

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE
COMMERCIAL ARBITRATION ACT OF BRITISH COLUMBIA, R.S.B.C. 1996, c. 55

BETWEEN:

ASSOCIATION OF ADMINISTRATIVE AND PROFESSIONAL STAFF
ON BEHALF OF DONNA ASHICK

(Claimant)

AND:

UNIVERSITY OF BRITISH COLUMBIA

(Respondent)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Leah Terai for
Claimant

Michael H. Korbin for
Respondent

DATES AND PLACE OF HEARING:

November 8, 9 and 27, 2007
at Vancouver, BC

DATE OF AWARD:

January 16, 2008

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Association of Administrative and Professional Staff (AAPS), on behalf of Donna Ashick, who was discharged from her employment as a Health Safety and Environment (HSE) Advisor, Level C2 in the University's HSE Department on November 29, 2005. Ms. Ashick was discharged without cause, "due to lack of suitability", and her salary and benefits were continued by the University for a period of sixteen months expiring at the end of March 2007.

The discharge was precipitated by an email sent on November 23, 2005 by Ms. Ashick to coworkers containing adverse comments about management. The November 23 email also attached a previous email authored by Ms. Ashick that alleged the Director of the HSE Department had lied to staff.

In its Statement of Claim, AAPS essentially asserts the University is restricted in the circumstances in which it can discharge an employee without cause, and that it acted improperly in terminating Ms. Ashick from employment. In its Statement of Defense, the University basically takes the position it could have discharged Ms. Ashick either for cause or without cause in accordance with the parties' Agreement on Conditions and Terms of Employment (ACTE).

The substance of the matter in dispute between the parties involves the interpretation of Article 9.1.1 of the ACTE, which is the "General" provision for "without cause" terminations from employment for regular employees. Article 9.1.1 reads:

The University recognizes that it has a responsibility to a regular employee who suffers a loss of employment as a result of departmental reorganization, budget cuts or the elimination of her/his position otherwise for reasons other than cause.

At the outset of these proceedings a preliminary matter was raised regarding which party should proceed first. The University argued AAPS should proceed first as the matter is not governed by the *Labour Relations Code*, but rather the *Commercial Arbitration Act* and the common law. AAPS essentially took the position the University should proceed first as it was in the best position to explain why it terminated Ms. Ashick. I ordered the University to proceed first.

The relevant circumstances surrounding Ms. Ashick's termination are not seriously disputed and may be summarized as follows. She was hired by the University on October 1, 1989 as a Chemical Safety Officer in the Department of Occupational Health & Safety. From October 1998 to April 1999 she worked in the position of Acting Environmental Safety Officer. From April 1999 Ms. Ashick held the position of Chemical Safety Officer and, in April 2001, she became an Environmental Audit Officer, until October 2005 departmental restructuring.

At the time of her discharge, Ms. Ashick's job title was HSE Advisor, Level C2, and her work generally involved performing audits and assessing compliance with established protocols. She would generate reports and often perform follow-up duties.

By all accounts, including formal performance evaluations, Ms. Ashick was a very good employee, technically sound and well-respected by her colleagues and management. She had never previously received any discipline whatsoever.

The HSE Department comprises three separate sections, each with its own manager reporting to Department Director, David Zajdlick. Ms. Ashick reported to HSE Management Systems Manager, Ray Hryciuk.

The evidence indicates Mr. Zajdlick was hired by the University in January 2005, and that he sought to make a number of changes to improve the efficiency and effectiveness of the Department. Amongst other matters, he viewed the existing flex day and fortnight scheduling system as inefficient, and he sought to change this.

A number of employees, including Ms. Ashick, very much favoured the fortnight system, and it was in regards to how she believed Mr. Zajdlick was handling the matter that she sent the emails that led to her termination.

On November 23, 2005 Ms. Ashick sent an email to AAPS representatives Bernice Urbaniak and David Harvey regarding “organizational changes” in the HSE Department. Ms. Ashick also copied the email to twelve AAPS members in the Department. It was not, however, sent to any of the three senior managers in the Department who also belonged to AAPS.

The November 23 email indicated Ms. Ashick held a concern about the way Mr. Zajdlik, was dealing with the matter of flex days and the established fortnight system. Ms. Ashick’s email outlined her view “that management is trying to divide and conquer and/or intimidate those who will find it difficult to speak out.”

The November 23 email sent by Ms. Ashick attached a string of other emails, including one dated November 10, 2005 from Ms. Ashick to Ms. Urbaniak. In this email Ms. Ashick accuses Mr. Zajdlik of having “lied” to Department staff, and inquires as to whether the University is required to consult with staff about whether he should pass his probationary period. In the email Ms. Ashick poses the question: “Would I be setting myself up for problems if I sent (Mr. Zajdlick’s “boss”) any information?”

On November 25, 2005, Mr. Zajdlick became aware of the emails sent by Ms. Ashick to the AAPS members in the Department who report to him. Soon thereafter Ms.

Ashick was terminated from her employment “due to lack of suitability”. As noted above, the University continued her salary and benefits for a sixteen-month period that concluded at the end of March 2007.

Mr. Zajdlick testified at these proceedings that he felt it was important to have the support of Ms. Ashick as she was a senior and respected staff member in the Department. Upon becoming aware of her emails, Mr. Zajdlick contacted the University’s Human Resources Department and spoke with Advisor Linda Penn about the matter. Mr. Zajdlick was of the view that Ms. Ashick’s emails contained defamatory and egregious comments, and that she should be terminated. He expressed to Ms. Penn and Associate Vice-President Human Resources Lisa Castle that either Ms. Ashick be discharged or he would resign. He ultimately agreed with them that it would be appropriate to terminate her without cause and continue her salary and benefits for the period set out in the parties’ ACTE for without cause terminations from employment.

Ms. Ashick testified on her own behalf. She stated that until just prior to the commencement of these proceedings she was unaware of Mr. Zajdlick’s actual directions to her manager, Mr. Hryciuk, regarding how the fortnight issue was to be dealt with, and that apparent contradictions in communications on this topic were due to Mr. Hryciuk’s correspondence to the staff in his particular section. Ms. Ashick acknowledged her conclusions about Mr. Zajdlick’s representations and conduct were erroneous.

At these proceedings Ms. Ashick apologized for having sent the emails and having made the comments she did about Mr. Zajdlick. Ms. Ashick stated she copied the email chain to her coworkers on November 23 by “mistake”, and that she was “negligent” in doing so.

Evidence was also led at these proceedings regarding the negotiation and practical application of the relevant ACTE provisions, particularly in relation to the matter of

without cause terminations from employment. Former Employee Relations Advisor Margaret Ostrom was responsible for administering the University's policy that was effective prior to the negotiation of the inaugural ACTE with AAPS in 1996. Ms. Ostrom attended the 1996 bargaining sessions as a note taker for the University. Ms. Ostrom testified the relevant policy in effect prior to the ACTE read as follows:

**NOTICE ENTITLEMENTS
(M & P Staff on Appointments with no End-Dates)**

General Policy Statement

The University recognizes that it has a responsibility to Management and Professional staff who have given good job performance and who suffer a loss of employment as a result of departmental reorganization or the elimination of their positions for the reasons other than cause.

Ms. Ostrom stated this policy was interpreted to cover all types of without cause terminations, including those for "fit", or where there were performance issues that had not attained the level of just cause for termination.

During the parties' inaugural round of bargaining in 1996, AAPS initially made the following proposal in regards to the matter of termination of employees:

8.3 Termination

8.3.1 General Policy Statement

The University recognizes that it has a responsibility to Management and Professional staff who suffer a loss of employment as a result of departmental reorganization or the elimination of their positions.

The University shall terminate the employment of non-probationary members only in one of the following ways:

- a. resignation;
- b. retirement, early or otherwise;
- c. dismissal for cause;
- d. financial exigency or reorganization;
- e. abandonment of position;
- f. incapacity;
- g. death;
- h. or as provided elsewhere in this Agreement.

During this inaugural round of bargaining AAPS also proposed language that would compel the University to reinstate staff members who had been found to have been “unjustly terminated”.

After some discussion between the parties AAPS amended its proposal on May 14, 1996 to read as follows:

Article 10: Termination

10.1 General

The University recognizes that it has a responsibility to Management and Professional staff who suffer a loss of employment as a result of departmental reorganization or the elimination of their position.

10.2 Types of Termination

The University may terminate the employment of non-probationary staff members only in one of the following ways:

- a. As a form of discipline
 - i. dismissal for cause
 - ii. abandonment of position
- b. For other reasons
 - i. retirement, early or otherwise
 - ii. financial exigency or reorganization;
 - iii. incapacity;
 - iv. or as provided elsewhere in this Agreement

After discussion AAPS essentially resubmitted this same language during a bargaining session on June 24, 1996.

On June 28 and July 5, 1996 the University submitted its language proposal, which included the following:

Article 10 Termination of Employment Without Cause

I Regular Employees

1. General

The University recognizes that it has a responsibility to regular Management and Professional staff who have given good job performance and who suffer a loss of employment as a result of departmental reorganization, financial exigency or the elimination of their positions otherwise for reasons other than cause (, including performance or disciplinary problems which do not constitute just cause). [typographical error in original]

AAPS' July 8, 1996 counter-proposal ultimately became the agreed-upon language. It read as follows:

The University recognizes that it has a responsibility to a regular employee who suffers a loss of employment as a result of departmental reorganization, financial exigency or the elimination of his/her positions otherwise for reasons other than cause.

It was also later resolved in bargaining that the "Remedy for Unjust Termination", in circumstances where one had been terminated for cause, would not include reinstatement but would rather be comprised of severance and, "may" include an order for punitive damages from an arbitrator.

Associate Vice-President Human Resources Lisa Castle also gave evidence at these proceedings. Ms. Castle was the University's chief spokesperson during 1999 bargaining with AAPS. She testified AAPS proposed to amend the without cause termination provision by "finish(ing) (the) sentence at 'budget cuts'." In other words, AAPS proposed removal of the term "or the elimination of her/his position otherwise for reasons other than cause." Further, AAPS proposed that the provision relating to "Remedy for Unjust Termination" be amended to "include reinstatement as remedy".

Ms. Castle gave evidence to the effect that AAPS representatives at the bargaining table articulated the position that the University should be limited to terminating employees from employment without cause for budget cuts, genuine reorganizations and the elimination of positions. Ms. Castle added the University rejected these proposals and, in doing so, expressed to the AAPS bargaining committee that the University had always exercised the right to terminate its management and professional staff without cause for any reason, and it was not prepared to back down from this position.

Ms. Castle recalled discussion at the bargaining table regarding Simon Fraser University having a policy for its management and professional group that limited without cause discharges. Within this context she essentially told the AAPS bargaining committee this was not something the University of British Columbia was interested in. AAPS later withdrew its proposals in regards to the matters relevant to this case, and this was the last time a proposal regarding Article 9.1.1 was raised at the bargaining table.

Under cross-examination Ms. Castle remained steadfast in her view that AAPS sought to change the existing language to limit the University's right to terminate without cause. AAPS was not merely articulating a position to the effect that it disagreed with how the University was interpreting the existing language. She pointed out there had never been an allegation or a grievance about how the University was interpreting the

language contained in Article 9.1.1. What AAPS sought was a language change to alter the existing rights and it did not achieve this.

The University also led evidence regarding its practice in relation to without cause terminations from employment. Eighteen termination letters issued by the University between January 1998 and the fall of 2007 were entered as exhibits in these proceedings, expressly indicating terminations for fit or suitability. AAPS was copied on these letters and it has raised no grievance about the University's ability to terminate employees for the stated reasons. In September 2007 the Chair of the AAPS Advocacy Committee was involved in a decision to terminate an AAPS member due to "serious concerns about (her) ability to fulfill (her) responsibilities".

RELEVANT PROVISIONS OF PARTIES' ACTE

During the course of these proceedings the parties made reference to the following provisions from their current ACTE for the term July 1, 2005 to June 30, 2010:

Article 1 Preliminary

... 1.2.2 Minimum Standards

The parties agree that employees are entitled, at a minimum, to the standard set out in this Agreement. Individual agreements providing different terms and conditions than in this Agreement shall be provided to AAPS prior to being finalized.

Article 2 University Rights

All rights not specifically addressed in this Agreement or the Framework Agreement are reserved for the University. The University agrees to act fairly, reasonably and without discrimination when exercising these rights.

Common law employment principles apply to the employment relationship between the University and employees unless specifically modified by the terms of this Agreement...

Article 6 Evaluation

...It is clearly understood that during this process, the administrative head's original evaluation of the employee remains in place for all purposes. It is clearly understood that the performance evaluation process is separate and distinct from any disciplinary process which may arise from the conduct or performance of the employee.

Article 8 Discipline and Termination

8.1 Progressive Discipline

The University and AAPS subscribe to the principles of progressive discipline in cases of culpable behaviour, conduct or performance including, without limiting the generality of the foregoing:

- Discipline is intended to be corrective in nature, not punitive;
- Discipline is applied with consideration given to the circumstances of a situation including, without limiting the generality of the foregoing, the nature and severity of the misconduct, the position and level of responsibility of the employee, the employee's work history and any mitigating circumstances;
- Discipline is applied in an escalating manner, appropriate to the nature and severity of the misconduct; and
- Discipline is not progressive in the event of severe misconduct warranting termination for cause.

8.4 Disciplinary Procedures

Consistent with the principles articulated in Article 8.1, where disciplinary action is being considered in cases of culpable behaviour, conduct or performance, the University must notify the employee of the shortcoming of her/his behaviour, conduct or performance by means of a written warning....

8.6 Termination of Employment for Just Cause

The University may terminate the employment of any employee without notice for just cause....

8.6.2 Probationary Employees

The University may terminate probationary employees for just cause. They may also be terminated for lack of suitability in a position.

8.8 Remedy for Unjust Termination

8.8.1 Severance

If it is found as a result of the grievance procedure that an employee has been terminated without just cause, the employee shall receive severance in accordance with Article 9, but shall not be reinstated at the University.

In cases where the University is determined by an arbitrator to have terminated an employee without just cause, the arbitrator may also award punitive damages to the employee.

8.8.2 Discharge Arbitration

Notwithstanding any other provision of this Agreement, the Arbitrator to hear a discharge case shall be empowered to set, peremptorily, a date for the commencement of the hearing which shall be within thirty (30) days of the termination. The employee will remain entitled to full pay and benefits until the decision of the Arbitrator is rendered, which shall be not later than ten (10) working days following the hearing. However, if the employee is discharged for assault, theft or gross misconduct, she/he shall cease work immediately without pay or benefits.

Article 9 Termination of Employment Without Cause

9.1 Regular Employees

9.1.1 General

The University recognizes that it has a responsibility to a regular employee who suffers a loss of employment as a result of departmental reorganization, budget cuts or the elimination of her/his position otherwise for reasons other than cause.