

Report of the Grievance Review Panel in the matter of a Grievance by the University of Toronto Faculty Association against the University of Toronto relating to the right of a faculty member who has resigned from the University to appeal a negative tenure decision to the University's Tenure Appeal Committee

Panel Members: Professor Emeritus Martin Friedland, Chair; Dr. Robin Healey; and Professor Joe Repka

March 31, 2008

Appearing for the University of Toronto Faculty Association, James McDonald, with Professor George Luste, UTFA President; Cynthia Messenger, UTFA Vice-President, Grievances; and Eric Comartin, UTFA Counsel

Appearing for the University of Toronto: John Brooks, with Professor Edith Hillan, U of T Vice-Provost

The University of Toronto Faculty Association (UTFA) brought this grievance in March 2006 in its own name against the University under Article 7 of the Memorandum of Agreement that has existed between the University and UTFA since 1977. The grievance alleges that the University breached Article 2 of the Memorandum by unilaterally changing an aspect of the Policy and Procedures on Academic Appointments (hereafter referred to as the Appointments Policy), one of the so-called "frozen" policies specified in the Memorandum. Section 23 of the Appointments Policy provides that "A person who has been denied tenure shall have the right of appeal..." UTFA alleges that the University has breached its obligation to extend this right of appeal to a faculty member who was denied tenure and has accepted a position at another institution.

The background to the grievance is as follows. A faculty member, Professor [X] of the Faculty of [X], was denied tenure in May 2005 and filed an appeal to the University's Tenure Appeal Committee within the 30 days permitted under the Appointments Policy. (In order to respect his privacy and because he is not a party to these proceedings, we are not identifying Professor [X] in this report.) As is the practice when tenure is denied, the candidate was given a period of time – in Dr. [X's] case, it was two years from July 1, 2005 until June 30, 2007 – to remain as a full-time member of the faculty. In early 2006 and before the appeal was to be heard, Dr. [X] accepted a position at [a University of Toronto teaching hospital] and resigned from his full-time position in the Faculty of [X] as of March 1, 2006. He would continue his association in the faculty with a status-only appointment.

In his letter of resignation, dated February 20, 2006, Dr. [X] stated that he wished to continue to pursue his appeal to the Tenure Appeal Committee, but the dean of the Faculty took the position that a resignation from the faculty barred the former faculty member's tenure appeal. The University supported the dean's view. The dean stated in his response that "the University does not accept or agree with your position that your resignation from your tenure stream appointment is in any way ... without prejudice to any right to proceed with your pending appeal before the Tenure Appeal Committee."

UTFA then brought the present grievance, dated March 1, 2006, under what is referred to as an Association Grievance, specifically provided for in the Memorandum, which states in section 7: "An Association grievance is any complaint by the Association that any of the undertakings or provisions in this Agreement that directly relate to the Association as such has been breached." Dr. [X] is not a party to this grievance.

When Dr. [X's] appeal came before the Tenure Appeal Committee on June 8, 2006, counsel for the University argued that the Committee did not have jurisdiction to hear the appeal. Dr. [X's] counsel requested that the Tenure Appeal Committee adjourn its hearing until the Grievance Review Panel had dealt with UTFA's grievance.

The Tenure Appeal Committee, however, rejected the request for an adjournment and accepted the University's argument that Dr. [X] had lost his right of appeal. The Tenure Appeal Committee stated that the Tenure Appeal Committee's jurisdiction "is limited to those who hold contracts of employment with the University" and that "in voluntarily terminating his contract of full-time employment with the University on February 28, 2006, Professor [X] terminated the jurisdiction of the Tenure Appeal Committee under the Policy and Procedures on Academic Appointments to proceed with his appeal of denial of tenure." The Tenure Appeal Committee referred to several sections of the Appointments Policy where the person appealing is referred to as a "candidate" and concluded that a person who resigned voluntarily is no longer a candidate.

The Association Grievance was heard by us on March 13, 2008 and we are indebted to counsel for their helpful submissions.

Should a resignation, such as that by Dr. [X], bar an appeal from a negative tenure decision? The tenure decision is a crucial stage in the life of an academic and in the life of the university. A negative tenure decision not only means that the academic must eventually leave the University, but it can also have consequences on the academic's future career. The fact of a denial of tenure tends to be known or, at least, suspected by future employers. One can easily understand why the candidate denied tenure wishes to appeal, if only to clear his or her name. Dr. [X] stated in his letter of resignation: "It is important for me to continue the appeal process...because the tenure/promotion decision impacts my professional career growth, whether I stay at the University or elsewhere." One can also easily understand why a person in Dr. [X's] position would accept a position at another institution, particularly one in the same geographical area, without

waiting for the tenure appeal to be heard. The position might not be available at a later time.

The University's position on the issue is also understandable. If the person denied tenure resigns but continues the appeal, the department or faculty is placed in an awkward position. It has to hire someone to replace the faculty member who resigned, but cannot risk offering someone a tenure stream appointment because it may not have the budget to pay for two positions if the tenure decision is later reversed and the person wishes to return to the Faculty.

UTFA argues that there is nothing specific in the Appointments Policy to justify the decision reached by the Tenure Appeal Committee. Section 23 of the Appointments Policy states: "A Person who has been denied tenure shall have the right to appeal on one or more of the following grounds..." There is no specific language saying that ceasing to be a full-time member of the faculty does or does not bar an appeal.

We were told by counsel that this is the first time that the issue has arisen. Perhaps it has not been an issue in the past because in at least some of the cases of an appeal from a denial of tenure the candidate has been given a leave of absence until the tenure appeal can be heard. We are told that Dr [X] did not request a leave, but do not know whether, if it had been requested, it would have been granted by the dean. The right to an appeal from a tenure decision should not, in our view, turn on the technicality of whether a dean or chair is willing to grant a leave of absence. Nor do we think that the right to appeal should turn on the use of the word "candidate," a word that the drafters likely used without thinking that it would thereby deny an appeal to a person who resigned his or her position.

UTFA provided us with a large number of cases and arbitration awards – from the early 1950s to the present – in which the person challenging the actions of a company, a government institution, or other body was not barred from a hearing by the fact that the person was no longer an employee, even if the resignation was voluntary. The respected text by Donald Brown and David Beatty, *Canadian Labour Arbitration*, sums up the authorities by stating in the 1977 edition (quoted in one of the cases cited by counsel): "as long as the grievor was employed at the time that the grievance arose, the fact that he may subsequently have ceased to be an employee will not render the grievance inarbitrable." Thus, at about the time that the Appointments Policy became "frozen", the law for non-university bodies appeared to be clear that resignation did not prevent an appeal or a grievance. That general law is the same today. The current 2007 edition of Brown and Beatty is almost identical on this point to the 1977 edition. There is no evidence before us on the question of whether anyone considered the issue when the Memorandum or the Appointments Policy was drafted.

We see no good reason why the same policy as set out in Brown and Beatty should not apply to universities. No case was cited on this point relating to universities, nor were we told about the practices and procedures at other universities.

We have concluded that UTFA's grievance should succeed. In our view, as stated by the Federal Court of Appeal in one of the cases cited by counsel for UTFA (*Treasury Board v. Lavoie* [1978] 1 F.C. 778) concerning a case where the grievor was deprived of the right to grieve by a termination of employment: "It would take very clear words to convince [us] that this result could have been intended."

Article 7 of the Memorandum of Agreement relating to individual grievances (but not to Association grievances) excludes from the Grievance Review Panel complaints "relating to appointments, tenure, or dismissal for cause of a tenured faculty member, for which existing procedures shall be followed." We are not concerned here with whether the decision to deny tenure was properly reached. That is the task of the Tenure Appeal Committee. We are, however, properly concerned with the interpretation of the Appointments Policy and whether the University's interpretation is the correct one. A similar distinction was made by the Grievance Review Panel in its important analysis in 1995 of the provost's Memo 134 relating to the interpretation of the tenure rules. Although there is not a provostial memo in the present grievance, in our view it should not matter whether it is a written policy distributed in a memo that is the subject of the grievance or instructions to counsel on the issue.

We are not in a very good position to determine what policy should be worked out. A tribunal such as this cannot consult within the academic community and cannot easily examine comparable policies at other universities. UTFA and the administration should together work out a solution. As stated in some of the decisions provided to us, it may be that a person who voluntarily resigns should not be entitled to the same remedy as a person who continues in the same position. The department or faculty, for example, might have hired someone on a permanent basis to teach the courses taught by the person who had resigned. Some disruption is inevitable whenever there is an appeal. It is accentuated when the person has resigned but wishes to continue with the appeal from the tenure decision. A new policy would also consider whether the Tenure Appeal Committee should order a second tenure hearing if the first hearing is found to be faulty. Perhaps that should depend on why the first tenure decision was quashed and should be determined by the Tenure Appeal Committee on a case by case basis.

Dr. [X] was not a party to this appeal and we are not determining what future steps he can take. The Tenure Appeal Committee made a determination against him for which he did not seek judicial review. Whether the University will contest his right to appeal his denial of tenure in the light of our decision we leave to the University, and whether if Dr. [X] pursues his appeal, the Tenure Appeal Committee will bar further proceedings because the matter has already been decided between the parties (what lawyers refer to as *res judicata*) we leave to the Tenure Appeal Committee. UTFA represented Dr. [X] at the tenure appeal, but was not itself a party to the tenure appeal proceeding and so the Tenure Appeal Committee's decision is not a bar to the present grievance as a matter of *res judicata*, which requires an identity of parties.

We are confident that the University and UTFA can in the spirit of the Memorandum of Agreement develop a workable policy on the issue that is subject to this appeal. In the

absence of such a policy, persons in the position of Dr. [X] should have the right to appeal their tenure decision even if they have resigned from the University.

I certify that this is the decision of the Panel

“M.L. Friedland”

Martin Friedland, Chair