FILE: 1999/00-12
Trial decision: 1999/00-13

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

AND IN THE MATTER OF the decision to try Mr. L. on charges of academic dishonesty made on February 10, 1997,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. SS

BETWEEN:

THE GOVERNING COUNCIL OF UNIVERSITY OF TORONTO

Prosecutor (Respondent)

- and -

Mr. L.

Defendant (Applicant)

INTERIM DECISION

PANEL

Mr. Raj Anand	Chair
Professor Roland LeHuenen	Dept. of French
Ms. Jinghua Liu	Law

APPEARANCES

Mr. Jerome H. Stanleigh Banister & Solicitor	Counsel for defendant
Ms. Linda Rothstein Gowling, Strathy & Henderson	Counsel for University

SCOPE OP THIS DECISION

[1] This panel of the University Tribunal heard two motions by the Defendant Mr. L. on May 26, 1999. Oral submissions were made by counsel for the Defendant and the University that evening and were supplemented by written arguments filed subsequently. This decision relates to these preliminary motions only, and nothing in this decision should be regarded as passing judgment in any way on the merits of the charges against the Defendant.

NATURE OP THE MOTIONS

[2] The Defendant first asked for an adjournment of the hearing in order to bring a motion before the Superior Court of Ontario to stay the charges. After argument, the Tribunal rejected the adjournment request. No notice of this request had been given prior to the May 26 hearing, which had been scheduled months in advance. Moreover, the Defendant's counsel had made known his objections as early as February 12, 1999, but had taken no steps to put his concerns before the Court. In general, absent unusual circumstances or a judicial order to the contrary, an administrative tribunal should not interrupt its processes when a challenge is made to its jurisdiction. Rather, it should determine the issue, at least in the first instance, and its determination will usually be of some assistance to any Court that is later called upon to review the Tribunal's decision. We took the view that if there were a serious objection to the jurisdiction of this Tribunal, the motion should have been brought before the Superior Court long before the commencement of this hearing,

[3] We then went on to hear argument on the Defendant's main motion, which sought to dismiss the charges against him on grounds of delay and abuse of process. Five exhibits, including affidavits and books of documents, were entered on consent, and no oral evidence was called.

[4] The allegation of delay related to the interval of about two and a half years between the late fall of1996, when some the charges now before this Tribunal were brought to the Defendant's attention, and the date of this hearing, May 26, 1999. The alleged abuse of process related to failure to disclose the University's witnesses and witness statements and the University's refusal to allow certain potential witnesses to be interviewed by the Defendant's counsel.

[5] We have reviewed the extensive briefs of correspondence between the University and their counsel, on one hand, and the Defendant and his solicitor, on the other, from December 19, 1996 (when Vice-Principal and Vice-Dean Ronald Dengler alerted the Defendant to two of the charges that are now before us in Exhibit 4) to April 26, 1999, shortly prior to our hearing.

[6] The pre-hearing exchanges do not present a pretty picture. There has clearly been unnecessary delay in the processing of the charges, as well as a certain amount of posturing on the part of both sides. Delay is a singularly debilitating factor in the conduct of administrative hearings, and serves the interests of neither side.

[7] We are, however, unable to accede to the submission of the Defendant that the delay in this case should cause this Tribunal to terminate its hearing. Our reasoning is as follows.

[8] First, as a factual matter, the extensive delays in this case were the cumulative result of some blameworthy conduct by both sides, as well as unavoidable lapses of time.

[9] It would serve no purpose to recite the lengthy history that is revealed in the correspondence; a few examples will suffice. The Defendant's original hearing was scheduled for April 8, 1997 and was adjourned at his counsel's request. More recently, the University tried since November 1998 to schedule this hearing, and it was the Defendant's and his counsel's unavailability that postponed the eventual date to May 26, 1999.

[10] On the other hand, after the April 8, 1997 hearing was adjourned on consent in order to consolidate the new charges that were then coming forward, the required meeting between the instructor Helen Rosenthal and the Defendant in relation to these charges did not take place until September 11, 1997. Partly this was due to the need to determine whether divisional procedure could be abridged on consent; but also the University initially insisted that the Defendant conduct the meeting without counsel, before relenting and permitting Mr. Stanleigh to attend with his client. Following September 11, 1997, the Defendant did not contact the Dean to arrange a meeting with him; but equally, the University failed to follow up in any formal way until February 2, 1998, and the required meeting therefore did not take place until March 26, 1998. It took the University a further five months until corrected formal charges were issued by the Vice-President and Provost on August 19, 1998, and an additional three months until the University's counsel asked the Defendant's solicitor for available dates for this hearing.

[11] The parties therefore share the blame for the extensive delays that have occurred in this case, and it would not be appropriate to reward one side or the other.

[12] Our second reason, which independently justifies the rejection of the Defendant's delay argument, is that there is simply no evidence that his defence has been impaired or that a fair hearing cannot proceed as a result of the lapse of time. Indeed his counsel conceded this point. Delay achieves the level of abuse of process and therefore justifies a stay of administrative charges only where a party demonstrates prejudice of sufficient magnitude to compromise the fairness of the hearing, and thereby prevent the tribunal from fulfilling its mandate: *Great Atlantic and Pacific Company of Canada* v. *Ontario (Human Rights Commission)* (1993), 13 O.R. (3d) 824 (Div. Ct); *Nisbett* v. *Manitoba (Human Rights Commission)* [1993] 4 W.W.R. 420 (Man. CA.); *Keenan* v. *Certified General Accountants of B.C.* [1999] BC.J. 351 (S.C.). Here,

there is no assertion that there is any testimony, document or other evidence that has been rendered unavailable by the passage of time.

[13] Our third ground relates to the Defendant's submission that his rights under section 7 and 11(b) of the *Canadian Charter of Rights and Freedoms* have been violated by the delays that have occurred. We do not need to decide whether these provisions are applicable to administrative allegations as opposed to criminal or quasi-criminal charges; we note that this issue is before the Supreme Court of Canada, on appeal from the decision of the B.C. Court of Appeal's decision in *Blencoe* v. *British Columbia (Human Rights Commission)* (1998), 160 D.L.R. (4th) 303. We also do not need to consider the jurisdiction of this administrative tribunal to decide *Charter* issues.

[14] It is sufficient to dispose of the Defendant's submission to observe that neither the University, which is prosecuting the present charges, nor this Tribunal, which must adjudicate them, is amenable to the *Charter*. Under section 32, the *Charter* applies only to Parliament, the provincial legislatures and entities that constitute the executive or administrative branches of government. The *Charter* can apply to a private entity such as the University if the entity is found to be government itself for purposes of s, 32, or if the entity carries on inherently governmental actions, as in the case of the hospital in *Eldridge* v. *Attorney General of B.C.* (1997), 151 D.L.R. (4th) 577(5CC.). In that case, the government defined the content of the health services provided by the hospital, and the entitlement of residents to receive them.

[15] In *McKinney* v. *University of Guelph* (1990) 76 D.L.R. (4th) 545, a case concerning the validity of a university's mandatory retirement policy, the Supreme Court stated:

> ...although a legislature may determine much of the environment in which the universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can be fairly said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government but there is nothing here to indicate any participation in the decision by the government and there is no statutory requirement imposing the mandatory retirement on the universities.

Similarly, the University of Toronto, in its *Code of Behaviour*, cannot be said to be implementing any government policy or program, and this Tribunal's function or procedures cannot be said to constitute an expression of government policy.

THE ALLEGATION OF NON-DISCLOSURE

[16] The University's counsel complained that she had no notice that this ground would be raised by the Defendant as a basis for dismissal of the charges against him. She was concerned that the University's affidavit material did not specifically address this issue.

[17] This point need not be decided, because our conclusion is that this aspect of the motion is premature and should be decided, if at all, by the panel which hears the merits of the present charges. University counsel declared her client's policy to be one of full and ongoing disclosure, and we note from the correspondence that some documentary and witness disclosure has already been carried out. It was understood that our hearing on May 26 would not address the merits of the charges against the Defendant, and so the University did not purport to have completed its disclosure obligation prior to that date. University counsel made clear that she would provide a list of witnesses together with available witness statements, as well as relevant documents, well in advance of a hearing on the merits.

[18] Much of the correspondence between the parties which was put before us made reference to the Defendant's position that his counsel should be entitled to question Dean Dengler, and the University's response that the Dean was the instructing client and therefore communications should be through counsel. Again, it is not necessary at this point and would serve no purpose to attempt to resolve this dispute. Dean Dengler, like any person involved in a civil proceeding, even a witness, has no obligation to speak to anyone outside the scope of the Tribunal's or a court's jurisdiction to compel such disclosure; for example, through the issuance of a summons to testify at a hearing. There is, in general, no discovery procedure in administrative hearings.

[19] If the University provides no disclosure, or alternatively provides allegedly inadequate disclosure, of Dean Dengler's testimony, the Defendant can ask the Tribunal for an appropriate order for further disclosure pursuant to its jurisdiction under the *Statutory Powers Procedures Act* or the *Code of Behaviour*. We are not in a position to decide such a motion without any understanding of the merits of the charges and prior to the anticipated disclosure.

CONCLUSION

[20] The preliminary objections of the Defendant are dismissed. We direct that this matter be re-scheduled for hearing on the earliest available dates.

DATED: August 18, 1999

Raj Anand

Raj Anand
For the University Tribunal