**FILE: 1982/83-05**

Trial: 1982/83-02

THE UNIVERSITY TRIBUNAL

THE UNIVERSITY OF TORONTO

| | | |
|---|---|---|
| The University of Toronto | ) | Kathryn Feldman and William King |
| | ) | |
| v | ) | |
| | ) | |
| Ms. C. | ) | John Campion and Donna Lang |

REASONS FOR DECISION

This is an application brought on behalf of Ms. C. for an Order that the University of Toronto be required to pay the costs incurred by her in connection with her defence of certain charges brought against her pursuant to the University of Toronto Code of Behavior on Academic Matters (approved by the Governing Council of the University on January 19, 1978). For the purpose of clarifying the issues before me, I shall shortly state the history of those charges and of their disposition by the Tribunal.

In the academic year 1981/1982, Ms. C. was enrolled as a student at the University. Among her courses was Psychology 100, and the offences with which she was charged both related to her alleged conduct during the final examination in that course held on April 26, 1982. The charges were laid on September 10, 1982 and came before the Tribunal for trial on October 26, 1982. A number of witnesses were called for both sides and a second session, held on November 2, 1982, was necessary to conclude the hearing.

The theory of the University's case was that Ms. C. had copied a great many, if not all, of her answers to the examination questions from the paper of another student. No direct

evidence of copying was presented; instead, the University relied heavily upon expert statistical evidence which was to the effect that the similarities between the two papers were so striking that the chances of their occuring naturally were less than one in ten million. Ms. C. called expert statistical evidence to challenge this conclusion together with character evidence, and testified herself that at no time had she been guilty of any wrong-doing as charged.

After deliberating for more than two hours, the jury returned to advise that they were unable to agree on a verdict. In accordance with section 10 (7) of the Enactment of the Governing Council respecting the Disciplinary Tribunal (April 17, 1980), I ruled as Chairman of the hearing that Miss C. must therefore be acquitted and she was accordingly discharged. The question of costs was not raised at that time by me or by either counsel.

On November 5, 1982, the Secretary to the Tribunal formally notified Miss C. by registered mail of the Tribunal's decision, which notice concluded with the statement: "I am forwarding to you and to the University Discipline Counsel information regarding rights of appeal. The deadline for you or for the University to file an appeal is November 26, 1982".

No appeal was filed by either party. However, on November 19, 1982, counsel for Miss C. wrote to the Secretary asserting a claim for costs against the University and requesting a hearing if necessary. In the result, submissions were made to me as hearing Chairman on December 14, 1982 and my decision was reserved until this day.

The submissions dealt with three main issues, which I would state as follows:

(a) What are the powers of the Tribunal to award costs, and how should they be exercised?

(b) Did the failure of the Tribunal to deal with questions of costs before the issuing of its formal decision on November 5, 1982 in any way deprive it of jurisdiction to consider the matter now?

(c) Assuming it has jurisdiction, in what amount, if any, ought costs to be awarded in this case?

It will be convenient to deal with (b) at the outset. Prior to hearing submissions, I had some concern that as Tribunal Chairman, I might now be functus with respect to making any further orders as between the parties. Both counsel addressed this question and having giving it consideration, I am of the opinion that this is not the case. While in my view, the notice of decision of November 5, 1982 complied with and satisfied the requirements of section 18 of the Statutory Powers Procedure Act, R.S.O. 1980, ch 484, such notice is not in my opinion strictly analogous to the final Order in a Civil Court which after issue and entry would render the maker of the Order functus. Nor should the Tribunal necessarily proceed by way of analogy. The Tribunal must first look to the language of the Enactment which provides in section 6 (2) as follows:

> "Where it is considered to be warranted by the circumstances, the Chairman of a hearing or the members of the Tribunal, as the case may be, may in his, her or their discretion award costs of any proceedings, both at trial and on appeal, and may make orders as to the party or parties to and by whom and the amounts and manner in which such costs are to be paid".

There is no requirement that this power be exercised at any particular time, and indeed, there is the clear suggestion that the questions of costs at a hearing may be raised and dealt with on a subsequent appeal.

Furthermore, the question of costs was not raised or dealt with at all at the hearing. While the notice of November 5, 1982 must be regarded as the final decision of the Tribunal for the purposes of satisfying section 18 of the Statutory Powers Procedure Act and determining the appeal period, it was so only with respect to the matters which were then before the Tribunal, that is, the charges laid against Miss C. . Such a notice cannot therefore fairly work to proscribe her rights, whatever they may be, with respect to an issue which was never before the Tribunal.

Finally, I think it must be recognized that the Tribunal is fundamentally administrative in its nature and ought not to become overly burdened with technical rules of procedure. There is a great danger that such rules can work against the ultimate goal of achieving a fair and equitable decision between the parties. While there must be rules of procedure, and while the Tribunal is bound to act in accordance with the Statutory Powers Procedure Act, it is significant that the formal rules of procedure which it has adopted have been very few, and these leave a great deal of discretion in the hearing chairman.

I, therefore, propose to deal with the application for costs as a fresh application. In view of the fact that notice of

the application was given reasonably promptly after the conclusion of the hearing on November 2, 1982, I find that there is no prejudice to the University if the application is dealt with now, although it would be desirable to have these matters argued and determined at the hearings to which they relate.

I, therefore, answer (b) in the negative, and move on to consider issue (a). Section 6 (2) of the Enactment, quoted above, gives to the chairman of a hearing what amounts to virtually a complete discretion to award costs of any proceedings "where it is considered to be warranted by the circumstances". Such discretion, however, must not be exercised capriciously, but judicially and in accordance with sound and recognized principles. This requires some consideration of the nature of the proceedings, and of the relative positionsof the parties.

The Tribunal serves to interpret and apply the University's Code of Behavior on Academic Matters. This Code, by its plain terms, relates to "the honesty and fairness of the teaching and learning relationship, especially with respect to evaluation. Thus the essence of an offence by a student is the seeking of credit by fraud or misrepresentation rather than on the basis of merit" (section C).

Any charges which come before the Tribunal are therefore essentially dealing with conduct considered by the University as offending against the basic standards of conduct of the University Community as set out in the Code. The position of the University is therefore not that of a private litigant, but of the enforcer of community standards. As such, its position is very much like that

of a Crown prosecutor in a criminal case. In my opinion, my discretion as to making an award of costs ought to be exercised with regard to the principles applicable to the awarding of costs in criminal cases.

There is little assistance to be derived from our own jurisprudence. The Criminal Code of Canada, R.S.C. 1970, ch. C-34 provides for the payment of costs to an accused to a very limited degree in summary conviction matters, and not at all in relation to indictable offences. This of itself may be taken as some indication of just how unusual is an award of costs in criminal proceedings.

The leading case would appear to be the decision of the English Court of Appeal in Berry v British Transport Commission, [1961] 3 All E.R. 65, where at page 74 Devlin L.J. stated:

> "In criminal cases it is so generally accepted that a successful defendant has no prima facie entitlement to or expectation of an award of costs in his favour that there is little or no authority on the point. There must be innumerable defendants who have succeeded without costs, but I have never heard of one who has claimed that he is prima facie entitled to them. In Becker v Purchase (37) the Divisional Court emphasised that a defendant was not entitled, as of right, to costs whenever the justices allowed his appeal or dismissed an information against him; if they gave no reason, the court could not interfere with the exercise of their discretion. A statement as to how the discretion should be exercised under the Act of 1952 if the accused was acquitted has been made by Lord Parker, C.J., in the Court of Criminal Appeal (38), which says substantially the same thing. In saying that the mere fact of an acquittal did not carry with it the "expectation" that the discretion would be exercised in favour of the acquitted person, Lord Parker, C.J., doubtless had in mind the use of the word "expectation" by Viscount Cave L.C., in Donald Campbell & Co. Ltd. v Pollak (39).

> This difference is not simply a difference in practice. It is a difference in the substance of the law. The court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the construction which it puts on it--"construction" being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing. What the court says is implicit in a statute is just as much a part of the law as the interpretation which the court puts on the text. It is the intent of every statute which confers a discretionary power that the power should be used justly. It does not follow that a principle on which it is just to make an award of civil costs will be equally just when applied to an award of criminal costs; and that is how the distinction arises. I do not propose to examine all the relevant differencesthat may be made for this purpose between a civil action and a criminal proceeding. But in relation to an award of costs against the party who initiates the proceedings there is one difference that is obvious. A plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly."

I respectfully adopt this statement of principle as applicable to the decision which I am called upon to make here.

In my opinion, the Tribunal ought not to make an award of costs against the University following the acquittal of an accused except in the most unusual circumstances. Without in any way deciding the point, and not in any way to limit the potential scope of circumstances that might be regarded as unusual, I can say that I would consider that a prosecution maliciously or thoughtlessly conceived or clearly without reasonable foundation might be so regarded. When considering whether or not to bring charges before the Tribunal, the University should not be constrained by fears of an inevitable financial penalty should the result be an acquittal. If it were so constrained, the proper

administration of the Code would be severely limited. In my view, this is a situation where the interests of the University Community as a whole must come before those of any individual accused.

This then brings me to a consideration of the final issue, namely, in what amount, if any, ought costs to be awarded in this case? Counsel for Miss C. argued that the "circumstances" to be considered included the fact that this case was the first where expert statistical evidence was introduced and as such was something of a test case; that the accused had deemed it necessary to engage the services of an expert to testify, at considerable expense; that the defence was obliged to spend considerable time, and therefore, incur considerable expense, in researching and dealing with legal points. While these facts are undoubtedly true, I do not consider that either they or the circumstances as a whole justify the making of the order sought.

Considering all of the circumstances, including the evidence at the hearing, the inability of the jury to reach a verdict and the submissions made before me, I can find no basis for finding unusual circumstances to exist, and certainly none to warrant a finding that the University acted maliciously or unreasonably in bringing the charges before the Tribunal. In the exercise of my discretion, I therefore decline to make any award of costs in favour of Miss C. against the University. There will be no Order as to the costs of this application.

December 31, 1982

Anthony Keith, Q.C.
Member, University Tribunal