

105

**Vice-recteur à la gouvernance - Vice-President, Governance**

**From:** Allan Rock  
**Sent:** Tuesday February 17, 2009 8:37 PM  
**To:** Louise Page-Valin; Andre E. Lalonde ( Dean, Science ); Jean-Yves Leduc  
**Cc:** Andrée Dumulon; Alain Roussy; 'achampagne@emondharnden.com'  
**Subject:** Re: College and University Employment Law E-Bulletin - Issue No. 23

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**From:** Louise Page-Valin  
**To:** Andre E. Lalonde ( Dean, Science ); Jean-Yves Leduc  
**Cc:** Andrée Dumulon; Alain Roussy; Allan Rock; achampagne@emondharnden.com  
**Sent:** Tue Feb 17 20:31:30 2009  
**Subject:** FW: College and University Employment Law E-Bulletin - Issue No. 23

Pour information



Louise

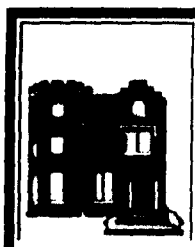
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**Sent:** Tue 17/02/2009 12:40  
**To:** Louise Page-Valin  
**Subject:** College and University Employment Law E-Bulletin - Issue No. 23



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February 17, 2009

Issue No. 23

## — CONTENT —

**UNIVERSITY'S REQUIREMENT FOR RECENT/CURRENT RESEARCH NOT DISCRIMINATORY ON BASIS OF AGE, TRIBUNAL HOLDS**

When the complainant, a 57-year-old consultant with a Ph.D., applied unsuccessfully for a tenure-track assistant professor position at an Ontario university, he alleged discrimination on the basis of age. The Ontario Human Rights Tribunal found that the university's criterion of current/recent research was legitimate and did not disadvantage the complainant on the basis of age. The complainant's twenty years outside of academia accounted for any view the hiring committee may have had regarding his untenurability, relative to the successful candidate who was actively engaged in research and currently teaching. Nonetheless, the Tribunal concluded that the university's response was dismissive and inadequate, and in violation of its duty to reasonably investigate an alleged human rights violation. Details below.

**TEACHING SCIENCE THROUGH SOCIAL ACTIVISM IS PROTECTED BY ACADEMIC FREEDOM, ARBITRATOR RULES**

A 21-year professor was issued a letter of reprimand after he posted on the internet descriptions of an introductory physics course for environmental studies students to which the Dean took exception. The letter alleged that the postings contained misleading statements about the course and essentially converted it from a science course to an activism course. While finding that the postings did contain some inaccuracies, an arbitrator held that the professor's emphasis on social and political issues was not materially inconsistent with the Senate-approved course description, and that the professor's emphasis on activism was part of a legitimate pedagogical experiment to introduce science to arts students who might be science-averse and, as such, was protected by academic freedom. [Details below.](#)

## — DETAILED REPORTS —

**UNIVERSITY'S REQUIREMENT FOR RECENT/CURRENT RESEARCH NOT DISCRIMINATORY ON BASIS OF AGE, TRIBUNAL HOLDS****The Facts:**

In early 2002, the complainant, Dr. Robert Neil Nelson, a Ph.D. in Education Administration, applied for a full-time tenure-track assistant professor position at Lakehead University's Faculty of Business Administration in Thunder Bay, Ontario. He had previously taught at Lakehead in a contract position, but left in 1981 after which he took some business courses at the University of Toronto and pursued a career in the private sector. At the time of his application he was working as a consultant.

In 2002 the Faculty was embarking on a new five-year academic plan which included the introduction of two masters programs for the 2003/2004 academic year, whereas traditionally it offered only two undergraduate programs. Consequently, recruitment was targeted at candidates with a doctoral degree and placed greater emphasis on research/scholarly activities, one of four criteria ultimately applied in the selection process based on the collective agreement requirements for the granting of tenure. The other three considerations were: (a) a doctorate or degree normally considered "terminal"

mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

The specific content of the duty in any given case will vary based on the circumstances, including, for example, the nature of the workplace and the nature of the complaint. The Tribunal in *B.L.* outlined three general factors to guide it in its determination: (1) awareness – did the respondent have an anti-discrimination policy, a complaint mechanism, adequate training for management and employees? (2) post-complaint – did the respondent treat the complaint seriously, investigate it promptly and sensitively? and (3) resolution – did the respondent communicate its findings and actions to the complainant and could it provide a discrimination-free workplace?

**Case Name:** *Nelson v. Lakehead University*

**Jurisdiction:** Ontario

**Tribunal:** Ontario Human Rights Tribunal

**Adjudicator:** Kathleen Martin, Vice-Chair

**Date:** July 14, 2008

**Citation:** [2008] O.H.R.T.D. No. 39 (QL)

**Full Text:** [http://onlinedb.lancasterhouse.com/images/up-OHRT\\_Lakehead.pdf](http://onlinedb.lancasterhouse.com/images/up-OHRT_Lakehead.pdf)

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## **TEACHING SCIENCE THROUGH SOCIAL ACTIVISM IS PROTECTED BY ACADEMIC FREEDOM, ARBITRATOR RULES**

### **The Facts:**

In 1995, Denis Rancourt, a professor in the University of Ottawa Physics Department for 21 years, developed a basic scientific orientation course designed specifically for students of Environmental Studies, in the Faculty of Arts. The course, designated as PHY 1703, and entitled "Physique et l'environnement" (physics and the environment), was a required course for environmental studies students, and was offered every other year in French, alternating with a required chemistry course which was offered in English. PHY 1703 was approved by the Executive Committee of the University Senate in May 1995.

Rancourt taught the course in all years that it was offered, except 2003 when he was on sabbatical. During that time Rancourt came to subscribe to a growing school of thought that the rote learning of scientific principles was ineffective and that "science learned by personal investment and problem-solving relevant to concerns which are meaningful to the student" fostered a truer understanding of science. From this perspective, Rancourt resolved to "reorient the course materials in PHY 1703 towards social, economic and political activism as a gateway to learning science" in a context more meaningful to the students. Believing also that traditional grading was inconsistent with this approach to learning, Rancourt did away with alphanumeric grading in favour of a satisfactory/non-satisfactory assessment.

Seeking to broaden the mix of students in the class to obtain a more diverse community-based milieu in which to discuss the topics, Rancourt created a posting on an independent website called Alternative Voices, directed to "[a]ll campus and community activists and concerned citizens," in which he described a "new bilingual undergraduate and graduate (cross listed) course," entitled "Activism Course: Understanding Power and its Contexts." According to the posting, "[t]he plan is that every year [the course will] alternate from this bilingual format to English." The posting described the course plan in part as follows: "We will consider the proposition that the main root causes of both environmental degradation and of social injustice are institutionalized and power-based and that the solutions must be primarily political (in the broad sense) rather than scientific or technological. We may learn some science (risk analysis, nuclear technology, ozone chemistry, greenhouse effect, etc.) and see how science is often misused to maintain the status quo rather than help elucidate the situation. Mostly though, we will try to 'understand power', so that we have a clear picture of what progressive citizens are up against. We will also explore avenues for change and collaboration." Content in class was described as being subject to determination by a "participatory democracy town hall-type process."

Rancourt also set out the changes on the university's Faculty of Science website where professors normally posted course information. Under the heading "Activism Course," the posting, which was directed to "students of the Environmental Studies Program," described the changes to grading and determination of course content, and the "broad overlying theme [of] 'Activism: Understanding Power and its Contexts.'" In this regard, the posting stated: "We can learn as much science as the students would like, covering all the basics that allow one to appreciate current issues such as: environmental degradation, energy use, nuclear power, climate change, risk analysis, genetic engineering, toxicity, etc. Or we can decide to spend more time on other basic knowledge items."

After the first class, the course changes came to the attention of the Dean of the Faculty of Science. He examined both the Faculty and Alternative Voices website and became concerned that in a number of respects the course descriptions were inconsistent with PHY 1703 as approved by the Senate. Over the following three months, Rancourt and the Dean engaged in lengthy correspondence detailing their respective views of the appropriateness, or not, of the course curriculum/delivery and Rancourt's website descriptions of it. Despite this ongoing tension, the parties entered into a memorandum of understanding (MOU) dated September 28, 2005 which enabled the class to continue for the full semester. In the MOU, Rancourt undertook to "cover the fundamental science concepts as described in the official course description," to teach the course in French, although conferences might be presented in English, and to remove the course description appearing on the Alternative Voices website. The MOU also provided that the course would be delivered "by means of a work group structure" and that the parties reserved their rights to pursue their concerns further.

On December 19, 2005 the Dean issued Rancourt a letter of reprimand for publishing information about PHY 1703 that he knew to be false and inconsistent with the course as approved by the Senate.

Acting on Rancourt's behalf, the Association of Professors of the University of Ottawa filed a grievance.

#### **The Arguments:**

Pointing out that the letter of reprimand spoke only to the content of the web postings and not to the content or teaching methods adopted by Rancourt, the employer argued that this was not a case about academic freedom, but simply about publishing false information. Specifically, the university asserted that the course was not designated bilingual, but French; that there was no approval that it be offered in alternate years in English; and that it was not a new course or a graduate course. Moreover, the employer argued, Rancourt, in his internet postings, essentially changed "a course which was about science with a vestige of activism [into] a course on activism with a vestige of science and where ... science appeared to be optional." The university had a legitimate interest in ensuring that students were given fair and accurate information about courses, the employer maintained, which justified its imposition of discipline in this case.

According to the Association, the letter of reprimand violated the grievor's academic freedom and right to conduct research, which were protected by various provisions in the collective agreement. Since its inception in 1996 the course had always had a "heavy load of political and social issues," the Association noted, and Rancourt, in his internet postings, was simply "pitching" the course to a broader audience in a manner that did not present the subject-matter as "dry science." The employer, it was said, did not understand the basis for the grievor's new approach, which was a legitimate pedagogical experiment protected by academic freedom.

#### **The Decision:**

Arbitrator Michel Picher allowed the grievance in part.

Picher began by clarifying that this case was not about the pedagogical innovations introduced by the grievor in the 2005 offering of PHY1703 – that formed no part of the discipline letter. The Dean's overriding concern from the outset was that the scientific content of the course be covered; this issue

having been addressed in the MOU to the apparent satisfaction of the Dean, the December letter of reprimand dealt solely with the content of Professor Rancourt's web postings. Consequently, Picher framed the issue as follows: "[W]hether Professor Rancourt exceeded the bounds of academic freedom and his duty to the University and his students by the content of his website postings developed for PHY 1703." The relevant context, Picher noted, was that "a component of academic freedom is the latitude of a professor to communicate with his or her students without undue interference from the University. In the advancement of their research and teaching professors may well resort to imaginative, innovative and even provocative statements and communications to their students. To the extent that such statements are not unlawful, or materially false and misleading, they should generally have the protection of academic freedom."

The arbitrator identified various statements in the grievor's web postings that the university had a legitimate interest in seeking to correct. Although some material was delivered in English, PHY 1703 was designated as a French language course, and there had been no discussion, let alone approval, to offer the course in English in alternate years. In light of the University of Ottawa's unique situation of being a bilingual institution, Picher noted, the school was necessarily sensitive to maintaining an appropriate balance of language offerings, a factor which was "obviously closely considered and carefully weighed at the level of Senate approval." Neither, the arbitrator found, was it accurate to describe the course as a cross-listed undergraduate and graduate course – although graduate students may have participated and audited the course as part of the requirements of a graduate course, it was "simply not true" that PHY 1703 was approved for graduate credit. The grievor's intention of making the course more attractive to a wider outside audience was held not to justify his publishing incorrect and misleading information: "[T]o carry promotion and advertising to that point crosses the line, insofar as the University's legitimate interest in the integrity of its academic program, and the public perception of that program, [are] concerned."

On the other hand, the arbitrator reached a different conclusion with respect to the allegation that Rancourt essentially converted a science course into an activism course. While it was true that the Alternative Voices posting referred to a "new" course that appeared to be called "Activism Course: Understanding Power and its Contexts," and "contained a fair load of salesmanship," Picher found that, when read together with the description on the departmental website, the information was "reasonably accurate as to the pedagogical innovation being introduced into PHY 1703." In the arbitrator's view, the posting on the departmental website, while emphasizing the component of social activism, did not suggest that little or no science would be learned; indeed, it stated that "all the basics ... would be covered." Bearing in mind that the grievor "was involved in legitimate pedagogical innovation" and seeking to attract people who might be science-averse, he concluded that it was not "inappropriate or beyond the bounds of academic freedom for Professor Rancourt to have framed the description of the course in the terms he chose."

Moreover, Picher found that the course had evolved from 1997 onwards to include socio-economic and political issues as a vehicle to the introduction of science. Not only was such evolution consistent with the need for latitude and flexibility in teaching methods and specific course content over time without requiring amendments to the Senate-approved course description but, the arbitrator noted, the university "effectively acquiesced" in the evolution of PHY 1703 before 2005 such that it had no equitable basis to complain about its continued legitimate evolution. In any event, the 2005 course content did not materially depart from that approved by the Senate for PHY 1703, Picher declared: "[T]he course content was not in fact changed and ... if there were any differences in nuance in the online publications made by Professor Rancourt, they fell legitimately within the scope of his academic freedom in pursuing a different pedagogical approach to draw students into the learning of science."

In the result, the arbitrator ordered the letter of reprimand be redrafted to reflect the inaccuracies identified in the award, but to omit any reference to Rancourt's communications being false or misleading with respect to the course content.

**Comment:**

In *York University Faculty Association v. York University*, [2007] O.L.A.A. No. 550 (QL), Arbitrator Russell Goodfellow described the importance of academic freedom in determining the relative rights

of academics and academic institutions:

There are few concepts or principles more important to the healthy and vibrant functioning of a university than academic freedom. The academy is and must be a bulwark against conventional thought and received opinion not just for the benefit of its members but for society at large. It is through free thought, investigation, and the development and dissemination of ideas that society advances and progress is made. Today's accepted practices and beliefs become tomorrow's discredited notions and out-moded ideas when exposed to the freedom of public debate and scientific scrutiny. The university has an essential role to play in this process – a role that can only be fulfilled if academic freedom is broadly defined and jealously guarded.

....

Defining academic freedom in this way does not, however, deprive the University of its own freedom of speech. Simply because a matter emerges from the pen or computer of a faculty member does not mean that the University is barred from addressing it. The University has the right to take positions, including public positions, on whatever matters it chooses. Necessarily, this includes the right to defend itself against any challenges that it may perceive to its functioning as an open and welcoming learning community and to the public reputations of those who volunteer their time and effort to support it.

As Arbitrator Goodfellow observed, it is the role of arbitrators to ask, in a given case, whether the parties have lived up to that obligation in relation to the various aspects of academic freedom.

**Case Name:** *Association of Professors of the University of Ottawa v. University of Ottawa*

**Jurisdiction:** Ontario

**Proceeding:** Grievance Arbitration

**Arbitrator:** Michel Picher

**Date:** June 25, 2008

**Citation:** [2008] O.L.A.A. No. 356 (QL)

**Full Text:** [http://onlinedb.lancasterhouse.com/images/up-PicherM\\_UniversityofOttawa.pdf](http://onlinedb.lancasterhouse.com/images/up-PicherM_UniversityofOttawa.pdf)

**Top**

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