CITATION: Ball v Audette, 2019 ONSC 3775
DIVISIONAL COURT FILE No.: DC-18-075
DATE: 20190618

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MYERS and FAVREAU JJ.

BETWEEN:	)	
	)	
TYLER BALL, GIZEM ÇAKMAK, SUSANNAH MULVALE, DAVID RAVENSBERGEN and STUART SCHUSSLER	)	
	)	
Applicants	)	*Sean Dewart and Adrienne Lei* for the Applicants
	)	
– and –	)	
	)	
GERALD AUDETTE, LUIGI BULLI, MYA RIMON, CAROL MCAULAY and YORK UNIVERSITY	)	
	)	
Respondents	)	*Sarit Batner and Peter Lei* for the Respondents, Gerald Audette, Luigi Bulli, Mya Rimon and Carol McAulay
	)	
	)	*Brookelyn Kirkham* for the Respondent York University
	)	
	)	**HEARD at Toronto:** May 31, 2019

BY THE COURT

REASONS FOR DECISION

OVERVIEW:

[1] This is an application for judicial review brought by Tyler Ball, Gizem Çakmak, Susannah Mulvale, David Ravensbergen, and Stuart Schussler. The Applicants are graduate students, employees of York University ("York"), and members of a bargaining unit representing graduate students.

[2] The Applicants seek to quash decisions of a York University Tribunal purporting to discipline them under York's *Code of Student Rights and Responsibilities* (the "Student *Code*") for misconduct committed during a labour dispute.

[3] The Applicants claim that any disciplinary action should have been taken pursuant to the Ontario *Labour Relations Act,* 1995, SO 1995, c 1, Sch A, as the activities at issue were taken in the context of a strike. Moreover, they argue that the hearing was in breach of the rules of natural justice and procedural fairness. They also assert that the sanctions imposed on them were excessive.

[4] The Respondents take the position that all students, regardless of whether they are also employees of the University, must abide by the rights and obligations of students as set out in the Student *Code*. Students are not relieved of those obligations simply because they are employed by the University. The Applicants breached those obligations and should therefore be sanctioned for the infractions of the Student *Code* whether or not they are also sanctioned by a labour arbitrator. The Respondent Ms. McAulay is responsible for campus safety and security and she filed the complaints as a representative of other individuals affected by the conduct of the Applicants.

[5] The central issues are:

a. **Jurisdiction**: Is this matter within the exclusive jurisdiction of a labour arbitrator pursuant to the *Labour Relations Act* or did the Tribunal have the right to proceed with a hearing pursuant to York's Student *Code*? Was the Respondent Ms. McAulay acting on behalf of York in lodging the complaints or was she acting on behalf of individual members of the community seeking to discipline students? If the matter is a true question of jurisdiction, the standard of review is correctness. If not, the standard of review is reasonableness;

b. **Prematurity:** Should these matters have first been appealed to the Appeal Panel and if so, are there "exceptional circumstances" such that it may proceed directly to judicial review?

c. **Procedural Fairness**: Did the Tribunal comply with the rules of natural justice and procedural fairness and were the sanctions imposed reasonable?

[6] The parties agreed that the stay order issued by Wilton-Siegel J. on April 23, 2019, pending the return of this Application, be extended to the time of the release of this decision. Wilton-Siegel J. stayed Gizem Çakmak's suspension and Susannah Mulvale's loss of non-essential services and participation in non-essential activities pending the return of this application. (Messrs. Ball, and Ravensbergen's suspensions do not begin until September 1, 2019.)

[7] For the reasons that follow, we find there are exceptional circumstances that warrant judicial review despite the Applicants' failure to exhaust the appeal route under the Student *Code*. The Tribunal's decision to hear this matter was an unreasonable interpretation of the Student *Code* and the relevant labour law principles set out in the *Labour Relation Act*, the *Back to Class Act, 2018 (York University)*, SO 2018, c 10, Sch 3 ("*Back to Class Act*") and the Supreme Court of Canada jurisprudence. In its collective bargaining agreement with the union and in accordance

with the applicable law, discipline of the Applicants for misconduct committed as part of a labour stoppage falls under the exclusive jurisdiction of a labour arbitrator. If, and only if, our conclusion on this point is not correct, is it necessary for us to address the issue of procedural fairness.

CHRONOLOGY:

[8] The Applicants are York graduate students. They are also employed by York as teaching assistants. The workplace is unionized. The Applicants are also members of the Canadian Union of Public Employees, Local 3903 (the "Union"), the bargaining unit representing graduate student teaching assistants, contract faculty, and graduate assistants employed by York.

[9] The Respondents Gerald Audette, Luigi Bulli, and Mya Rimon are the Tribunal members who heard the complaints against the Applicants. At the beginning of the hearing of this application, they were removed as individual respondents on consent, on the understanding that York is the proper respondent on behalf of the Tribunal.

[10] The Respondent Carol McAulay is York's Vice President, Finance and Administration.

[11] On August 3, 2018, Ms. McAulay filed complaints against the Applicants to York's Office of Student Community Relations pursuant to the Student *Code* (the "Complaints"). She claims she did so as a representative of other staff who complained to her in her personal capacity, not in her capacity as a senior administrator of York.

[12] In the Complaints, it is alleged that the Applicants engaged in misconduct between April 13, 2018 and July 7, 2018 while participating in secondary picketing and strike-related protests at York and off-site during the strike that lasted from March 5, 2018 to July 25, 2018.

[13] The Complaint contains allegations about incidents that took place in the following places:

- April 13, 2018: Empire Club event;
- May 1, 2018: Board of Governors meeting;
- May 1, 2018: Shoppers Drug Mart/West Office Building;
- May 9, 2018: Office of Governor Randy Williamson;
- May 12, 2018: Office of Governor Antonio Di Domenico;
- May 25, 2018: Office of Vice Provost, Students;
- May 31, 2018: Office of Governor Jacques Demers; and
- June 7, 2018: Office of Chancellor Greg Sorbara.

[14] The behaviour in question included:

a. Attending the locations referred to above, including private law firms, and refusing to leave until the police arrived;

b. Encircling York staff and administrators at various locations, pushing them and preventing them from leaving; and

c. Engaging in verbal insults and profane language, including through social media.

[15] On July 25th, the *Back to Class Act* was enacted. The Act required all striking workers to return to work.

[16] On September 17, 2018, the Applicants filed grievances pursuant to the collective agreement challenging the Complaints claiming that any disciplinary action should have been pursued under the *Labour Relations Act* and, on September 18, 2018, the Applicants filed an application with the Ontario Labour Relations Board ("OLRB") alleging that the Complaints are an unfair labour practice.

[17] On September 24, 2018, York's Office of Student Community Relations ("OSCR") advised the Applicants that the complaints against them would be heard together to allow common issues to be considered together.

[18] After an unsuccessful attempt at mediation, the OSCR provided hearing dates in December 2018. Those dates were adjourned to January 2019 at the Applicants' request. On December 10, 2018, the OSCR clarified that the Complaints would be adjudicated by way of five separate hearings before the same Tribunal.

[19] From December through February, the Applicants brought nine motions before the Tribunal and five appeals before the Appeal Panel on a variety of issues. The issues raised by the Applicants included allegations that Tribunal members ought to be removed due to the existence of a reasonable apprehension of bias, the status of Ms. McAulay as a representative of other University staff, the timeliness of the Complaints, and the jurisdiction of the Tribunal. They also made a request to postpone the proceeding pending the parallel grievance arbitration proceedings that they had commenced. All of the interim relief sought was refused.

[20] The hearing on the merits of the Complaints took place over a number of days in February 2019. Ultimately, on March 8, 2019, the Tribunal issued its reasons on misconduct and sanctions and sent letters to each Applicant, outlining the principles and the application of the Student *Code*, and noted that the Applicants are both students subject to the Student *Code* and York employees.

[21] The Tribunal held that each of Mr. Ball, Ms. Çakmak, Ms. Mulvale and Mr. Ravensbergen "fail[ed] to uphold an atmosphere of civility, honesty and respect for others" and engaged in "behaviour that harms or threatens to harm another person's physical or mental wellbeing", and the Tribunal imposed sanctions on the basis of these findings. No finding of misconduct was made

and no sanctions were imposed on the Applicant, Stuart Schussler. The Student *Code* breaches and penalties imposed upon the Applicants are as follows:

Student	Breaches		Sanctions (Effective)
Tyler Scott Ball	1.	Attendance at office of Jacques Demers	• Suspension Sept. 1, 2019 – Dec. 31, 2019 • Prohibited from attending the offices of Chancellor Sorbara and Mr. Demers without an appointment or an invitation for as long as he is a York student
	2.	Attendance at office of Chancellor Greg Sorbara	
Gizem Çakmak	1.	Attendance at Board of Governor's meeting (confinement of two staff)	• Suspension May 1, 2019 – Apr. 30, 2020 • Prohibited from having any contact, direct or indirect, through any means, with Sarah Millington or Jeff O'Hagan (staff that were confined) for as long as she remains a York student • Prohibited from attending the office of Mr. Williamson without an appointment or an invitation for as long as she remains a York student
	2.	Attendance at Empire Club event	
	3.	Attendance at office of Randy Williamson	
Susannah Mulvale	1.	Attendance at Empire Club event	• Banned from participating in non-essential activities and loss of access to non-essential services (does not include health and wellness services) May 1, 2019 – April 30, 2020 • Prohibited from attending the office of Mr. Di Domenico without an appointment or invitation for as long as she remains a York student
	2.	Attendance at office of Antonio Di Domenico	
David Ravensbergen	1.	Attendance at Empire Club event	• Suspension from Sept. 1, 2019 – April 30, 2020 • Prohibited from attending Chancellor Sorbara and Mr. Di Domenico offices without appointment or invitation for as long as he remains a York student • Prohibited from having any contact, direct or indirect, through any means, with Susan Webb, Barbara Joy, and Jeff O'Hagan (staff that were followed) for as long as he remains a York student
	2.	Attendance at Shoppers Drug Mart/West Office Building (group protest, following staff members)	
	3.	Attendance at office of Chancellor Greg Sorbara	
	4.	Attendance at office of Antonio Di Domenico	
	5.	Attendance at office of Vice Provost, Students	
Stuart Schussler	1.	None	None

[22] The Applicants' appeal of the sanctions to York's Appeal Panel was dismissed on May, 14, 2019, on the basis that the sanctions were not unnecessarily punitive or incompatible with the violations.

COURT'S JURISDICTION:

[23] The Divisional Court has jurisdiction to grant an application for an order in the nature of *mandamus*, prohibition or *certiorari*, a declaration or an injunction in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power: *Judicial Review Procedure Act*, RSO 1990, c J.1, ss. 2 and 6(1).

STANDARD OF REVIEW:

[24] The standard of review on "true questions of jurisdiction" is correctness. The Supreme Court has acknowledged however, that to date, they have been unable to identify a single instance where this category has been applicable, and the Court has repeatedly declined to characterize an issue which involves the statutory interpretation by a tribunal of its mandate as a "true" question of jurisdiction: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 59; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at p. 43.

[25] By contrast, where the Tribunal is interpreting its "home" statute, the decision is to be reviewed on a standard of reasonableness: *Bart v. McMaster University*, 2016 ONSC 5747, at para. 130.

[26] If a party raises an issue of procedural fairness, it is not necessary to engage in a standard of review analysis. The Court must determine whether the requisite level of procedural fairness has been accorded, taking into account the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, and *London (City of) v. Ayerswood Development Corp.*, 2002 CanLII 3225 (Ont. C.A.) at para. 10).

[27] The adequacy of the reasons and sanctions should be reviewed under the reasonableness analysis. This means that the reasons must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para. 47 and *Nurses' Union v. Newfoundland and Labrador*, 2011 SCC 62, [2011] 3 SCR 708.

ANALYSIS OF THE ISSUES AND CONCLUSIONS:

[28] The key issue is whether the Tribunal had the authority to hear this matter pursuant to the Student *Code*, or whether the decision must be quashed on the basis that these issues can only be addressed by a labour arbitrator in accordance with the *Labour Relations Act*. If the Tribunal did not have the jurisdiction to hear this matter, none of the other issues, save the issue of prematurity, need be addressed.

[29] We have addressed the jurisdiction issue first as it informs our decision on the issue of prematurity.

The First Issue: Jurisdiction - Did the Tribunal have authority to hear these Complaints?

[30] The Tribunal is constituted pursuant to the *York University Act, 1965*. The statute grants the authority to discipline students to the President of the University. The President has delegated his authority to the OSCR which has promulgated the Student *Code*.

[31] The Student *Code* provides that the OSCR shall decide whether a complaint falls within the "jurisdiction" of the Student *Code*. The Student *Code* consists of an internal set of rules that the President follows in carrying out the disciplinary role. There is nothing in the *York University Act, 1965* specifically dealing with discipline of students who are employees or giving primacy to student discipline over employee matters when the two intersect.

[32] The OSCR considered the Complaints and, after mediation, referred them to the Tribunal for adjudication in accordance with the Student *Code*. Once referred, the Tribunal adjudicated the Complaints.

[33] As mentioned above, the Applicants raised the Tribunal's jurisdiction as a preliminary matter. In a decision dated February 1, 2019, the Tribunal dismissed the motion, finding as follows:

> The essential character of this case is that the purported actions of students as outlined in the complaints are alleged to be in violation of the [Student] *Code*; it does not arise from the collective agreement. The fact that the alleged breaches of the [Student] *Code* occurred during a time of heightened tensions at York University, or that the [Applicants] are members of a labour union, does not remove the responsibilities of students under the [Student] *Code* or the jurisdiction of the Panel.

[34] The Applicants challenge this decision on the basis that the essential character of the complaints was labour related, and that the legislative scheme and collective agreement required that any disciplinary action taken against the Applicants in relation to the strike be brought under the *Labour Relations Act*.

[35] The Respondents submit that although the Applicants were employees of York during the strike, they were also students of the University subject to the Student *Code*. The fact that the Applicants are employees does not obviate the necessity to comply with the Student *Code*; it specifically provides that "nothing in this [Student] *Code* is intended as a method or excuse to suppress peaceful protest, civil debate, or other lawful conduct so long as student responsibilities…are upheld." Moreover, nothing in the *Labour Relations Act* or the *Back to Class Act* stipulates that the students cease to be governed by the Student *Code* by virtue of their status as employees of the University.

[36] The Respondents submit that a labour arbitrator does not have the power to adjudicate student discipline matters or impose suspensions for contraventions of the Student *Code*.

[37] In assuming jurisdiction, the Tribunal noted that:

> While the [University Tribunal] recognizes that the conduct giving rise to the complaints occurred during a labour disruption, the [Tribunal] finds that student conduct must continue to be governed by the [Student] *Code* during a labour disruption. The Respondents' characterization of the conduct as "picketing by striking employees" does not eliminate their responsibilities as students under the [Student] *Code*…
>
> The *Pepsi-Cola* case lays out that "picketing which reaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible regardless of where it occurs."

[38] The Respondents submit that the Tribunal had the right to determine whether there was a breach of the Student *Code* and, if so, to assign sanctions for the breach of its terms.

[39] The Respondents note that section 3 of the Student *Code* applies to "non-academic student conduct…on University premises and conduct not on University premises but which has a real and substantial link to the University and applies to all students of York University…"

[40] Section 3 also provides that, "The University reserves the right to… determine whether or not a matter should be addressed under the [Student *Code* and] take necessary and appropriate action to protect the safety and welfare of individuals on campus or the campus community as a whole notwithstanding the [Student *Code*]."

[41] The Respondent Ms. McAulay submits that in filing the Complaints, she was not acting in her capacity as a senior administrator at York pursuing employee discipline but rather as a representative of various other members of the York community who sought to voice their complaints about the behaviour of students and to seek sanctions by the University for such behaviour.

[42] The Respondents therefore take the position that this proceeding was not to address the resolution of a labour issue between an "employer" and "employee" within the meaning of the *Labour Relations Act*.

[43] For the following reasons we do not agree.

[44] The question to be determined is whether this is in essence (a) a labour issue between the University and its teaching assistant employees and, if so, whether the dispute must be addressed under the *Labour Relations Act* or (b) a breach of the Student *Code* such that it is properly adjudicated by the Tribunal. As the Court held in *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureure générale)* 2004 SCC 39, [2004] 2 SCR 185 at para 20:

> We must look at the dispute in its full factual context. Its legal characterization – whether it is a tort claim, a human rights claim, or a claim under the labour contract – is not determinative. The question is whether the dispute, viewed in its essential character and not formalistically, is one over which the legislative intended the arbitrator to have exclusive jurisdiction.

[45] When employees are represented by a trade union in collective bargaining, an arbitrator has exclusive jurisdiction to determine all questions of fact and law pertaining to workplace disputes before it. Section 48 of the *Labour Relations Act* specifically provides that:

> 48 (1) Every collective agreement *shall* provide for the *final and binding settlement by arbitration*, without stoppage of work, *of all differences between the parties arising from* the interpretation, application, administration or *alleged violation of the agreement, including any question as to whether a matter is arbitrable*. [Emphasis added]

[46] Section 80.1 of the *Labour Relations Act* further provides that, "An employer shall not discharge or discipline an employee in a bargaining unit without just cause during the period that begins on the date on which a strike or lock-out … and that ends on the … date on which a new collective agreement is entered into …"

[47] This power is enhanced by the strong privative clause found at s. 114 (1) which provides that:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes...

[48] Section 17(4) of the *Back to Class Act* that was enacted to end the strike, provides that:

> (4) Any dispute between the parties concerning discharge or discipline in respect of activities that took place during the period described in subsection (3) shall be determined through the grievance procedure and arbitration procedure established in the new collective agreement.

[49] In the reasons, the Tribunal does not refer to and explain these provisions and their application, nor the terms of the collective agreement. The Tribunal concludes but does not explain why they find the essential character of the dispute "does not arise from the collective agreement". The Tribunal's determination that the allegations arose "during a time of heightened tensions" does not reflect a consideration of the full factual context of the issues.

[50] The courts have recognized that labour relations statutes should not be duplicated and undermined by concurrent proceedings: *Weber v. Ontario Hydro*, [1995] 2 SCR 929, at p. 956 McLachlin J. (as she then was) held that:

> The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.
>
> On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> In considering the dispute, the decision-maker must attempt to define its "essential character". . . .

[51] While it is clear that the Applicants are both employees and graduate students, we are of the view that the essence of this dispute is an employer-employee dispute governed by the *Labour Relations Act* and must therefore be determined by a labour arbitrator not by the Tribunal. We come to this conclusion for the following reasons:

(i) All of the acts in question took place during a legal strike;

(ii) All of the impugned acts were taken while the Applicants were picketing and demonstrating;

(iii) Both parties' witnesses testified that the Applicants' actions were "labour-dispute related". Their acts, however ill-advised and/or wrongful, were expressions of their dissatisfaction with their working conditions;

(iv) Section 48 (1) of the *Labour Relations Act* clearly provides that "all differences between the parties arising from the interpretation, application, administration or alleged violation of the [collective] agreement, including any question as to whether a matter is arbitrable" shall be determined by a labour arbitrator. The Act's broad privative clause requires a high degree of curial deference;

(v) Section 17(4) of the *Back to Class Act* specifically requires that disputes over activities that took place during this strike be dealt with under the collective agreement;

(vi) No determination as to jurisdiction was sought or obtained from a labour arbitrator and there was a refusal to adjourn these proceedings to obtain that decision; and

(vii) There is no conflicting legislation that specifically empowers the Tribunal to assert jurisdiction in these circumstances.

[52] Ms. McAulay's assertion that she made her Complaints as a representative of the complainants does not change the fact that this is not in essence a dispute about student behaviour, but a dispute between the University and its employees who were angry and upset about their working conditions.

[53] The Student *Code* does not contemplate complaints being brought by a third party self-appointed representative. Referring to herself as representing other members of the York community does not diminish the fact that Ms. McAulay is a senior member of the employer with labour relations responsibilities who is moving before a Tribunal that exercised its disciplinary authority to penalize employees for their misconduct during a strike.

[54] Moreover, s. 17(4) of the *Back to Class Act* specifically applies to "[a]ny dispute between the parties concerning ... discipline in respect of activities that took place during the period [of the strike]." It sets out a complete code and leaves no room for other discipline for "activities that took place" during the strike. It does not say "labour" activities or "student" activities. It requires arbitration for "any dispute" concerning discipline for any and all activities that occurred during the strike regardless of the existence of the Student *Code*. York cannot require its employees to engage in its own process so as to enforce discipline on them for acts that fall under the *Back to Class Act* and within the purview of the arbitrator under the collective agreement and the *Labour Relations Act*.

[55] The Respondents are not permitted to use the alleged misconduct of a student to discipline an employee for collective bargaining activities. The Applicants' actions while picketing and demonstrating during a legal strike must be determined by a labour arbitrator.

[56] Given that there is only one applicable statute that governs the discipline of employees for actions taken during a legal strike, we are of the view that this is one of those very rare true questions of jurisdiction that raises the issue of whether the Tribunal had authority to address the complaints in the first place: See *Dunsmuir*, at para. 59 and *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 OR (3d) 561 at para. 56. The standard of review of a question of true jurisdiction is correctness. The Supreme Court has made it clear that administrative bodies must be correct in their determination as to the scope of their delegated authority because jurisdictional questions are fundamentally tied to both the maintenance of legislative supremacy and the rule of law: See *Crevier v. Quebec (A.G.)*, [1981] 2 SCR 220 at pp. 236-237.

[57] In any event, even if the question of which tribunal ought to have heard these complaints is one of interpretation rather than jurisdiction, we find that for the above reasons, the Tribunal's decision that it had jurisdiction to adjudicate these complaints was an unreasonable interpretation of the statutory provisions and law at play. For these reasons, the application for judicial review to quash the decision of the Tribunal is granted.

The Second Issue: Is this application for judicial review premature given that no appeal was brought of the February 1 Decision?

[58] The Respondents take the position that this application for judicial review should be dismissed as premature because the Applicants did not appeal the Tribunal's jurisdiction decision to the Appeal Panel: See *Toth Equity Limited v. Ottawa (City)*, 2011 ONCA 372.

[59] The Respondents note that the Applicants sought recourse to the Appeal Panel numerous times in respect of other Tribunal decisions, including the March 8 sanctions, which shows that they knew the Student *Code*'s appeal process provided them with an adequate alternative remedy. Having elected not to pursue an adequate alternative remedy, they should be precluded from now challenging the jurisdiction of the Tribunal before this Court.

[60] Subsection 2(1) of the *Judicial Review Procedure Act* provides that an application for judicial review may be brought "despite any right of appeal". However, the Divisional Court will exercise the power to hear such an application only in exceptional circumstances: See *Re Woodglen and Co. Ltd. and City of North York*, 1983 CanLII 1614 (Ont. Div. Ct.).

[61] It is premature for a party to bring a court proceeding to seek a remedy if a statutory dispute resolution process offers an adequate alternative remedy and that process has not fully run its course or been exhaustive: *Volochay* at paras. 61-70, and *Western Life Assurance Company v. Penttila*, 2019 ONSC 14.

[62] In *Volochay*, the court held at para. 73 that, "To be an effective or adequate remedy, the defect alleged -- here a denial of procedural fairness -- must be capable of being raised before the reviewing body, and the reviewing body must be capable of 'curing' the defect".

[63] Similarly, in *Harelkin*, the court held that a hearing by an internal appeal body will be found to constitute an "adequate alternative remedy", even if the initial decision-maker breached a duty of procedural fairness, provided the appeal body proceeds *de novo*, there is no reasonable

apprehension of bias and the second hearing is conducted fairly: See *Harelkin v. University of Regina*, [1979] 2 SCR 561 and *Khan v. University of Ottawa* (1997), 34 OR (3d) 535 (Ont CA).

[64] In this case, section 11 of the Student *Code* provides for an appeal to the Appeal Panel on the basis that "the University Tribunal had no power under this [Student] *Code* to reach the decision or impose the sanctions it did". The Applicants claim that they did not appeal the Tribunal's jurisdiction decision to the Appeal Panel because they are not challenging the Tribunal's power to impose the sanctions, and that their jurisdictional challenge therefore does not fall within the Appeal Panel's review authority. While we find this to be an overly literal interpretation of the Student *Code*, we do find that in this case there are exceptional circumstances justifying our decision to decide the jurisdictional issue despite the Applicants' failure to pursue an appeal before the Appeal Panel.

[65] The policy rationale for allowing administrative proceedings to run their course before judicial intervention are twofold. First, administrative proceedings are meant to be quicker and efficient, and therefore interrupting them with applications for judicial review of interim decisions unnecessarily fragments the proceedings. In addition, before intervening in an administrative process, the Court should have the benefit of a full record on the matter: See *Volochay*, at para. 69.

[66] In our view, neither of these policy rationales is present in this case for a number of reasons.

[67] First, at the hearing before us, Ms. McAulay's counsel's initial position was that it was too late for the Applicants to appeal the jurisdiction decision to the Appeal Panel. During the hearing, she indicated that Ms. McAulay would not oppose the timeliness of such an appeal, however counsel for York, who was present at the hearing, was not in a position to advise whether the Appeal Panel would grant an extension of time. Therefore, in the particular circumstances of this case, it is not clear that the appeal process is an adequate alternative remedy.

[68] Second, there is no risk of fragmentation in this case because the Tribunal and the Appeal Panel have already finally determined the merits of the complaints, including the imposition of sanctions. Notably, while the issue of jurisdiction was not squarely raised before the Appeal Panel, it would certainly have been open to the Appeal Panel to make a finding that the sanctions imposed on the students were beyond the Student *Code*'s purview, given that the complaints arose from a labour dispute, but the Appeal Panel did not do so. Under the circumstances, it is again hard to see that an appeal would be an adequate alternative remedy, and in our view declining to hear this application for judicial review would likely cause further delay in addressing a serious jurisdictional error.

[69] Third, while the courts have held that issues of jurisdiction do not necessarily constitute exceptional circumstances (See *Volochay*, at para. 67), this does not mean that in all cases where jurisdiction is raised, a tribunal's process should be allowed to run its course. In this case, the *Labour Relations Act* clearly provides that all labour disputes are to be decided by an arbitrator and that all disputes about the application of the Act are to be determined by the OLRB. In addition, section 17(4) of the *Back to Class Act* explicitly deals with this labour dispute and requires that disagreements over activities that took place during this strike be dealt with under the collective agreement. Given these strong privative clauses, there is no utility in requiring the Applicants to

appeal the jurisdiction decision to the Appeal Panel given that the Legislature has clearly indicated that labour arbitrators and the OLRB are to adjudicate such disputes.

[70] Fourth, in *Volochay* at para. 80, Laskin JA for the court, held that evidence of "hardship, or prejudice, or costs, or delay" may constitute exceptional circumstances. One of the Applicants has no permanent status in Canada. Once suspended, she faces the real risk of deportation and or the loss of her health benefits as she has no legal right to remain in Canada.

[71] For these reasons, we find that it is appropriate for this court to exercise its discretion and address the issue of jurisdiction on judicial review.

The Third Issue: Did the Tribunal violate the principles of natural justice and procedural fairness?

[72] As noted above, given our conclusion that discipline for misconduct committed as part of a labour stoppage falls within the exclusive jurisdiction of a labour arbitrator, we need not address the issue of procedural fairness. However, in the event that we are wrong as to jurisdiction, we find that for the reasons articulated below, there was a lack of procedural fairness in the manner in which the hearing on the merits was scheduled and requests for adjournments were addressed.

[73] In *Baker* the Supreme Court set out the following six factors to be assessed in considering the fairness of the process undertaken by a decision-maker:

a. the nature of the decision being made and process followed in making it;

b. the nature of the statutory scheme and the term of the statute pursuant to which the body operates;

c. the importance of the decision to the individual or individuals affected;

d. the legitimate expectations of the person challenging the decision; and

e. the choices of procedure made by the agency itself.

[74] We agree with the Respondents that there is nothing objectionable about the Tribunal's desire to proceed expeditiously, that the Tribunal had the right to schedule dates, and that the lack of cross-examination *per se* is not always a sufficient reason to undermine the fairness of the process.

[75] However, in this case, we find there was a denial of procedural fairness because:

a. The Tribunal failed to consider the factors relevant to its decision to deny a brief adjournment as set out in *Igbinosun* and articulate why it would not grant an adjournment for the Family Day Weekend when other dates had already been set for the following week: See *Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484, 96 OR (3d) 138;

b. The Tribunal did not consider the prejudice to the Applicants who were represented by counsel. While the Complainant's lawyers were able to cross-examine the Applicants' witnesses, on the day that the Applicants' lawyer was not present six of the Complainant's seven witnesses testified. Despite the fact that the hearing had been ongoing for many days and had further dates booked in the next week, the Applicants were deprived of the opportunity to cross-examine virtually all of the Complainant's witnesses despite their entitlement to cross-examination being recognized by the Student *Code* and in s. 10.1 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22;

c. The Tribunal did not take into account the seriousness of the consequences arising from the refusal to adjourn or the seriousness of an adverse outcome including the fact that the Applicants' employment was at stake if they were suspended as students, as were their education plans, and, in the case of one of the Applicants, her right to remain in Canada and receive health benefits; and

d. Although the February 16 date was peremptory, the Tribunal failed to consider that the Applicants' counsel sought to explain that she had other obligations on the Saturday of the Family Day weekend on February 5, and that none of the factors that would normally mitigate against the granting of an adjournment (such as lack of compliance with prior court orders, prior peremptory hearing dates, and evidence that the applicant is seeking to manipulate the system), were present in this case.

[76] As a result of the confluence of all the factors listed in the prior paragraph, we are of the view that in this particular case, the denial of an adjournment resulted in the process being unfair to the Applicants. We wish to make it clear that we are not finding that the fact that counsel was not available to attend when required, by itself, undermined the fairness of the process or was a relevant consideration. The Tribunal has the right to schedule proceedings before it generally. The doctrine of fairness is not implicated unless or until there are sufficient grounds to tip the balancing of the factors set out in *Baker* viewed as a whole.

CONCLUSION:

[77] Given our conclusion that the Tribunal should not have heard the Complaints and that the hearing was procedurally unfair, we do not find it necessary to address the issue of whether the sanctions imposed were reasonable.

[78] For the above reasons, the Application for judicial review is granted, and an order is made quashing the decisions of the Tribunal and the Appeal Panel.

Thorburn J.

Myers J.

Favreau J.

Date of Release: June 18, 2019

CITATION: Ball et al. v. Audette et al. and York University, 2019 ONSC 3775
DIVISIONAL COURT FILE NO.: 075/19
DATE: 20190618

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MYERS and FAVREAU JJ.

BETWEEN:

TYLER BALL, GIZEM ÇAKMAK, SUSANNAH MULVALE, DAVID RAVENSBERGEN and STUART SCHUSSLER

Applicants

– and –

GERALD AUDETTE, LUIGI BULLI, MYA RIMON, CAROL MCAULAY and YORK UNIVERSITY

Respondents

REASONS FOR DECISION

Date of Release: June 18, 2019