] The applicant will have her costs.

J.