FILE: 1999/00-14

UNIVERSITY OF TORONTO
UNIVERSITY TRIBUNAL
TRIBUNAL APPEALS BOARD

Members of the Panel:
Anthony Keith, Q.C., Associate Chair
Professor Lorraine Weinrib, Faculty of Law
Professor Arthur Ripstein, Department of Philosophy
Sally Safa - student, Faculty of Dentistry

IN THE MATTER of the University of Toronto Act, 1971 S.O. 1971, c. 56, as amended;

AND IN THE MATTER of the University of Toronto Code of Behaviour on Academic Matters;

AND IN THE MATTER of disciplinary charges against Mr. K.

BETWEEN:

K.

(Appellant)

And

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO
(Respondent)

Eric P. Polten, for the Appellant
Linda R. Rothstein, for the University of Toronto

REASONS FOR DECISION WITH RESPECT TO THE COSTS OF THE APPEAL

On April 20, 1999 we released our reasons dismissing the appeal of the Appellant

from the decision of the Chair of the Tribunal at trial dated October 14, 1997 on certain jurisdictional points, and from the decision of the Tribunal sitting with a jury rendered July 29, 1998 following trial relating to certain charges against the Appellant. In our reasons we expressly reserved our decision as to the costs of the appeal pending receipt of further submissions by the parties. We have now considered the further submissions made in writing by both parties.

Both the Appellant and the Respondent have requested an order that their solicitor/client costs be paid by the other party. Our authority with respect to costs is found in the University of Toronto's *Code of Behaviour on Academic Matters* ("the Code"), article C.III.10 which reads as follows:

> "Where it is considered to be warranted by the circumstances, the Board may in its discretion award costs of any proceedings 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."[1]

CLAIM BY APPELLANT FOR COSTS

The thrust of the Appellant's argument that he should be entitled to costs is that

(a) there is no jurisprudence which supports an award of costs in favour of the Crown, either in criminal matters or under the Code; and

(b) there is an immense inequality of resources between himself and the University.

As to the first point, we do not agree that we should necessarily be bound by any analogy which may be made to criminal matters. Although there are many similarities to criminal prosecutions, proceedings before the Tribunal are more closely related to those of

---

[1]This provision appears in the 1991 Code, which was in force at the time the charges against the Appellant were laid. The identical provision appears in the 1995 Code now in force.

administrative tribunals, where awards of costs are more common.

With respect to the argument based upon inequality of resources, this point was dealt with adversely to the Appellant by the Ontario Court (General Division) in *Attorney General v. Dieleman* (1995) 22 O.R. (2d) 785.

The Appellant has been found guilty of the charges against him by a jury and his appeal from that conviction has been dismissed. We see no basis whatever upon which he is entitled to have his costs of the appeal paid by the University. To hold otherwise would be to say that the University was required to underwrite the cost of all appeals. The application by the Appellant for an order for payment of his costs is therefore dismissed.

CLAIM BY THE UNIVERSITY FOR COSTS

In seeking an order compelling the Appellant to pay its costs of the appeal, the University raises a number of points:

(a) none of the very large number of issues raised by the Appellant was decided in his favour, and there should be a limit on the ability of a litigant to pursue issues endlessly without cost consequences;

(b) the sheer volume and number of meritless issues raised by the Appellant contributed substantially to the length and complexity of the proceedings and exposed the University to unnecessary costs;

(c) serious allegations of misconduct and impropriety were made by the Appellant against the Chair of the Tribunal at trial and against the University Discipline counsel, all of which were found to have been utterly baseless;

(d) the University has refrained in the past from seeking costs against this Appellant, although circumstances would have favoured such an order; and

(e) the University underwrote the expense of providing copies of transcripts from the proceedings below for use on appeal, although this was clearly the

Appellant's responsibility.

ANALYSIS

It is recognized that, subject to procedural limitations, a litigant has the right to have an unfavourable order of a court or tribunal reviewed on appeal. In civil matters, the litigant understands that if the appeal is unsuccessful, he or she will normally be obliged to pay the costs of the opposite party. The same would normally hold true in the case of applications for judicial review in administrative matters. Only in criminal matters would it be most unusual for the Crown to obtain an order for payment of its costs by an unsuccessful appellant, in addition to whatever sanction may have been imposed for the commission of the offence of which s/he had been found guilty.

By laying charges under the Code, the University seeks to enforce standards of community behaviour, and in that sense Tribunal proceedings may be seen as analogous to proceedings under the *Criminal Code*. Indeed the conduct complained of often involves acts of theft or dishonesty which might otherwise be prosecuted criminally.

On the other hand, the Tribunal is not a court of law but a statutory tribunal created to deal with matters of academic discipline within the University community. In that sense, it may be said to resemble a specialized administrative tribunal, a resemblance reinforced by that fact that its decisions are subject to judicial review in the civil courts.

The framers of the Code have seen fit to grant to the Tribunal a very broad discretionary power to order the payment of costs of any proceeding. In our view such a discretion should be exercised sparingly as far as any order for costs in favour of the University is concerned, so that no person who wishes to appeal an unfavourable decision will be dissuaded from doing so simply because of the fear of financial penalty. On the other hand, there will undoubtedly be cases in which it is appropriate for such a discretion to be exercised in favour of the University. Our immediate task is to determine whether this is such a case.

In our reasons for dismissing the appeal, we commented with concern on the unsupported allegations of misconduct made by Appellant and his counsel against both the co-chair of the

Tribunal who presided at trial, and against University Discipline counsel. With respect to the co-chair, she was accused of directly interfering with the jury in circumstances which, if true, would have amounted to jury tampering. This allegation having been made, in writing, no attempt was made to substantiate it, and it was never withdrawn.

It was further alleged, in writing, that the co-chair inflamed the jury by her prejudicial remarks against the Appellant; this was expanded on the argument of the appeal to assert that she had in fact acted as a second counsel for the prosecution.

These allegations were categorically rejected by this Board on appeal as being utterly without foundation. Our comments on this point were expressly adopted by the Divisional Court in disposing of the Appellant's subsequent application for judicial review. In our view Appellant and his counsel ought to have known that they were baseless and to have refrained from making them. We agree with the comment of counsel for the University that such allegations have the potential of bringing the entire disciplinary system of the University into disrepute.

With respect to University Discipline counsel, Appellant and his counsel characterized the initial laying of the charges as intentionally malicious, asserted that she had engaged in "collusive" and "unethical" contact with another law firm representing the University, and that she had made inflammatory and prejudicial remarks to the jury at trial. Counsel for the Appellant persisted in putting these allegations forward despite being put on notice that they were groundless and that to do so would invite an application for costs. None of these allegations was upheld either at trial, on appeal or on application for judicial review, nor was there ever any basis for making them in the first place.

In our view this sort of conduct cannot be ignored. If a litigant chooses to make unfounded allegations which seriously reflect upon the integrity of the disciplinary process and persists in putting them forward despite being warned of the possible consequences, he or she may expect to be called to account.

We also agree with University counsel that the proceedings in this appeal were made unnecessarily complex and difficult by the plethora of issues raised in the Notice of Appeal

and the Appellant's factum. No attempt whatever was made to identify key issues. All points were treated as equally important. All were dismissed as being without any foundation whatsoever.

While in theory a litigant may raise whatever he or she wishes by way of appeal, it is expected that an effort will be made to present arguments only on those points which are reasonably apposite, and that those points will be presented in a concise and organized way. This is especially so when the litigant is represented by counsel. Regrettably this was not our experience in this case. In the result, we think that it is fair to relieve the University of some of the burden of costs incurred in responding to the appeal.

We do not say that these are the only circumstances in which this Board will be justified in exercising the discretionary power given to it under Article C.III.10 of the Code. We are satisfied that it is appropriate to do so in the circumstances which exist in this case.

SCALE OF COSTS

University counsel has submitted that in view of the Appellant's conduct this case calls for the assessment of costs on a solicitor/client scale. We note that such costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 130 at 134. We agree that the conduct outlined above in connection with the allegations against counsel and the co-chair may properly be so described. Our difficulty is in being certain that such conduct was truly that of the Appellant rather than his counsel. While a litigant is generally bound by acts done and taken by counsel on his behalf, we are reluctant to fix the litigant in this case with a financial penalty when the basis for such penalty may be the excesses of his counsel. For this reason we will restrict our assessment of the University's costs to the lesser party-and-party scale.

ASSESSMENT

The University's party-and-party Bill of Costs claims fees of $17,096.00, disbursements of $1,515.70 and G.S.T. of $1,302.82, for a total of $19,914.52. All of the disbursements, except for possibly one item of $5.25, relate to the provision of the transcripts of the trial proceedings for use on appeal. The Code provides in Article C.III.7 that if the student

wishes to refer in the argument of the appeal to the transcript of oral proceedings recorded at the trial, five copies of such transcript certified by the reporter or recorder thereof shall be ordered by and normally at the expense of the student. We are informed that in this case the University had provided the transcripts, in the face of the Appellant's refusal to do so, in order to expedite the trial. We are satisfied that the University should be reimbursed for its expenses in that regard, and accept the amount set out of $1,515.70.

With respect to the claim for fees of $17,096.00, we are quite satisfied that the amount of time spent in preparing for and attending on the appeal is reasonable, having regard to the sea of points raised in the Notice of Appeal and in the Appellant's factum. We wonder whether it is fair to charge the presence of co-counsel at the hearing of the appeal to the Appellant's account, as neither participated in the argument. In all of the circumstances, we would assess the Respondent's claim for fees at $15,000.00.

The Respondent's party-and-party costs payable by the Appellant are therefore as follows:

Fees	$15,000.00
G.S.T.	1,050.00
Disbursements	1,515.70
G.S.T.	106.10
Total	$17,671.80

CLAIM FOR COSTS AGAINST THE APPELLANT'S SOLICITOR PERSONALLY

In all of the circumstances above related, the University has asked us to consider the potential liability for costs personally of counsel for the Appellant, taking no position as to whether the Tribunal has jurisdiction to so order.

Although the language of Article C.III.10 of the Code would appear to confer a very broad and general discretion, we note the deliberate reference to "party or parties". In our view this restricts our jurisdiction in the matter of payment of costs to the parties themselves. We are strengthened in this view by the judicial interpretation which has been given to the phrase "by whom.....the costs shall be paid" in section 131(1) of the *Courts of Justice Act*. On its face

these words would appear to confer an entirely general and unrestricted discretion; however they have been judicially interpreted to mean "by which of the parties to the proceedings the costs shall be paid": *Rockwell Developments v. Newtonbrook Plaza Ltd.*, [1972] 3 O.R. 199, 207 (C.A.).

Our very great concern as to the conduct of counsel for the Appellant has been expressed earlier in these reasons, and in our reasons released on April 20. In our view such conduct went far beyond the fearless raising of causes, however unpopular, particularly in connection with the unsubstantiated and unfounded allegations against University Discipline counsel and the Tribunal co-chair who presided at the trial. However even if we had determined that we had jurisdiction to do so, we would not have issued an order for payment of costs by him personally. The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. As was stated by Madam Justice McLachlin in *Young v. Young* (supra) at page 135,

> "Any member of the legal profession might be subject to a compensatory order for costs if it shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute, and in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.....Courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling."

We do not propose to let the matter rest there, however. In our view the conduct of counsel for the Appellant was sufficiently egregious as to warrant the examination of the circumstances by the Law Society of Upper Canada in order that it may take such steps within its jurisdiction over members of the legal profession as it may consider appropriate in the circumstances. We will be requesting the Tribunal Secretariat to forward to the Law

Society a copy of these reasons together our reasons dated April 20, 1999 and such other papers filed in connection with or pertaining to the appeal as it may thereafter request.

For all of the above reasons, we therefore order that the Appellant do pay to the University of Toronto the sum of $17,671.80 by way of its assessed party-and-party costs of this appeal.

Anthony Keith, Q.C., Associate Chair

Chronology of Discipline Proceedings in the Case of Mr. "K"

1993/94-09	March 23, 1994	University Tribunal recommends expulsion
1994/95-09	April 24, 1995	Tribunal Appeals Board dismisses the student's appeal
	June 1, 1995	Governing Council confirms the expulsion
[1995] O.J. No. 3734	December 4, 1995	Divisional Court quashes the decision of Governing Council to expel and orders a new trial before the University Tribunal
1997/98-04	October 14, 1997	University Tribunal issues written ruling on jurisdictional objections raise by the student (2nd trial)
1998/99-06	July 31, 1998	University Tribunal recommends expulsion (2nd trial)
1998/99-07	December 4, 1998	Chair of the Tribunal panel rules on the student's request for costs (2nd Trial)
1998/99-08	April 20, 1999	The student's appeal is dismissed by the Discipline Appeals Board (2nd Appeal)
	May 13, 1999	Governing Council confirms the expulsion (2nd Expulsion)
[1999] O.J. No. 2944	July 16, 1999	Divisional Court dismisses application for judicial review
1999/00-14		Discipline Appeals Board Rules on Student's request for cost at the 2nd Appeal