Case Name:

Freeman-Maloy v. York University

Between
Daniel Freeman-Maloy, applicant, and
York University and Dr. Lorna Marsden, respondents

[2004] O.J. No. 3123
Court File No. 336/04

Ontario Superior Court of Justice
Divisional Court
Epstein J.

Heard: July 19, 2004.
Judgment: July 20, 2004.
(37 paras.)

Administrative law — Natural justice — Reasonable apprehension of bias — The hearing — Procedure — Particulars — Judicial review and statutory appeal — When available — Bars — Alternate remedy available — Corporations and associations law — Universities and colleges.

Motion by the defendants, York University and Marsden, to quash the application by Freeman-Maloy for judicial review of a decision made by Marsden. Marsden was the president of York. She wrote to Freeman-Maloy and informed him that he was prohibited from re-registering at York for three years because he attended unauthorized political demonstrations and used unauthorized sound amplification devices. Prior to the letter, York officials did not inform Freeman-Maloy that disciplinary procedures were being contemplated. After Freeman-Maloy started his application for judicial review, the York gave him notice that a full hearing before the York's disciplinary panel was scheduled to hear his case.

HELD: Motion dismissed. The disciplinary hearing was stayed pending the resolution of the judicial review application. The disciplinary hearing was not an adequate alternative remedy to judicial review. There was a serious question about whether York had the jurisdiction to call the hearing in the manner that it did. The disciplinary hearing deprived Freeman-Maloy of the safeguards he was entitled to under York's own procedures and by the rules of natural justice. Any appeal would be to Marsden herself, the person whose decision was being challenged and who was arguably the complainant in relation to Freeman-Maloy's conduct. Freeman-Maloy was not attempting to circumvent other administrative procedures. He launched his application when no appeal of Marsden's decision was available to him. Freeman-Maloy's academic career could be irreparably harmed if he was forced to participate in the disciplinary

hearing. He would be caught in a procedural nightmare in the summer before his next school year was about to begin. York and Marsden would not be harmed if the disciplinary hearing was stayed.

Statutes, Regulations and Rules Cited:

York University Act, 1965.

Counsel:

Peter Rosenthal and Jackie Esmonde, for the applicant.

Lisa M. Constantine, for the respondents.

Reasons for Judgment

¶ 1 **EPSTEIN J.**:— The respondents, York University and Dr. Lorna Marsden, move to quash this application for judicial review of a decision made by Dr. Marsden. The basis of the motion is that the applicant, Mr. Daniel Freeman-Maloy, has an adequate alternative remedy in the form of a full hearing before a panel of the University Discipline Tribunal, which is scheduled to be heard on July 21, 2004. The issue in this motion is whether there are special circumstances that would justify the continuance of the judicial review application.

Background

¶ 2 Mr. Freeman-Maloy was a student at York University during the 2003-2004 academic year. The 2003-2004 academic year was Mr. Freeman-Maloy's first year as a student at York University.

¶ 3 Mr. Freeman-Maloy is a political activist who participates in demonstrations and other activities aimed at drawing attention to violations of human rights in Canada and around the world. He engaged in such demonstrations, as well as in other social justice activities, while a student at York University. In particular, he participated in demonstrations on October 22, 2003 and March 16, 2004.

¶ 4 In a letter dated November 12, 2003, Anne Marie Ridley of the University Complaint Centre stated that Mr. Freeman-Maloy had, on October 22, 2003, used a sound amplification device without permission and ignored University officials who asked him to stop. She referred Mr. Freeman-Maloy to Presidential Regulation Number 2, which governs student behaviour at the University. She then wrote, "I would like to hear your response to these concerns, and so I invite you to meet with me at your earliest convenience."

¶ 5 Shortly after receiving the letter, Mr. Freeman-Maloy met with Ms. Ridley in her office and they discussed the matter.

¶ 6 On the basis of the record before me, it would appear that Mr. Freeman-Maloy received no other formal complaint about any aspect of his conduct from the time of the meeting with Ms. Ridley until he received a letter from President Marsden on April 28, 2004.

¶ 7 This letter dated April 21, 2004, advised Mr. Freeman-Maloy of the decision that is the subject of the application for judicial review. It reads as follows:

> In the past year you have been involved in conduct that is unacceptable according to the standards of York University. Specifically, on October 22, 2003 you were seen attending an unauthorized demonstration in Central Square and in Vari Hall Rotunda and using an unauthorized sound amplification device. This demonstration was in violation of the Temporary Use of Space Policy and the Policy for Use of Vari Hall Rotunda.
>
> On November 12, 2003 you were sent a registered letter from the Office of Student Affairs telling you that your behaviour was unacceptable and asking for your attendance at a meeting to discuss the October 22nd incident. You failed to reply to the letter. When seeing Ms. Ridley from OSA in person, you responded to her request for a meeting by saying you were too busy but would try to set something up. You also refused to give updated contact information to our offices. These responses were unsatisfactory.
>
> On March 16, 2004, you were seen setting up and participating in an unauthorized demonstration in the Vari Hall Rotunda. Again, you were seen to be using an unauthorized sound amplification device. This demonstration was also in violation of the Temporary Use of Space Policy and the Policy for Use of Vari Hall Rotunda. During the October and March demonstrations, you interfered with the proper functioning of University programmes and activities, contributed to the threat of harm to the safety and well-being of York University community members, and failed to abide by reasonable instructions given orally and in writing by an official of the University authorized to secure compliance with regulations, rules, practices and procedures, all contrary to Presidential Regulation 2.
>
> As a result of your actions outlined above, and pursuant to my authority over the conduct of students, I have determined that you will not be permitted to re-register at York University for three calendar years from May 1, 2004 and I am instructing the University Registrar accordingly.
>
> After May 1, 2004, and until you re-register, you have no purpose on campus and are therefore asked not to attend the premises of York University. If you are seen on the premises, you will be issued a notice of trespass.

¶ 8 Prior to President Marsden's rendering the decision, Mr. Freeman-Maloy was not made aware that disciplinary procedures against him were being contemplated. He was given no opportunity to make any representations whatsoever.

¶ 9 On June 17, 2004, Mr. Freeman-Maloy commenced an application for judicial review of the decision, in which he requests, among other things, a prohibition against the University's disciplining him for any conduct that occurred prior to President Marsden's decision, on the grounds of reasonable apprehension of bias. He alleges that President Marsden was without jurisdiction to make any finding with respect to his conduct and without jurisdiction to impose any sanctions on him. Mr. Freeman-Maloy further complains that he was not afforded any hearing or formal procedures as provided for in the Presidential Regulation No. 2.

¶ 10 The respondents to the application, President Marsden and the University, filed a Notice of Appearance, and their counsel came to an agreement with counsel for Mr. Freeman-Maloy on a schedule for exchange of documents required for the hearing of the application. The application was then scheduled to be heard in early August, now, specifically on August 10, 2004.

¶ 11 On Friday July 2, 2004, apparently as a result of much negative reaction to the decision, Mr. Freeman-Maloy was given notice that the University intended to hold a disciplinary hearing. The letter from the respondents' counsel stated in part:

> I am writing to advise you that I will be delivering a Notice of Hearing in the manner provided for in Presidential Regulations Numbers 2 and 3. A University Discipline Tribunal will be convened to determine whether Mr. Freeman-Maloy's course of conduct fell below the Standards of Student Conduct as set out in Presidential Regulation Number 2. If the Tribunal finds that Mr. Freeman-Maloy's conduct fell below the Standards of Student Conduct, the University Discipline Tribunal will then consider the issue of penalty. The range of possible penalties is set out in the Presidential Regulations.

¶ 12 The notice of hearing was served on July 8, 2004.

¶ 13 President Marsden's decision to suspend and ban Mr. Freeman-Maloy remains in place.

¶ 14 The governance of the University is specified in the York University Act, 1965. The conduct of students and the procedure for disciplining those whose conduct contravenes the standards are prescribed in Presidential Regulation Number 2. The Regulation prescribes a series of steps that must be followed prior to the convening of a Trial Panel of the University Discipline Tribunal. These procedures include: the making of a complaint to a complaints officer; the reduction of the complaint to writing; the conduct of a preliminary investigation by the complaints officer; advising the Provost of the complaint; the determination by the Provost of whether the complaint involved a

minor or a serious infraction; consideration of mediation by the complaints officer; the referral of the complaint to the Provost; arranging for the prosecution before the Trial Panel by the Provost.

Analysis

¶ 15 The University and Dr. Marsden submit that, in view of the impending hearing of the University Discipline Tribunal (the "discipline tribunal"), this application for judicial review should be quashed, or in the alternative, stayed. They rely on the well established principle that judicial review is an alternative and extraordinary remedy and that courts will not interfere in the process of administrative tribunals before the procedures under the governing statute have been exhausted. The practice of the court in cases where an adequate alternative remedy is available is to decline to entertain applications for judicial review, even where the application is based on allegations of lack of jurisdiction, procedural unfairness, or bias. See: Happy Landing v. Ontario (Ministry of Labour, Employment Standards Branch) [1998] O.J. No. 2416 (Gen. Div.)

¶ 16 The University and Dr. Marsden argue that particularly where there is an adequate alternative remedy to judicial review in the form of a de novo re-hearing, the proper order is to quash the application for judicial review, or, in the alternative, to order that it be stayed.

¶ 17 The legal principles upon which the University and Dr. Marsden rely are, of course, well established. The leading case of Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 122 D.L.R. (4th) 129 (S.C.C.) makes it clear that the court has discretion to determine whether judicial review should be undertaken. The exercise of this discretion involves an examination as to whether the statutory appeal procedures were an adequate forum in which those seeking to challenge the decision could pursue that challenge and obtain a remedy. This adequate alternative remedy principle was fully examined at length in Harelkin v. University of Regina (1979), 96 D.L.R. (3d) 14 where Beetz J., for the majority, held at p. 41 that "even in cases involving lack of jurisdiction", the prerogative writs maintain their discretionary nature.

¶ 18 However, it is not sufficient to state that an alternative remedy exists - the alternative remedy must be "adequate." In determining whether there exists an adequate alternative remedy that precludes judicial review, courts have considered a number of factors. These factors include the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body.

¶ 19 I therefore turn to whether the discipline tribunal is an adequate alternative remedy to judicial review of the President's decision.

¶ 20 In Harelkin, the Supreme Court made it clear that from a policy perspective allowing a university to consider its own processes and possibly correct its own errors is consonant with the traditional autonomy of universities as well as being a low cost and

expeditious way of resolving differences such as those that exist between Mr. Freeman-Maloy on the one hand and the University and Dr. Marsden on the other.

¶ 21 However, even though there are policy reasons for allowing this matter first to play out within the University procedures, the discipline tribunal invoked by the University and President Marsden is not an "adequate" alternative remedy for the following reasons.

¶ 22 First, on the record before me there is a serious question about whether the University has the jurisdiction to call the hearing of the discipline tribunal in the manner in which it did. In my view the disciplinary hearing is not an adequate forum for resolving, at first instance, this important jurisdictional issue. I say this for a number of reasons not the least of which is that there is no meaningful appeal route from the decision of the discipline tribunal. When pressed on this point, counsel for the University and President Marsden conceded that any appeal Mr. Freeman may wish to take from the decision of the discipline tribunal would be to President Marsden, herself.

¶ 23 This takes me to the issue of reasonable apprehension of bias. In Matsqui Indian Band the Supreme Court of Canada determined that whether or not there is an apprehension of bias is a relevant factor in determining whether a proposed alternative remedy is "adequate".

¶ 24 Counsel for Mr. Freeman-Maloy submits that the discipline tribunal is not an adequate alternative to judicial review because of the reasonable apprehension of bias. Two sources of bias are alleged. First, there is a concern about the members of the panel, how they were appointed and their relationship with President Marsden. Secondly, there is the problem identified above concerning the appeal route from the panel's decision.

¶ 25 It is the second of the two that concerns me. I am not prepared to presume that the members of the discipline tribunal cannot carry out their duties in a fair and impartial manner. However, the fact that Mr. Freeman-Maloy's right of appeal from the panel goes directly to the person whose decision is being challenged and who arguably is also the complainant in relation to the concerns about Mr. Freeman-Maloy's conduct, is a matter of serious concern.

¶ 26 It is noteworthy that this is not a situation where Mr. Freeman-Maloy brought his application for judicial review in an attempt to circumvent other administrative procedures that were available to him. At the time he launched his application there was no appeal of President Marsden's decision available to him. It was not until Mr. Freeman-Maloy commenced his application for judicial review in which he seeks an order of prohibition preventing the respondents from taking further disciplinary action against him, that the respondents took the unusual step of invoking a disciplinary hearing.

¶ 27 As a result, this application for judicial review can be distinguished from cases such Harelkin, a case in which a student attempted to circumvent a statutory appeal to the university senate. In Harelkin, there were internal disciplinary procedures available, and

the jurisdiction of university senate to hear the matter was not in question. In this case, Mr. Freeman-Maloy did not have any appeal route open to him, and the respondents have now called a hearing that is questionable on both jurisdictional and natural justice grounds.

¶ 28 Thus, in circumstances in which there are serious questions as to the jurisdiction of the proposed administrative remedy and where it contains no meaningful right of appeal, it cannot be said that there exists an "adequate" alternative remedy.

Cross-Motion

¶ 29 In his cross-motion Mr. Freeman-Maloy asks for an order staying the tribunal hearing pending the resolution of the application for judicial review. An interlocutory injunction may be issued by a judge where it is "just or convenient" to do so, and on "such terms as are just."

¶ 30 It is "just or convenient" to issue an injunction where a claimant establishes: there is a serious issue to be tried; irreparable harm will result if the injunction is not issued; and the balance of convenience favours granting the injunction. See: RJR-Macdonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311.

¶ 31 Counsel for the University and Dr. Marsden has fairly conceded that there is a serious issue to be tried.

¶ 32 "Irreparable harm" in the context of interlocutory injunctions refers to harm that cannot be properly compensated with damages.

¶ 33 In this case the harm relates to Mr. Freeman-Maloy's being caught in a procedural nightmare while the time is fast approaching when his next school year will begin. The combined effect of the questionable validity of the discipline tribunal together with the uncertainty surrounding the timing of the tribunal's ability to deal with the matter over the summer causes me to conclude that Mr. Freeman-Maloy's academic career may be irreparably harmed if he is forced to participate in the hearing before the discipline tribunal.

¶ 34 The third branch of the RJR-Macdonald test considers the relative hardship between the parties. Mr. Freeman Maloy's need for injunctive protection must be weighed against the corresponding need of the respondents to be protected against injury resulting from having been prevented from exercising their own legal rights for which they could not be adequately compensated under Mr. Freeman-Maloy's undertaking in damages if the uncertainty were resolved in the respondents' favour. The court must weigh one need against the other and determine where the "balance of convenience" lies. [See Note 1 below]

Note 1: In this case there is no evidence that the respondents would be harmed if the July 21 hearing were stayed pending the determination of the judicial review application. As a result, I have not put the issue of an undertaking as to damages to Mr. Freeman-Maloy. In fact, quite fairly, the respondents have not argued that they will suffer any damages if the July 21 hearing is stayed.

¶ 35 The balance of convenience strongly favours staying the July 21 hearing pending the resolution of Mr. Freeman-Maloy's application for judicial review. In the circumstances of the judicial review application's being heard within a few weeks, it simply makes no sense to subject the parties to the time and expense of the July 21 hearing.

Conclusion

¶ 36 I find that the discipline hearing is not an adequate alternative remedy to the judicial review application. It is of questionable jurisdictional validity and deprives Mr. Freeman-Maloy not only of many of the safeguards to which he is entitled under the University's own procedures but also of many of the protections afforded by the rules of natural justice. In these circumstances, the motion to quash the application for judicial review is dismissed and the cross-motion to stay the hearing of the discipline tribunal is allowed.

¶ 37 If the parties are unable to resolve the issue of costs, they may make written submissions to me within 20 days.

EPSTEIN J.

QL UPDATE: 20040729
cp/e/nc/qw/qlaxc