

IN THE MATTER OF AN ARBITRATION

BETWEEN:

QUEEN'S UNIVERSITY

(the "University")

AND:

QUEEN'S UNIVERSITY FACULTY ASSOCIATION

(the "Association")

IN THE MATTER OF:

PROFESSOR ADELE MERCIER

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE UNIVERSITY:

Alan Whyte	- Counsel
Gordon Smith	- Vice-Dean, Faculty of Arts and Science
Dan McKeown	- AVP Faculty Relations

APPEARANCES FOR THE ASSOCIATION:

Cathy Lace	- Counsel
Sean Hayes	- Auxiliary Student
Margaret Smith	- Acting Grievance Officer
Constance Adamson	- Grievance Chair
Kayll Lake	- QUFA President
Adele Mercier	- Grievor

A W A R D

I have before me two grievances (Grievances #4 and #5) from a series of grievances challenging the treatment of Professor Adele Mercier. Grievance #4, dated November 26, 2013, challenges the University's decision, dated October 29, 2013, to remove the grievor from her office in Watson Hall and move her to another office in a different building contrary to articles 1, 15, 22 and 36 of the collective agreement. Grievance #5, dated February 17, 2015, alleges that in violation of articles 1 and 22.1.3 the University failed to take the steps required to ensure that the removal of the grievor from her office in Watson Hall did not continue longer than reasonably required. The parties have agreed to bifurcate the issue of remedy such that at this stage the Association asks for only a declaration. There is no dispute with respect to my authority to hear and determine these matters.

The salient facts in these matters are as follows.

- Professor Mercier is a tenured associate professor in the Department of Philosophy at Queen's University, having been hired in 1992. The department is housed on the third floor of Watson Hall. For 20 years, until October 29, 2013, her office had been located on the third floor of Watson Hall. Throughout her time at Queen's University, all faculty members in her department had their offices on the third floor of Watson Hall.

- From about 2008, Professor Mercier pursued allegations of gender bias and favouritism in the Department of Philosophy involving both faculty and students. Professor Mercier filed a Human Rights complaint under the University's internal complaint process on August 29, 2009. A number of her colleagues made complaints about Professor Mercier, one of whom alleged in an email that Professor Mercier posed a threat of workplace violence. This complaint was investigated and found to be without merit.
- The tension in the department continued with there being an external climate review in 2010. In April 2010, Professor Mercier was cautioned about debating colleagues in the absence of a formal dispute resolution process. In the fall of 2010, absent an investigation into her internal complaint, Professor Mercier filed a complaint with the Human Rights Tribunal of Ontario (HRTO). The response to the HRTO complaint described Professor Mercier as a very difficult employee. The HRTO decided to defer consideration of Professor Mercier's complaint pending disposition of Grievances #1-#3. Departmental tensions continued to run high into 2013.
- In a May 20, 2013 letter to Mr. Dan Bradshaw, the Associate Vice Principal Human Resources with responsibility for faculty relations, Professor Mercier

complained about the conduct of two departmental staff, Judy Vanhooser and Marilyn Lavoie, and in particular what she considered to be Ms. Lavoie's failure to take accurate departmental meetings minutes by not recording Professor Mercier's motions.

- Ms. Lavoie continued to take the departmental meeting minutes throughout.
- In October 2013, Ms. Lavoie and Ms. Vanhooser complained that at an April 2013 workshop dealing with workplace conduct presided over by Mr. Dan Langham, Director of Environmental Health and Safety, comments made by Professor Mercier constituted a threat of workplace violence. Mr. Langham did not agree. There was no investigation.
- Professor Mercier continued to have concerns about Ms. Lavoie's minute-taking. The department head suggested Professor Mercier raise her concerns at the department meeting scheduled for October 18, 2013, which she did. Professor Mercier was vocal in raising her concerns and Ms. Lavoie was upset by what had been said.
- Ms. Lavoie, as a staff secretary, is in a bargaining unit of employees represented by the United Steel Workers (USW). On October 23, 2013 the

United Steel Workers local sent an "Issue Request" (a pre-grievance complaint) to the University advising that Ms. Lavoie wished to raise an official complaint against Professor Mercier pursuant to article 11.04(b) of the USW collective agreement dealing with harassment under article 16.13 and "possible workplace harassment and/or workplace violence as outlined in article 17.02." The Issue Request further advised that "it is the union's intention to submit a grievance under article 11.02 if this complaint is not resolved satisfactorily at the Informal Resolution Stage."

- In response, a meeting was convened by management on October 24, 2013. Professor Mercier was not advised.
- Present at the October 24, 2013 meeting were: Professor Mozersky, the department head; Heather Shields, non-faculty labour relations; Dr. Smith, the dean; Dan Langham; Dan Bradshaw, Associate Vice President Faculty Relations; Mr. Alan Whyte, counsel. The consensus arising from the meeting was that the antagonists should be temporarily separated pending a full investigation of both the October 23, 2013 complaint against Professor Mercier and Professor Mercier's May 20, 2013 complaint against Ms. Lavoie and Ms. Vanhooser and that it made more sense to move Professor Mercier's office because, whereas the two support staff were required to be physically within

the department in order to function, Professor Mercier could function from outside the department. It was thought that, generally, separation was not only normative where there existed a level of antagonism such as this but also required under Section 25(2)(h) of the Occupational Health and Safety Act (OHSA). Section 25(2)(h) of OHSA requires an employer to "take every precaution reasonable in the circumstances for the protection of a worker."

- Heather Shields was dispatched to meet with the two support staff employees which she did on October 28, 2013. Both told her that they felt unsafe while at work as they didn't know what Professor Mercier might do. They were both content to allow the University to take the action that it considered appropriate. Ms. Shields concluded that "there was no apparent threat to their physical safety (but that) stressors related to complaints of ongoing harassment in the Department had caused these employees to feel psychologically unsafe in their current situation" and that she "was concerned that leaving the current work arrangements in place pending a resolution of the complaints might lead to workplace absences for medical reasons that could be avoided by modifying the workplace pending the outcome of an investigation." Ms. Shields advised Mr. Bradshaw of her assessment.

- Ms. Shields' concern for psychological impairment was consistent with that expressed by Mr. Bradshaw at the October 24 meeting and her concerns with regard to possible medical absences reflected that of Dr. Smith.

 - There was no consideration given to alternatives other than separating the antagonists by moving Professor Mercier's office nor was there consultation in this regard with either the Association or Professor Mercier.

 - A letter dated October 29, 2013, over the signature of Dean Mumm, advised Professor Mercier that:
 - both office staff members in the Department have indicated that they feel unsafe in your presence and do not wish to have direct communications with you;
 - the university is required to respond to safety concerns;
 - because office staff are unable to move their work whereas you are able to do so the University has decided:
 - to move your office to Mackintosh-Corry Hall commencing Friday, November 1, 2013;
- and that:
- you should not attend your office in Watson Hall until you are advised that you may do so;

- you should arrange immediately to see students for academic purposes at your new office;
- you should not have any verbal contact with Departmental office staff either in person or by phone;
- any E-mail contact required for academic purposes should be directed to the Faculty Office.

The above are described as interim arrangements.

- Professor Mercier wrote in reply on October 31, 2013 that, "based on no evidence" and "without advising me", the University was signalling that "I am a persona non grata in my own department" and that this is being done "without regard to the irreparable harm that it will do to my professional and personal reputation."
- Ms. Ramneek Pooni, the grievance officer for the Association, also wrote in reply by email on October 31, 2013. She said that on reading the October 29, 2013 letter to Professor Mercier she was "struck dumb" and asks for a "less disruptive way" to accomplish the desired separation. She comments that "the manner of this directive smacks of punishment."

- Dean Mumm replied the next day, assuring Ms. Pooni that Professor Mercier "will not be impeded in the fulfillment of her academic duties" and in regard to the timing of the relocation that "the nature of the complaints required that there be no delay."
- In response, Ms. Pooni asked for disclosure as per article 22 of the collective agreement. Mr. Bradshaw wrote in response on November 4, 2013 that the University was not acting under article 22.1 of the collective agreement because "the University has not suspended Prof. Mercier with full pay; and the University has not relieved her of any of her duties or privileges."
- Professor Mercier's Watson Hall office contents were not moved to her relocated office. Specifically, the telephone was not connected until November 11, 2013 and she was not provided with access to a fax machine, scanner, printer, photocopy machine, blackboards or, initially, with a computer. By letter dated November 5, 2013 Professor Mercier wrote to Dean Smith setting out a list of what was required in order for her to function effectively. Dr. Smith replied by email dated November 12, 2013 that "...there are limits to the assistance we can provide and your most recent email exceeds those limits. For a list of the facilities and support that the University is obliged to provide you,

please refer to Article 36.1 of the Collective Agreement. We believe those obligations have been met."

- There is no evidence of any other faculty member ever having had his/her office involuntarily moved out of the location housing the offices of all other full-time faculty members within any department to an outside location, i.e. to another building.
- Professor Mercier had personalized her office with three armchairs, three standing lamps, a large table with eight chairs (to meet with students for tutoring sessions), two large horizontal bookshelves to house handouts and articles and a large (6'x8') blackboard fastened to the wall. She also had easy access to a fax machine and scanner, a photocopy machine, materials such as paper, pens, clips, stapler, chalk, etc. In response to her request that her furniture be moved and access be provided to the rest, she received the November 12, 2013 email from Dr. Smith advising her that her request exceeded the limits of that required under article 36.1 of the collective agreement.
- Access to the resources of the Global Development Studies Department was made available to Professor Mercier around November 19, 2013 but without

after-hours access or access to facilities in which to tutor students or kitchen access. Her office furniture and personal items had not been moved when Professor Mercier went off on sick leave on November 26, 2013. She remained on sick leave until October 29, 2014 (for 11 months).

- Ms. Elizabeth Hewitt was appointed as the external investigator. Her mandate included the investigation of the safety complaints made by Ms. Lavoie in the October 23, 2013 Issue Request, i.e. threat of workplace violence. Professor Mercier was interviewed by the investigator on three occasions and a finding was eventually made in June 2015 that she did not pose a safety threat.
- Ms. Sydney Downey, Queen's University Return to Work Specialist, confirmed in December 2015, at Professor Mercier's request, that Professor Mercier was not considered a safety threat.

The relevant provisions of the collective agreement are set out below.

Article 8 – Management Rights

- 8.1 The University retains the right to manage the University except to the extent modified by the terms of this Agreement. This right shall be exercised in a fair and equitable manner consistent with the provisions of the Agreement.

Article 22 – Safety and Security

22.1.1 Notwithstanding the provisions of Article 20.2.1 and Article 20.2.6, the University may suspend a Member with full pay and may relieve a Member of some or all of his/her duties and/or privileges when

- (a) the University has reasonable and probable grounds to believe that the failure to take the action outlined herein would result in significant harm to a person associated with the University or University property; and
- (b) the University has considered all reasonable alternatives.

22.1.2 In such situations, as soon as practicable

- (a) the basis of the University's actions shall be fully disclosed to the Association through the Grievance Officer (or delegate) and the Member affected; and
- (b) Association and Member affected shall be given reasonable opportunity to address the basis for such belief outlined in Article 22.1.1(a) should they choose to do so and to suggest alternatives to the suspension.

22.1.3 The suspension of the Member under the provisions of this Article shall be for a period no longer than reasonably necessary to address the concern of the University.

22.1.4 Notwithstanding the foregoing, the University's actions under Article 22 are grievable under the provisions of Article 20. The University shall, in any such grievance, have the onus of establishing that it has met the conditions set out herein.

22.2 Health, Safety and Security

22.2.1 The University and the Association agree to promote safe, secure and healthy working conditions and procedures, and to encourage Members to adopt and follow sound health, safety and security procedures in the performance of their work.

22.2.2 The University recognizes a responsibility to take every precaution reasonable in the circumstances to protect the health, safety and security of Members as they carry out their responsibilities. To that end, the University agrees

- (a) to maintain the joint health and safety committees required by the Ontario Occupational Health and Safety Act, R.S.O. 1990, c.0.1, as amended from time to time and ensure that the Association has the right to appoint at least one (1) representative to each joint health and safety committee that covers areas where Members are employed;
- (b) to cooperate with the Association in making reasonable provisions for the safety, health and security of Members;
- (c) to take reasonable measures to protect the health, safety and security of Members;
- (d) to take those measures that are reasonable to maintain the security of the buildings, offices and grounds while at the same time maintaining reasonable access for Members who have a need for such access at times other than during regular working hours;
- (e) to ensure that the Association has the right to appoint at least one (1) person to any representative committee whose terms of reference specifically include the health, safety and security of Members as they carry out their responsibilities; and
- (f) to comply with the Occupational Health and Safety Act, R.S.O. 1990, c.0.1, as amended from time to time.

Article 20 – Discipline

20.1.1 A Member may be disciplined only for just and sufficient cause, and only in accordance with the provisions of this Article.

20.2.1 The only disciplinary measures that may be taken by the University against a Member are the following:

- (a) Written reprimand;
- (b) Suspension with pay;
- (c) Suspension without pay; or
- (d) Dismissal

Article 14 – Academic Freedom

14.2 Academic freedom includes the following interacting freedoms: freedom to teach, freedom to research, freedom to publish, freedom of expression, freedom to acquire materials. Academic freedom ensures that:

- (d) Members have the right to freedom of expression, including the right to criticize the government of the day, the administration of the institution, or the Association;

Article 15 – Academic Responsibilities

15.1.1 The Parties recognize that the nature of the University gives rise to academic responsibilities. The academic responsibilities of Members arise from their involvement in an appropriate combination of

- (a) undergraduate and graduate teaching, counselling, supervision, and/or professional practice of Librarians and Archivists;
- (b) research, scholarly, and/or creative activities; and
- (c) administrative and professional service.

The exact distribution of these duties may vary among disciplines and may vary among individuals and their type of appointment, in accordance with the relevant provisions of this Agreement. Members shall meet their obligations in a professional manner.

Article 36 – Working Conditions

This article provides for the required institutional resources and facilities necessary for faculty to fulfill their academic responsibilities.

SUBMISSIONS

Association

The Association submits that in removing Professor Mercier from her office and, in effect, banning her from the department premises and from activities that could bring her in contact with staff, the University acted under article 22 of the

collective agreement and in breach of that article when it failed to consider all reasonable alternatives and without notice to or due consultation with Professor Mercier or the Association. The Association asks that I apply the interpretation of article 22 set out in the interim award, i.e. emergency powers coupled with protections afforded to those made subject to those emergency powers, and find a breach.

In addition, it is submitted: that the University breached article 36.1.2 when it failed to provide the grievor with an office for four days; that the University breached article 36.1.2 when it failed to provide her with a telephone from October 28 to November 11, 2013; that the failure to provide Professor Mercier with the furniture with which she had furnished her Watson Hall office was also a breach of article 36.1.2; that she was denied the level of support for services identified in article 36.1.5; that Professor Mercier was deprived of access to her teaching resource materials and devices, i.e. fax, scanner, printer, etc., which had an adverse impact upon her academic responsibility to teach and to do research as required of her under article 15.2 which impacted her academic freedom as guaranteed under article 14.2(a); and that she was improperly denied the right to perform the service functions required of her under article 15.

In response to Mr. Bradshaw's evidence that on the information before it, i.e. Ms. Shields' report of her conversation with the two staff members, the University did not conclude that the failure to invoke article 22 would result in significant harm and in anticipation of the University's argument, the Association argues that the test under

article 22 is not whether the University concludes that there is a risk of significant harm but whether, objectively determined, the University has reasonable and probable grounds to believe that failure to act in the proposed manner will cause significant harm. It is the position of the Association that had the University believed in good faith that there was no risk of workplace violence, it would have so informed the staff and Professor Mercier and would have so instructed the investigator. Having failed to do so and the investigator having been directed to investigate the threat of workplace violence, I am asked to find that the University acted on a reasonable and probable belief that a failure to act would result in significant harm to Ms. Lavoie and Ms. Vanhooser within the meaning of article 22.

The Association points out that whereas the definition of "workplace violence" under OHSA is the exercise or attempt to exercise physical force against a worker, article 22.1.1(a) speaks of "significant harm" such that article 22.1 is not confined to situations of risk of physical injury. It is submitted that the "significant harm" referenced in article 22.1 encompasses emotional harm as well. Given that both Ms. Shields and Mr. Bradshaw spoke of a concern for the psychological wellbeing of Ms. Lavoie and Ms. Vanhooser if not separated from Professor Mercier and believed that a failure to take the action they did might result in medical leaves of absence, it brought the University's decision making, also on an objective standard, within article 22.

It is argued that, by failing to consider less drastic measures than exiling Professor Mercier from the department, by failing to consult with Professor Mercier

and the Association and by failing to take all reasonable steps to shorten the duration of her exile, the University breached article 22.

In regard to the Association's submission that the failure of the University to take all reasonable steps to shorten the time period during which Professor Mercier was outside the department, i.e. October 29, 2013 to June 15, 2015, constitutes a breach of article 22, I am asked to find that the University made no attempt from the time the decision was made to relocate Professor Mercier to determine if relocation continued to be necessary in light of the prevailing circumstances, i.e. whether, if less intrusive measures were introduced, there continued to be any significant risk to the health of the staff members. It is submitted that the relocation went on for longer than was reasonably necessary and that at no time did the University reassess the balance of interests.

In the alternative, the Association argues that the actions of the University against Professor Mercier were neither "fair" nor "equitable" nor consistent with the terms of the collective agreement and, therefore, in breach of article 8.1, Management Rights. In summary, it is the position of the Association that if the risk of harm is not significant within the meaning of article 22, as testified to by the University witnesses, then the standard of protections afforded to the rights and interests of the faculty member should be greater, not less, than the standard of protection afforded by article 22 because the institutional interests in the protection of others are by definition less urgent and pressing. When reference is had to the drastic measures taken by the

University, i.e. the relocation of the office and the effective banishment from the activities of the department premises, and to the impacts upon Professor Mercier's ability to teach and to her reputation and to the absence of consultation and reassessment, I am asked to find that even if the University did not act under article 22, its actions were unfair and unreasonable and, therefore, in breach of article 8.1, Management Rights.

In the final alternative, the Association submits that the actions of the University in this case breached article 20, Discipline. Article 21.24 requires that allegations of workplace harassment be dealt with under article 20, which establishes a test of "just cause." Absent a full investigation in advance, it is submitted that the University disciplined without just cause. Further, it is argued that because the only forms of discipline permitted under article 20.2.1 are reprimand, suspension with pay, suspension without pay and dismissal, I am asked to find that the University breached article 20 by imposing an impermissible form of discipline.

University

The University asserts that the decision to temporarily relocate Professor Mercier was the result of a balancing of interests that reflected its obligation under the Occupational Health and Safety Act, the USW collective agreement, the QUFA collective agreement and its harassment policy. It is further asserted that the decision

was a direct reflection of the operational requirements related to the realities of Ms. Lavoie's, Ms. Vanhooser's and Professor Mercier's employment within the department and that it provided stability pending the investigation of the cross-harassment complaints. Most importantly, it is asserted that the facts and circumstances did not warrant the invocation of article 22. Rather, it is asserted that it acted under article 8.1, Management Rights.

The University accepts, as found in the interim award in this matter, that the test for the applicability of article 22 is an objective one, i.e. the test as to whether it met the threshold of belief that a failure to act would result in "significant harm." It is the position of the University that it did not have reasonable and probable grounds to believe that a failure to relocate Professor Mercier's office would result in "significant harm" to Ms. Lavoie and Ms. Vanhooser. The objective proof, it is argued, is that it did not suspend Professor Mercier with pay nor did it relieve her of some or all of her duties and/or privileges.

The University emphasizes that the article 22 test is "significant harm," i.e. a very important harmful outcome or consequence. The University points to the conclusion of Mr. Langham that Professor Mercier was not a threat to do physical harm to the support staff and to the assessment of Ms. Shields, after meeting with the two support staff employees, that Professor Mercier did not pose a threat of physical harm to the support staff employees in support of its contention that on the objective test it did not rely on article 22 because it did not believe that a failure to act would

result in "significant harm" to Ms. Lavoie and/or Ms. Vanhooser. In further support, the University relies on its belief that the "interim relocation was not an exceptional response." Finally, the University submits that it cannot be that the parties intended article 22 to be triggered in response to "routine complaints of harassment."

In further support of its contention that it did not rely on article 22, the University maintains that it did not suspend Professor Mercier with pay nor relieve her of some or all of her duties and/or privileges as contemplated under article 22. On the contrary, it is submitted that Professor Mercier continued to perform her duties (except for service which she was not doing prior to the relocation of her office) as set out at article 15.1.1(a), (b) and (c). It is to be remembered, the University points out, that none of Professor Mercier's duties were contingent or dependent upon the location of her office.

The University refers to the dictionary definition of a privilege as "a right or advantage enjoyed by a person or body of persons beyond the common advantage of other individuals; a private or personal favour enjoyed; a peculiar advantage." The University argues that the location of Professor Mercier's office in Watson Hall was not an advantage she enjoyed over others in the faculty. It is submitted that because her office was located in Watson Hall along with all of her colleagues in the Department, this was not an advantage she enjoyed in relation to her fellow faculty members. Accordingly, because the test is whether or not the person claiming the privilege can point to it being an advantage compared to his/her colleagues, it is

asserted that Professor Mercier cannot argue that she lost a privilege that she enjoyed over others because all others also had their offices in Watson Hall.

Turning to the assertion that it improperly disciplined Professor Mercier, the University, citing *University of Windsor and Faculty Association 2005 Carswell Ont 4836 (McLaren)*, argues that in order to be discipline, the action complained of must be intended to punish or correct and it must impact an employee's record, pay, classification or work schedule. It is asserted that with regard to the relocation of the grievor's office, none of these factors were present. The University maintains that the "interim relocation" of Professor Mercier's office was not undertaken in response to a decision that Professor Mercier had engaged in wrongdoing, but rather as a means of addressing the tension in the department on an interim basis, pending the completion of the investigation. The decision is characterized as administrative in nature. If there is any doubt in this regard, reference is made to article 20.2.1 which stipulates that the only forms of discipline permissible under this collective agreement are a written reprimand, a suspension with or without pay and dismissal such that, it is argued, the relocation of an employee's office cannot be found to be discipline under this collective agreement.

It is the position of the University that in acting as it did, it chose to exercise its management rights in order to facilitate a more stable and respectful working environment and to ensure that it met its obligations under OHSA, the USW collective agreement, the QUFA collective agreement and its harassment policy. Reference is

made to *re: Brookfield Management Services Co. and CUOE 1999 Carswell Ont 7375 (Davie)* in support of the proposition that the exercise of management rights will not be found to be unreasonable provided that the reasons for implementing the management prerogatives relate to the betterment of the business or other legitimate business reasons. It is submitted that in circumstances where the department was in a state of tension and unrest, where cross-complaints of harassment had been filed and where there existed concern about the psychological wellbeing of Ms. Lavoie and Ms. Vanhooser and the risk of Ms. Lavoie going off sick, which would impair the operation of the department, the temporary relocation of Professor Mercier's office must be found to have been for legitimate business interests and, therefore, a proper exercise of management rights.

In response to the Association argument that no account was taken of the reputational harm suffered by Professor Mercier as a result of the University's decision to relocate her office, the University, relying on *Pierro v. Hospital for Sick Children 2016 ONSC 2987*, submits that any reputational harm stemmed not from the relocation of her office but from the allegation of harassment against her such that if the allegation was to be dismissed upon investigation, she would be vindicated. It is argued that, in any event, any harm suffered by Professor Mercier must be viewed in light of the fact that she continued to receive her salary, was able to perform her duties as a faculty member and continued to benefit from a private office. Citing *OPSU v. Ontario Ministry of Health 2007 Carswell Ont 9023* and *Ryerson (supra)*, the

University argues that professional employees, such as Professor Mercier, may have to bear a cost in furtherance of "the need to investigate allegations of misconduct."

In this final analysis, I am asked to find that in relocating Professor Mercier's office, the University engaged in a reasonable exercise of its management rights by carefully balancing its various obligations, as well as the legitimate interests of Professor Mercier, Ms. Lavoie and Ms. Vanhooser.

Association Reply

The Association makes the following points in reply.

- The relocation of a faculty member's office outside the department, although not a suspension, is a matter of major import not ever having been done before.
- A "privilege" is not unique to the individual but, as here, may be enjoyed by a group. The provision of an office within the department was a privilege enjoyed by all faculty members within the department including Professor Mercier.
- While Ms. Lavoie was clearly upset by what transpired at the October 23, meeting, so too was Professor Mercier, with no account taken of her emotional state.
- To the extent that "workplace violence" was identified in the October 25 USW Issue Request and was a matter to be investigated, the investigator should have been directed to investigate workplace violence first so as to lessen the time that this allegation was allowed to exist as an impediment to Professor Mercier being permitted to return to her Watson Hall office.

- The University can't have it both ways: that is, argue on the one hand that there was no threat of "significant harm" within the meaning of article 22 and, on the other hand, that the drastic action taken as it impacted Professor Mercier was a fair and reasonable exercise of its management rights.

DECISION

The overarching issue is whether the University acted under article 22 and if so whether in compliance or whether it acted under article 8, Management Rights, and if so whether in compliance. It had to have acted under one of these two grants of authority.

Article 22 is an unusual and somewhat complicated article that grants emergency power to the University to act where it has "reasonable and probable grounds to believe that the failure to take the action outlined herein would result in significant harm to a person associated with the University...." The actions outlined are to "suspend a member with pay and relieve a member of some or all of his/her duties and/or privileges." At the outset, the University, in an attempt to expedite, effectively moved a motion of non-suit such that it was agreed that I should issue an interim award based on the evidence the Association intended to call. Accordingly, in

an interim award dated October 5, 2016, I analyzed and applied article 22 to the facts then before me. That analysis continues to have application and is set out below.

The University is correct, in part, when it characterizes article 22 as an "employer-friendly" article. This is so because the article allows the University to act in response to safety concerns that meet the stipulated threshold in a way that may be detrimental to an individual faculty member without regard to the investigation and disciplinary due process provisions of article 20.3. However, the article also contains protections for the affected individual member. These are: firstly, the requirement to consider "all reasonable alternatives" to the action taken under article 22.1.1; secondly, the requirement to discuss the basis of the University's action under article 22 with the Association "as soon as practicable"; thirdly, to provide the affected member "as soon as practicable" with the opportunity to address the basis for the University's belief under article 22.1.1; fourthly, to limit the duration of an article 22.1.1 suspension to a period "no longer than reasonably necessary to address the concern of the University"; and, fifthly, should the member grieve, to put the onus on the University to establish that it has met the preconditions to taking action under article 22.1.1. Clearly, these parties have put their minds to the appropriate balancing of interests in situations involving public safety and security that require an "emergency" University response such that article 22 must be interpreted having regard to this balancing of interests.

It cannot be, therefore, that the University can at one and the same time respond to an emergent public safety concern where, within the meaning of article 22, it has "reasonable and probable grounds to believe that the failure to take action under article 22.1.2 would result in significant harm to a person associated with the University, by taking an action contemplated under article 22.1.1 and then avoid the remainder of article 22 by claiming that it acted under article 8, Management Rights. This is why the test as to whether article 22 applies in any given case must be an objective one under which it is determined as a question of fact whether the University met the threshold belief under article 22.1.1(a) and whether or not its response fell within the response(s) contemplated under the article.

The interim award went on to explain the extent of the emergency powers, as follows.

While the wording of the first paragraph of article 22.1.1 dealing with the extent of the University's emergency powers is not as clear as it could be, there are two possible interpretations. Under the first, advanced by the University, the University must both suspend the member with pay and relieve a member of some or all of his/her duties and/or privileges. Under the second interpretation, advanced by the Association, the University has broad discretionary power to respond to an emergent threat to public safety ranging from relieving a member of some or all of his/her duties and/or privileges to suspending the member with pay. When read in the context of an article that provides the University with

extraordinary emergency powers, albeit with extensive after-the-fact member protections, the parties would not likely have intended to require the University to take the most extreme action in order to activate the article, i.e. both suspend and relieve a member of some or all of his/her duties and/or privileges. The more likely intention would have been to provide the University with a range of emergency powers with the expectation – given that it must consider reasonable alternatives (22.1.1(b)) and that its action may be subject to grievance (22.1.4) – that it will choose the least impactful course of action that will address the threat. It follows that the better interpretation of the first paragraph of article 22.1.1 is that the University "may" (or may not) suspend a member with pay and that it "may" (or may not) relieve a member of some or all of his/her duties and/or privileges. It follows that "and" is used in a disjunctive sense to separate the various powers that may or may not be exercised under the article.

Finally, the interim award deals with the nature of the precondition for the activation of article 22, as follows.

The University also takes the position that absent a more fulsome investigation, it did not have "reasonable and probable grounds to believe that the action outlined herein would result in significant harm to a person associated with the University." Accordingly, the University takes the position that it could not have satisfied the precondition for activation of article 22. Firstly, in the context of a clause providing for the exercise of emergency powers to respond to threats to public safety, it cannot be, as the University argues, that before it can act under article 22 it requires virtual certainty that failure to act would cause significant harm to a person. Rather, as the article stipulates, this need only be a reasonably held belief – a belief that of necessity must be in the moment and under the press of time. Indeed, in article 22.1.3, the threshold is referred to not as a "belief" but as "the concern of the University." The evidence upon which I have been instructed to rely establishes, firstly, that two departmental support staff employees complained that they felt unsafe in Professor Mercier's presence and, secondly, that the University, in response, physically moved Professor Mercier's office from the Department and directed her not to have contact with these support staff employees. Again, in the context of the exercise of emergency powers that preclude the type of thorough investigation described under article 20.3, this evidence, on an objective assessment, supports the conclusion that the University acted because, at the time, it had reasonable and probable grounds to believe that the failure to take the action that it did would result in significant harm to the two support staff employees who had raised concerns about their physical safety while in the presence of Professor Mercier. Otherwise, why physically separate Professor Mercier from these two employees?

On the evidence then before me, I found that on an objective test the University acted under article 22 when it relocated Professor Mercier's office and thereby

deprived her of certain privileges that she had previously enjoyed. While the analysis of article 22 remains intact, I have now had the benefit of all the evidence as tendered and full argument.

There is now evidence before me that supports the conclusion that the University did not believe that Ms. Lavoie and Ms. Vanhooser were under threat of physical harm from Professor Mercier at the time it acted to relocate her office. I refer to: the conclusion of Dan Langham, Director of Environmental Health and Safety, that comments made by Professor Mercier at an April 2013 meeting dealing with workplace conduct, attended by Ms. Lavoie and Ms. Vanhooser, did not constitute a threat of workplace violence; the conclusion of Heather Shields after meeting with Ms. Lavoie and Ms. Vanhooser on October 25, 2016 that there was no apparent threat to their physical safety, only to their psychological wellbeing; and the evidence of Dr. Smith and Dan Bradshaw that the concern was for the psychological wellbeing of Ms. Lavoie and Ms. Vanhooser (which, it is argued, does not rise to the threat of “significant harm”) not their physical safety.

However, this evidence must be weighed against the specific reference to "workplace violence" in the October 23, 2016 USW Issue Request, keeping in mind that "workplace violence" is defined in OHSA as "physical" violence and that the USW Issue Request makes specific reference to OHSA as did the University in explaining its actions. It must be weighed against the November 1, 2013 response of Dean Mumm to the Association's concern about the treatment of Professor Mercier

that "the nature of the complaints required that there be no delay." It must be weighed against the decision to charge the external investigator with investigating whether there was a threat of workplace violence and to allow that investigation to proceed. It must be weighed against the failure to inform either Professor Mercier or Ms. Lavoie at the time that in its opinion it did not consider Professor Mercier to be a threat to the physical safety of Ms. Lavoie and, finally, it must be weighed against the action taken at the time.

In regard to the action taken, it must be emphasized that, while it may be that physical separation is a common method of dealing with workplace friction generally this was the first time that a faculty member had had his/her office unilaterally relocated outside the department. The evidence is that, at least from 1998, all full-time faculty of the Department of Philosophy had their offices on the third floor of Watson Hall. When coupled with the order never to attend Watson Hall until told otherwise, i.e. effectively a ban from the department premises that the University knew or should reasonably have known would be for a prolonged period and would have a significant reputational impact upon a tenured professor, support is found for the conclusion that the University was of the mind that it was responding to a threat of significant physical harm. The absence of consultation or of a meaningful search for less impactful alternatives that might otherwise have provided the necessary separation supports the conclusion that the University believed that a failure to act expeditiously would result in significant physical harm to Ms. Lavoie and Ms. Vanhooser.

To repeat, the reference to "workplace violence" in the October 23, 2013 Issue Request, the meaning of that term in this context, the reliance of the University upon its OSHA obligations, the inclusion of the "workplace violence" allegation within the mandate of the external investigator and the gravity of the action taken without consultation or a meaningful search for alternatives support the conclusion that the University acted under article 22 because it believed that a failure to act without delay would result in significant physical harm to Ms. Lavoie and/or Ms. Vanhooser.

However, even if the University did not act out of a belief that significant physical harm would result if it did not relocate Professor Mercier and ban her from the Department premises, the evidence of Ms. Shields, Mr. Bradshaw and Dr. Smith makes it clear that, at the very least, the University believed that if it did not act to relocate Professor Mercier, Ms. Lavoie and Ms. Vanhooser would suffer psychological harm to the extent that Ms. Lavoie might have to take a medical leave. While the University downplays this threat as not a threat of "significant harm" within the meaning of article 22, its actions in effectively banning Professor Mercier from Watson Hall, the haste with which it acted and its failure to search for less impactful alternatives or to consult belie its position. Indeed, as noted, Dean Mumm wrote on November 1, 2013 that "the nature of the complaints requires that there be no delay." It must be found that even if it was acting solely on the basis of a threat of psychological harm to the extent of requiring possible medical leave for Ms. Lavoie,

that would be harm sufficient to meet the objective threshold of "significant harm" under article 22.

It is the position of the Association that the action complained about, i.e. the relocation and banning of Professor Mercier from Watson Hall, had the effect of taking from her a privilege within the meaning of article 22.1.1. On the basis of the evidence that was then before me, I found in the interim award as follows:

Finally, on the evidence before me, the movement of Professor Mercier's office outside the Department when all other professors within the Department (who do not have cross-appointments) have offices within the Department, along with the evidence in regard to telephone and computer access, with regard to access to teaching resources and files, with regard to her office furniture not being moved, with regard to the impact upon student contact, along with the evidence of Professor Mercier's exclusion from Departmental meetings because one of the support staff members who voiced concern about her personal safety when in the presence of Professor Mercier takes the notes at these meetings, satisfies me (absent a definition of privilege in the collective agreement) that, at the least, the University's actions had the effect of relieving Professor Mercier of certain privileges that she had enjoyed.

In affirming my prior conclusion in this regard, I rely upon the evidence I did then and I reject the argument with respect to the meaning of privilege now advanced by the University. A privilege does not have to be something of value uniquely accorded to an individual that is not accorded to anyone else. A privilege may be something of value that is accorded to a group to which an individual belongs. Keeping in mind that there was no contractual requirement to provide a faculty member with an office within his or her Department, all Philosophy Department faculty members (who were not cross-appointed) nevertheless enjoyed personal offices on the third floor of Watson Hall where the Department of Philosophy is

housed and benefited from the convenience, support and sense of belonging thereby provided. Absent a contractual right, the provision of offices on the third floor of Watson Hall is clearly a privilege accorded to the group. It follows that the forced relocation of Professor Mercier to a different building and the banning of her from Watson Hall constitute the loss of a privilege that she had previously enjoyed along with all of her colleagues. Accordingly, not only on an objective test was the University motivated by reasonable and probable grounds to believe that if it did not act as it did, significant harm would befall Ms. Lavoie and/or Ms. Vanhooser, within the meaning of article 22.1.1(a), it acted within the scope of its authority under article 22.1.1 to, in response, effect the discontinuance of a significant privilege.

Turning to the employee protection provisions of article 22, the evidence establishes that the University did not consider "all reasonable alternatives" as it is required to do under article 22.1.1(b). While it is unfair to second guess an employer's actions in response to an emergent situation, in this case consideration of "all reasonable alternatives" is contractually required and it is clearly established that there was no attempt made to achieve separation in a less impactful way. Accepting that the support staff were required to be in Watson Hall, there was no ongoing requirement for Ms. Lavoie to continue to take the department meeting minutes nor was there any reason why, at the very least, Professor Mercier could not utilize her office in the evening and on weekends when the support staff would not have been there. The point

to be made is that absent any attempt to find a less impactful solution, there is no way of knowing if such a solution was available.

Article 22.1.2 requires consultation with the Association and the member as soon as practicable after the fact. The University is to disclose the basis for its actions and the Association and the member are to be given the opportunity to address the basis for the belief upon which the University has acted. The required consultation here, if it had occurred, might well have led to a mutually acceptable alternative or have resulted in a shortened timeframe during which Professor Mercier was removed from the department.

In the final analysis, I am satisfied on an objective test that the University acted under article 22 in relocating Professor Mercier but that, in breach of article 22, it ignored the employee protections provided for under that article.

If I am somehow mistaken in finding that the University acted under and breached article 22, then, as I have pointed out (and as the University asserts), it must have acted under article 8.1 of the collective agreement. Article 8.1 stipulates that "the University retains the right to manage the University except to the extent modified by the terms of this Agreement" and that "this right shall be exercised in a fair and equitable manner consistent with the provisions of this Agreement." The University put itself on somewhat of a high wire when, on the one hand, it argued that it did not perceive a threat of "significant harm" to Ms. Lavoie and Ms. Vanhooser and therefore could not have acted under article 22 but, on the other hand, argued that it

acted under article 8.1 under which it must establish that it acted in a "fair and equitable manner." I say this because, to the extent that it asserts that it did not believe that there was a threat of "significant harm" within the meaning of article 22, the fair and equitable test under article 8.1 becomes a more difficult one to meet.

At the out-set it is necessary to confirm that in the face of the tension that existed in the Department and in the face of the cross-complaints of harassment that had been filed it was not unreasonable for the University to have decided that it needed to separate Ms. Lavoie and Ms. Vanhooser from Professor Mercier pending the outcome of an external investigation. Further, given the fact that Ms. Lavoie and Ms. Vanhooser were wedded to their work location and given that Professor Mercier could function from elsewhere, it was not unreasonable to have decided that it was Professor Mercier who would have to alter her work arrangements. These decisions were, in the circumstances, properly within the University's management rights under article 8.1. The difficulty here stems from the manner in which these decisions were put into effect with the resultant impact upon Professor Mercier.

It seems to this arbitrator that on the facts here the employee protections provided under article 22, where there is a perceived threat of "significant harm" i.e. consultation, search for less impactful alternatives and minimizing the duration of the impact, (none of which was done) constitute indicia of what would be fair and

equitable requirements under article 8.1, in the circumstances of a situation where there is no perceived threat of "significant harm,"

Furthermore, the necessary backdrop against which it must be determined whether the University exercised its article 8.1 management rights in a fair and equitable manner as they impacted upon Professor Mercier is the fact that the action taken, i.e. relocation of Professor Mercier's office and her exclusion from Watson Hall, was pending the outcome of an external investigation into cross-complaints of harassment. Professor Mercier, although her behaviour was clearly in issue, had not admitted to nor been found on October 29, 2013 to have engaged in misconduct. Rather, to repeat, cross-complaints of harassment had been filed and because separation was required and because the support staff were wedded to their work location, Professor Mercier was identified as the one that had to alter her work arrangements in order to effect the separation. It follows that in these circumstance the relocation of Professor Mercier should have been carried out in the least impactful manner possible.

In *re: Ryerson (supra)*, a case involving the imposition of an interim campus ban upon a faculty member accused of making inappropriate sexual advances to a student pending the disposition of the grievance, the arbitrator, faced with a challenge to the interim restrictions upon the grievor, made two points that are applicable here. Firstly, the arbitrator found that "there is a continuing onus on the Employer to assess whether the disputed interim measures can be lifted or amended given new facts or

circumstances." Secondly, the arbitrator concluded that the "decision making of the Employer should be seen holistically, as to whether all the factors, taken as a whole, reasonably justify the actions taken." In that case the Arbitrator upheld the interim campus ban.

While the decision to separate Professor Mercier from the two support staff employees was reasonable and while it was also reasonable to conclude that it was Professor Mercier who would have to alter her work arrangements in order to effect the separation, I am compelled to conclude on a holistic assessment of the University's actions that the University did not conduct itself fairly and/or equitably within the meaning of article 8.1 in regard to its treatment of Professor Mercier. Given that there was no admission or finding of misconduct at this point and given that it was Professor Mercier (not Ms. Lavoie or Ms. Vanhooser) who was required to alter her work arrangements to effect the necessary separation pending the investigation, it was incumbent upon the University to seek to minimize both the impact and the duration of the forced interim relocation. It did neither. Apart from consulting or otherwise searching for a less impactful separation, neither of which was done, at the very least the University could have taken steps to ensure that from the outset Professor Mercier would be comfortable in her relocated office with furniture at least comparable to what she had and access to all the supplies and support that she required. Instead, it refused to provide comparable furniture or to move her furniture and when Professor Mercier submitted a list of what she needed – all of which she had had supplied before

– the response from Dr. Smith, dated November 12, 2016, referred her to article 36.1 of the collective agreement for a list of the facilities and support that the University was obligated to provide. However, this was not a case of contractual obligation with regard to office facilities but rather a case of an office relocation pending an investigation in regard to which, to repeat, the University should have taken all reasonable steps to minimize the impact upon the employee forced to move. This would have included outfitting Professor Mercier’s relocated office as her Watson Hall office had been outfitted.

As already observed the University either knew or reasonably should have known, in circumstances where all faculty members have offices on the third floor of Watson Hall, that the effective banishment of Professor Mercier from the Department premises would have a significant reputational impact. In the further circumstance where the University was acting pending the outcome of an external investigation, such that there had been no finding of misconduct at that point, it could reasonably have been expected that the University would have taken steps to lessen the reputational impact of the separation upon Professor Mercier. There is no evidence that anything was done in this regard or that there was consultation for the purpose of fashioning a more flexible separation or otherwise minimizing the reputational impact of the separation upon Professor Mercier. It is not sufficient for the University to argue that any reputational harm that Professor Mercier may have suffered would flow not from the interim relocation but rather from the allegations of harassment such that

if these allegations were found to be groundless Professor Mercier would be vindicated. It is also not sufficient to argue that account must be taken of the fact that Professor Mercier continued to receive her salary and to perform her duties as a Faculty member in accessing the University's response to any reputational harm. The exercise of Management rights may be through acts of commission or through acts of omission. The University's failure to take all reasonable steps to minimize the reputational harm to Professor Mercier i.e. an act of omission constitutes an exercise of managerial discretion that was neither fair nor equitable in its application to Professor Mercier.

As for the extended duration of Professor Mercier's exclusion from the Department, the University could have insisted, over the investigator's objection, that the alleged workplace violence component of the investigation be done separately and immediately, especially in light of Ms. Shields' conclusion in October 2013 that Professor Mercier did not pose a threat of physical violence. Even though the University has argued here that the threat was not significant, it allowed the investigation into whether Professor Mercier posed a threat of physical violence to continue until June 2015. In sum, the University did not satisfy the onus upon it of accessing "whether the disputed interim measures could be lifted or amended given new facts or circumstances".

Accordingly, having regard to all of the foregoing, the University did not exercise its management rights fairly and equitably in its treatment of Professor

Mercier after it had decided to effect a separation between her and the two support staff members pending an investigation of their cross-complaints and after it had decided that it was Professor Mercier who would have to alter her work arrangements.

I have found on an objective test that the University acted under article 22 of the collective agreement in forcing the relocation of Professor Mercier and banning her from the Department premises but that, in doing so, it failed to comply with the employee protections contained in that article. However, if I am somehow in error in this regard, I have also found that if it acted under article 8.1 of the collective agreement, as it asserts, the University failed to exercise its management rights in a manner that was fair and equitable, as required under article 8.1, not in regard to mandating the separation nor in deciding that it was Professor Mercier who had to alter her work arrangements, but in regard to the manner in which it effected the separation as it impacted Professor Mercier.

I have not been satisfied that the University acted in breach of either article 20 (discipline), article 14 (academic freedom) nor article 15 (academic responsibilities).

I remain seized.

Dated this 29th day of January 2019 in the City of Toronto, Ontario.

Kevin Burkett

KEVIN BURKETT