

UNIVERSITY OF WINDSOR
DECISION OF THE ADJUDICATOR
STUDENT NON-ACADEMIC MISCONDUCT

BETWEEN

[REDACTED]
APPELLANT

AND

RYAN FLANNAGAN
ASSOCIATE VICE-PRESIDENT STUDENT EXPERIENCE
RESPONDENT

JANUARY 2018

DECISION

Adjudicator: Professor Jeff Berryman, Associate Vice-President Academic

Appellant: [REDACTED] appearing in person

Respondent: Appearing for Ryan Flannagan, Ms. Claire Bebbington, McTague Law Firm

REASONS FOR DECISION

INTRODUCTION

[1] In 2016, the University of Windsor took the step of creating distinct procedures for addressing Student Non-Academic Misconduct (SNAMP), thus removing it from the Senate Bylaw on Academic Integrity. Also, in the same year the University created a distinct policy on Sexual Misconduct (SMP). The interplay of the procedures and this policy is at the heart of this appeal. The SNAMP established a new structure for handling student non-academic misconduct. The procedures place a great deal of responsibility on the Associate Vice-President Student Experience, who is charged with receiving complaints, investigation, and then rendering a decision which may amount to a graduated scale of disciplinary actions. The procedures also stress that where possible the Associate Vice-President Student Experience should attempt mediation and create an opportunity for a teachable moment. If the event is not of a type that can be remedied in such a fashion, then a disciplinary sanction is to be imposed. In this way, the procedures create a form of inquisitorial process in which the Associate Vice-President Student Experience conducts an investigation (or delegates this function), meets individually with the respective and interested parties, and renders a decision.

[2] The SNAMP also contains an automatic right of appeal from a decision of the Associate Vice-President Student Experience to the Adjudicator, which, under the procedures' definitions is the Provost (or designate). For

the purposes of hearing this appeal, Dr. Kneale, Provost, designated Professor Jeff Berryman, Associate Vice-President Academic, as his designate.

[3] As this is the first decision to be rendered under the new procedures, it is an opportune time to express an opinion on the nature of the appeal process established under the procedures. As will be detailed, this is a critical issue central to the resolution of this particular appeal.

THE NATURE OF THE APPEAL

[4] In law, there are at least three characterizations that could be used to describe the nature of the appeal process to the adjudicator as laid out in SNAMP. If the actions of the Associate Vice-President Student Experience were conceived as exercising a purely administrative function, then the appeal process would resemble judicial review of administrative action. In such a process, the adjudicator would exercise restraint and show deference unless there was a clear error in the way the Associate Vice-President Student Experience exercised his/her decision-making powers. Such an error could be as in exceeding the jurisdictional boundaries of SNAMP, making a decision that is demonstrably unsupported by the evidence, or exercising some procedural bias against a party. In such a proceeding, it would be rare for the adjudicator to hear new evidence. A second characterization would be as in an appeal from a lower adjudicative body. Under this process an appeal would be based upon a record of the lower adjudicative body's hearing and decision. Again, it would be rare for the adjudicator to hear new evidence, deference being accorded the fact-finding function performed by the lower adjudicative body. A third characterization would be to grant the adjudicator full powers to hold a new hearing of the evidence, a hearing *de novo*, make his/her own decision on the charges laid under SNAMP, and either affirm or substitute his/her decision for that of the Associate Vice-President Student Experience.

[5] At the hearing, I raised the issue of the characterization of the adjudicator's function under SNAMP before Ms. Bebbington at the conclusion of her closing statement. It appeared to me that counsel for the Associate Vice-President Student Experience had approached this appeal more towards the first of my characterizations than the second or third. At the time, Ms. Bebbington did not disagree. In a subsequent e-mail correspondence to me, copied to [REDACTED], Ms. Bebbington wished to raise the issue before I rendered my decision and suggested I take written submission on the issue. [REDACTED] objected to that course. I declined Ms. Bebbington's request on the grounds that I had already commenced writing my decision.

[6] It is my opinion that the nature of the adjudicator's appeal function lies somewhere between the second and third characterizations outlined above. I believe this is the only conclusion that can be drawn from the language of the procedures. SNAMP uses the language of an 'appeal' (5.2), which is granted automatically, of a 'finding' of Non-academic Misconduct or sanction imposed by the Associate Vice-President Student Experience. Further on

(5.2.2.), an appeal 'stays' the decision of the Associate Vice-President Student Experience. This is the language that implies that both the adjudicator and Associate Vice-President Student Experience are exercising an adjudicative as against an administrative function.

[7] SNAMP 6.1 then lays out procedural principles that must be observed by the adjudicator. In particular, that the principles of natural justice are to apply; specific mention given to the right to both parties to be present at a 'hearing', to present relevant evidence, to question all witnesses and comment upon all documents presented, and to be represented by an advisor or legal counsel (6.1 (a), (b), (c), and (d)). SNAMP 6.2 lays out the order of proceedings for the parties. However, here the order always commences with opening statements from the Associate Vice-President Student Experience followed by opening statements by the appellant student. The Associate Vice-President Student Experience then leads all his/her evidence, followed by cross-examination before the student appellant leads his/her evidence, also subject to cross-examination. Thus, unlike a true appeal that places the burden on the party appealing to prove grounds for an appeal, the burden is always placed upon the Associate Vice-President Student Experience to justify his/her decision at step 1. While it is arguable that even within this process, all the Associate Vice-President Student Experience is required to do is to give evidence him or herself to justify the step 1 decision, that seems to be at odds with what is further envisaged in SNAMP. Under 6.7 the parties are required to disclose all relevant documents including a "summary of the evidence witnesses are expected to give". Later, under 6.8 the parties are required to disclose the names of witnesses to each other. However, the Associate Vice-President Student Experience need not give the names of witnesses where he/she is of the opinion that such disclosure "may pose a risk to safety of the witness." Under 6.10 the parties shall present the adjudicator all evidence relevant to the matter. The evidence may include 'witnesses' testimony, written reports or statements, documents, and information from faculty members, Residence Life staff, or other University Staff or students whose input may be of assistance." (Underlying added). Under SNAMP 6.13 the adjudicator is not bound by the rules of evidence but will be guided by the principles of fairness and natural justice. Under 6.15 the adjudicator is to apply a 'balance of probabilities' standard of proof; one that is applied by Canadian courts to all civil trial processes.

[8] SNAMP clearly contemplates that the adjudicator will undertake a trial hearing process. The process requires the Associate Vice-President Student Experience to prove his/her case on the balance of probabilities through calling evidence of witnesses and documents. The student appellant is given an opportunity to cross-examine those witnesses, and may call his or her own witnesses, who, then, are also subject to cross-examination.

[9] Further support for the approach I intend to adopt is provided by the fact that in the procedures laid out in SNAMP, the only time a student gets to receive the adjudicative protection of a full hearing, a matter which is normally treated as *sine qua non* of natural justice where a defendant faces loss of entitlements, as in potentially

being suspended or excluded from the University, is in the appeal hearing before the adjudicator. Under the rule of law that operates in Canada, great value is placed in an adjudicative system that allows the defendant an opportunity to place under scrutiny the evidence used to establish his or her wrongdoing.

[10] I do not wish to be construed as stating that every appeal heard by the adjudicator must conform to a hearing *de novo*. There are many types of appeals that may simply be able to be handled on a written record, with or without written or oral testimony or submissions. Appeals against a sanction imposed where there is no dispute of liability, being one example. A question of appropriate jurisdiction is another. Parties should be encouraged to submit an agreed statement of facts. However, where the appellant questions the issue of liability, as in this case, where the appellant argued that he did not commit an act of sexual misconduct, it seems unavoidable not to have a full hearing.

[11] It is the absolute right of the Associate Vice-President Student Experience and his/her advisors to determine how to run its own case before the adjudicator. In this case, Ms. Bebbington chose only to call Mr. Flanagan as a sole witness, and through his evidence, place before the adjudicator a number of written exhibits. In this way, the evidence of the survivor, to use the nomenclature of the Sexual Misconduct Policy, together with the evidence and written notes of Dr. Danieli Arbex, the investigator, were brought before the adjudicator. While there is nothing in error with this approach, it of course prevents the appellant the ability to cross-examine those witnesses. The evidence adduced in this fashion is useful to assist the adjudicator in understanding the reasons why the Associate Vice-President Student Experience came to his/her decision, and its veracity for the truth of the factual matters it discloses will be accepted where it is unchallenged. However, where the evidence of the appellant, evidence that is not impeached under any cross-examination, directly contradicts the evidence of others adduced through the examination-in-chief of the Associate Vice-President Student Experience, then the evidence of the appellant must be preferred. As is detailed below, that has happened in this case.

[12] It has been suggested that the full adversarial evidential process is at odds with contemporary approaches to handling sexual misconduct matters. Ms. Bebbington indirectly alluded to this issue in her e-mail request to make further written submissions. In particular, the trial process can act to retraumatize a survivor. There are accommodations that can be made to the hearing process that can minimize this risk to survivors. The appropriate response would be to raise the matter with the adjudicator as a preliminary point before the hearing has commenced or been scheduled.

THE FACTS

[13] I heard over five hours of testimony and accepted 32 exhibits into evidence. A great deal of the relationship between the appellant and the survivor was covered. I have summarized that evidence below. I later identify

specific aspects of the evidence to support my decision. I have also sought to anonymize the survivor, I refer to her as 'M' in this decision, as nothing turns on her identity being discoverable through this decision which, I believe should be publicly available, but only after both the appellant and M graduate or otherwise leave the University.

[14] Both the appellant and M are students enrolled in the Faculty [REDACTED] Both are [REDACTED] immigrants, comfortable conversing in [REDACTED] language. The appellant is nearly fifty years old, married with three children, [REDACTED] and M is nearly twenty-eight years old with a young daughter who stays with relatives, [REDACTED] while M is studying in Windsor.

[15] The appellant and M met while attending a second-year class they were both enrolled in during the fall term of 2016. The commonality in ethnicity, and previous life experiences to get into [REDACTED] school, cemented itself in a friendship in which both parties found mutual advantage in becoming study partners. The appellant wanted more from the relationship; more in emotional commitment if not in a physically sexual way, although that may have been the appellant's eventual desire. This friendship continued throughout the academic term. In the commencement of the winter term, 2017, the appellant returned from [REDACTED] where he had been visiting with his wife and children. The appellant gave evidence (exhibit 17) that he wished to not have as close a relationship with M as he had prior to the end of 2016. The appellant gave evidence that M indicated that she wished them to be as they were before the break, enrolling in the same courses so that they could be study partners. The appellant gave evidence that throughout this period, M would occasionally cook for him. He also gave evidence that cultural significance is given in [REDACTED] society to the cooking of food by a woman for a man.

[16] The period toward the end of January 2017 marks a slight change in the relationship. In exhibit 7, a transcript of an exchange of text messages indicates annoyance registered by the appellant at M's decision to decline an invitation to attend the cinema. Here are those messages dated 23rd January:

M If you haven't started on [REDACTED] and you want my notes, I can send it to you tomorrow before class.

Appellant that's very thoughtful of you. I will appreciate it.

M Sure, no worries, I know u have a lot on your plate and it will be hard for you to keep up.

Appellant Thank you, But that didn't make me forget about having to go the Friday movie on me own. Lol

M How would you have the notes for you if we are the movies? We have plenty of time to go no worries. Is that why you didn't answer the phone all weekend?

Appellant Maybe yes

M Seriously....

Appellant Don't worry. Have a good night

M you know I'm upset but goodnight
Appellant The last thing I would want to do is upset you
M What is your problem this semester. There's always an issue with everything I'm doing.
M I told you about [REDACTED] and the readings I have to do but yet, you were upset.
M To retaliate, you decide not to answer any of my calls?

The next day, 24th January, at 7:48 am, the appellant texts:

Appellant Hope you had a good night. Sorry I do crazy things sometimes. Anyway, [REDACTED] is an opportunity to improve our transcript. PLEASE promise me you will score nothing below 85 today. I promise likewise. See you later.
M Thank u. I'll do my best.

Later in the evening of the 24th January the following exchange takes place:

Appellant [REDACTED] just sent you a non urgent email.
M You know, I'm happy that I met you. Thank you for your friendship.
Appellant You're most welcome
M Haven't touched [REDACTED] Need some me time. My brain hurts
Appellant You definitely need some rest. Tomorrow is another day
M Thanks night
Appellant Have a good night M.

[17] I have included this exchange verbatim because I believe it demonstrates that the appellant had more emotional connection in the relationship than M, although M was aware of the appellant's feelings. It is also evident that M wished to keep a relationship with the appellant, but with far less emotional intensity than the appellant.

[18] The events commencing February 2nd are crucial to an understanding of the breakdown in the relationship between the appellant and M. On Thursday 2nd February at approximately 4 pm the following text exchange takes place:

Appellant It's odd but, there's something special about you. Knowing you is one of the best things that ever happened to me. I cherish you.
M Aww that's sweet. Likewise, I'm happy I met you.

However, the next recorded text exchange takes place on February 4th, at 2.50 pm when M sends the following message:

M Read you msg and I'll honour your request.

The request being referred to is a long e-mail sent at 2.39 pm by the appellant and entered as exhibit 8. In that message, the appellant pours out his feelings. A few passages will express the appellant's sentiments.

"Destiny has it that the vast majority of my friends are women. That being said, because I just couldn't find the one I loved, it wasn't an easy task for me to settle down. I find it difficult to fall in love because the chemistry wasn't there. In the end, I had to compromise."

"Sometimes I think of you as a blood related sister, sometimes a friend, sometimes an associate, and sometimes as a confidant. The selfish thinking, as I now see them, did not consider the fact that you have your partner/husband to think about. I have queried myself if my feelings for you have to do with being lonely having relocated from [REDACTED]. Then, I thought, that can't be true. It is not the first time in my life that I will have a reason to travel for weeks before returning to my family. Besides, I speak with my wife and children everyday on video apps. Thus, it wasn't a matter of feeling lonely. Maybe it is an infatuation that I need to get a snap out of."

In the last paragraph of the e-mail the appellant states:

"I write this memo to clear my conscience and help me move on. I want to devise a mechanism that would help me concentrate on the aspect of our study alone without getting personal. I don't want to intrude into our personal life any more than is necessary. To help me achieve this aim, I would avoid voice calls and restrict conversation to text messages, email, and in-School discussions. By so doing, we can make a great study partner. Remember, I adore you but, more importantly, your success and my success is the overriding objective here."

[19] The long e-mail explains the brief text message delivered by M at 2.50pm. However, this is then followed by a further text message from M at 6.25 pm (4th February):

M And the last thing I'll say to you is that you don't treat ppl the way you feel at any given time. You cannot choose to speak to me on your terms. One minute is this, the next day is another thing. That's not the friend I want. I will no longer call or text you. Enjoy the rest of your [REDACTED] school experience.

This text was also followed by a phone call to M by the appellant at 6.35 pm and two phone calls from M to the appellant; one of 17 minutes duration at 6.40 pm, and another of 83 minutes duration at 6.59 pm. (Exhibit 11).

[20] M's text response and telephone conversation then generated a flurry of texts from the appellant commencing at 9.28 pm (4th February).

Appellant Now I realize how I could have stupidly lose my precious jewel. I'm ashamed I've put you through unnecessary moment. I'm going to make it up to you. That's a promise, M, I sincerely apologise, I won't go to sleep until I figure out how to proof myself to you.

Further texts follow, An exchange of texts the following day, 5th February, at 5.08 pm read as follows:

Appellant M, Please do not be too hard on me. I know I've done you wrong and you didn't deserve what I've done to you. I honestly apologize and will prove to you that the apology is sincere. My heart bleeds for M and I can't stop crying. Now that I've heard your voice, I can go to sleep so I can do some studies later. I care about you and you're special to me even if my actions have failed to show that. I hope I'll see you tomorrow.

M I'll see you tomorrow

Appellant Thank God I can finally control my palpitations. I won't disappoint you.

M Ok

[21] In an attempt to repair the relationship, give an apology, and to, according to the appellant's oral testimony, respond to M's request for something that said to her that the appellant was truly committed to her, the appellant determined to do the following. One, he decided to give M a covenant (exhibit 10). Two, give M a gift, and three, send M's daughter a gift.

[22] The circumstances surrounding the third promise are important given the weight accorded this promise by the Associate Vice-President Student Experience in his decision. It was the oral testimony of the appellant that he checked with M the address of her relatives where her young daughter resided in an oral conversation on February 5th. When asked by M why he wanted to check this address, he had told M that he wished to send a gift to her daughter. The appellant also opined that in [REDACTED] culture, to like a woman you have to like her family, and hence the gift to M's daughter. I closely examined the appellant on this point. In cross-examination Ms. Bebbington did not raise issue with this testimony.

[23] The appellant followed up on his first promise by preparing a typed covenant (Exhibit 10). To the uninitiated, a covenant is an expression of promises signed by the promisor, and in this case, with professions of swearing before God. The specific promises made by the appellant and contained within the covenant are as follows:

- ❖ Desist from sending her mixed signals
- ❖ Desist from being egocentric
- ❖ Desist from consciously or recklessly doing anything that can make her sad
- ❖ Do everything within my capacity to keep a smile on her face so long as I live
- ❖ Be her best friend for the rest of my life
- ❖ Have her in contemplation in my plan for future
- ❖ Cherish, adore, and treat her like the queen she really is
- ❖ Treat our relationship with respect
- ❖ Treat her uniquely, specially, and tenderly
- ❖ Treat and love her child/children as mine
- ❖ Be there for her in times of good and bad
- ❖ Always endeavor to be the man she wants me to be

Perhaps the most remarkable aspect of this document is the fact that it was signed by both the appellant and M. However, with respect to the latter's signature, I harbour doubts M signed it contemporaneously with the appellant, but that her signature accompanied her annotations to the covenant when she returned it to the appellant on March 14th. Regardless, I conclude that M was aware of the contents of the covenant. The covenant was given to M on February 6th.

[24] The appellant followed up on the second promise by giving M a Valentine's Day card (Exhibit 9) on February 14th. However, this was no ordinary Valentine's Day card, rather, written on it was an 18-line prose poem that specifically made references to previous events or text exchanges that had passed between the appellant and M.

[25] The appellant followed up on his third promise by sending a gift to M's daughter ordered on February 5th. The gift was a LEGO DUPLO Disney Minnie's Café Building Kit. This was sent to the relative's address [REDACTED] but, according to the oral testimony of the appellant, which was not challenged on cross-examination, under the name of M, such that the daughter would believe the gift came from her mother.

[26] The next significant date is March 7th, although there is evidence of ongoing communication and a relationship between the appellant and M from February 14th. On March 7th, the appellant testified that before a class started in which both he and M were enrolled, M saw a new photo of the appellant's wife on his laptop

computer. This annoyed M and she moved to a different location in the classroom. On the same day, early evening, M sent the appellant a text that read, "I'll be giving u back the typed written covenant written by u, as I find no need for it any more especially when it was breached couple of weeks later." (Exhibit 7).

[27] The covenant was returned on March 14th with annotations. The last annotation on the covenant states, "I hope he holds you accountable because you breached this covenant. I take covenants seriously. Sadly, I don't think you do." It is the 'Good God' that M is hoping will hold the appellant accountable, because that is an underlined portion of the typed covenant against which this annotation appears.

[28] On March 19th, a Sunday, the appellant was working in the library. M came in and approached the appellant, to which the appellant made a joke to the effect that it was unusual to see M in the library. M allegedly raised her voice and demanded a food container back in which she had sent food to the appellant. The appellant said that he told M he did not like incivility and that he wanted to have nothing to do with M.

[29] On March 21st the appellant took the food container and placed it on the desk where M usually sat in the class that they shared. When M entered the classroom, she allegedly threw the container across the room, catching the attention of other students in the classroom. The appellant believed this behaviour was uncivil.

[30] On March 23rd the appellant filed a complaint with the Associate Dean of the [REDACTED] [REDACTED] alleging harassment by M. (Exhibit 17). On March 24th M went to the Campus Police and filed a complaint against the appellant. (Exhibit 14). Following receipt of the complaint Campus Police Officer Briscoe spoke to Assistant Dean [REDACTED] who informed Campus Police Officer Briscoe, according to her report, that both parties had been spoken too and advised not to have contact with each other. On April 4th Campus Police Officer Briscoe spoke to the appellant. The incident report concludes with the following remarks:

"An email was sent to both M and [REDACTED] and copied to [REDACTED] advising each to cease contacting each other and to abide by an agreement prepared by the staff at the [REDACTED]."

[31] The reference to a document prepared by staff in the [REDACTED] is a reference to the resolution of the complaint made by the appellant to Associate Dean [REDACTED]. Professor [REDACTED] met with M. It was with the agreement of both the appellant and M that they wished to settle their dispute informally and to that end both agreed to enter into behavioural contracts. M's behavioural contract is exhibit 15. Within its terms are clause 1, "I agree that I will not have contact, directly, indirectly or electronically with [the appellant];" clause 2, "I agree that when I encounter [the appellant] in class or on campus, I will behave in a respectful and professional manner", and clause 3, "I agree that I will not taunt [the appellant] in English or in our native language." The behavioural contract

of the appellant is exhibit 24 and contains within its terms clause 1, "I agree that I will not have contact, directly or electronically, with [M]; I agree that when I encounter her in class or on campus, I will behave in a respectful manner", and clause 2, "I agree that I will destroy any information in my possession regarding [M]'s family residence."

[32] On April 3rd M filed a complaint with the Associate Vice-President Student Experience alleging sexual harassment under the University's SMP. The complaint presented a different version, or interpretation of the facts narrated above. However, the numb of the complaint is contained in the last paragraph, which reads:

"Campus Police sent us an email telling us to stay away from one another and to act in a respectful manner. I then received an email from [REDACTED] to come in and sign a behavioural contract. She told me that this was the process for informal resolution. I told her I was not signing it because I felt I had done something wrong, but I would do it to keep the peace. They told us not to speak with anyone in the school about the situation and I complied. The next day I came to school and on my break I sent a Facebook message to my friend [REDACTED] and she told me that she had been looking for me because [the appellant] had approached her, shaking, telling her that I wanted to destroy his life because he had evidence against me. He said that if he didn't have the evidence the school and police would have believed me and he wouldn't know where he would be. He also told her that we had an intimate relationship and because it didn't work out I started all of these problems. He breached the behavioural contract the day after we signed it by talking about....[apparent gap in document submitted in evidence]... [the appellant's] behaviour had made me increasingly uncomfortable, and has reached a point where he is now unduly threatening my relationship by telling people that we have had sex. This is a very serious accusation in our culture and stands to negatively affect me in [REDACTED] school, but also in the communities where we are from. We have never had sex or any sort of intimate relationship to me and his efforts to misrepresent me are both hurtful and threatening."

[33] The evidence of breach of the appellant's behavioural contract is contained in exhibit 16, which is a record of an exchange between M and some other person who I assume is [REDACTED] mentioned above that occurred on March 30th. This is the exchange:

M Hey girl? How far
[REDACTED] HEY HEY HEY!!
All is welllllllllllll
lmao that dude came to complain to me yesterday it was very entertaining he was literally shaking and I was just looking at him
M what he say now?

[REDACTED] Nothing he hasn't said before even showed me evidence gan...LMAO [I assume is a text abbreviation for 'Laughing my ass off.']

M So he came to you randomly talking about me?

[REDACTED] LMAO.. like he was like ohhh do you have some time I was like yeah..

M Okay

[REDACTED] so he left and came back and was like 'm sure you heard about me and M and I'm like no.. why what happened? and he just started.. he's not serious

[34] Upon receipt of the complaint the matter was assigned to Dr. Daniell Arbex, a trained investigator in sexual harassment matters. On April 12th (Exhibit 28) Dr. Arbex sent an e-mail to the appellant indicating a complaint of sexual harassment had been made against him and inviting him to make arrangements to meet with her to see and discuss the complaint. The appellant responded by e-mail (exhibit 29) expressing his frustration with having to discuss this matter at a time when he was in the midst of preparing for his examinations. Without making a prior appointment the appellant attended on Dr. Arbex on April 13th where she undertook an investigation of his understanding of the facts.

[35] Following Dr. Arbex's investigation she filed a report to the Associate Vice-President Student Experience on October 2nd, recommending that the evidence supported the offense of Sexual Misconduct including 'harassment', 'unwanted attention' and 'unwanted remarks', and 'sending unsolicited gift' in violation of the SMP. Further, Dr. Arbex recommended a sanction of censure – one year. (Exhibit 4).

[36] The Associate Vice-President Student Experience met with the appellant on October 23rd and November 16th to discuss the complaint. Following this discussion Mr. Flannagan took further time to reflect on the matter, finally issuing his decision on November 21st, 2017

THE DECISION OF THE ASSOCIATE VICE-PRESIDENT STUDENT EXPERIENCE

[37] Mr Flannagan accepted the recommendation of Dr. Arbex to the extent that the appellant violated the SMP with respect to 'unwanted attention' and 'sending unsolicited gifts' (SMP 1.1, 1.3 & 4.1). Mr. Flannagan was of the opinion that there was an extended period of communication from the appellant that was intimate in nature, suggesting that the appellant wished the relationship to go beyond a mere study partnership. Further, Mr. Flannagan found that the "level of attention was not in itself a violation of the policy because the complainant did not clearly indicate to you that this attention was unwanted. However, considering the volume of the correspondence that took place, it is worth noting that the complainant did not at any time reciprocate your intimate feelings in writing." (Exhibit 5).

[38] Crucial in Mr. Flannagan's decision are the circumstances surrounding the unsolicited gift. The decision states:

"It is when the Unwanted Attention is combined with the act of *Sending Unsolicited Gifts* that the policy violation occurs. On February 6th, without consultation with the complainant, you mailed a gift to her young daughter. The complainant indicated to Ms. Arbex and to Campus Police that at no point did you ask her permission to send a gift to her daughter. Further, when you first met with Ms. Arbex you advised her that you obtained the complainant's address from her CV, which she had shared with you at an earlier time for the purpose of peer review. Subsequently, when you met with Ms. Arbex on a second occasion you advised her that you had asked for the complainant's permission to send the gift and then pulled the address from her CV. As discussed, this is an important discrepancy in your version of events."

[39] As a result of his findings Mr. Flannagan concluded that the SMP policy was violated and imposed a sanction of 'admonition', the lowest sanction available.

PARTIES' SUBMISSIONS

[40] Ms. Bebbington, for the Associate Vice-President Student Experience, argued that the evidence before Mr. Flannagan supported his decision. She noted that the sanction imposed was the least severe. Ms. Bebbington responded to a number of the legal arguments asserted by the appellant in his opening statement. In particular, that there should be no attention paid to an allegation of bias on the part of Dr. Arbex in the conduct of the investigation. The decision was of the Associate Vice-President Student Experience, who came to his own decision following receipt of the investigator's report and following two meetings with the appellant. In fact, Mr. Flannagan had not accepted the recommendation concerning sanction. Ms. Bebbington also rejected the assertion that the prosecution of this complaint was vexatious. She cited the difficulty experienced by survivors in coming forward with sexual misconduct complaints and thus an adjudicator should be loathed to suggest that such action was vexatious.

[41] The appellant made more forceful submissions concerning the construction and interpretation of the SMP. He argued that in his mind he was being charged with sexual harassment, a more serious charge than sexual misconduct. When the Associate Vice-President Student Experience concluded that the appellant had violated the SMP 'unwanted attention' and 'unsolicited gift', he interpreted this as an impermissible substitution of a lesser charge when a more serious violation had not been proved. I dealt with this submission immediately during the hearing. It is a submission based on an incorrect reading of the SMP, and wrong characterization that the SMP is to be likened to a Criminal Code setting out a graduated scale of offenses. The SMP has a single charge, 'sexual misconduct' and not gradations of changes. It is not to be read as a codification of discrete forms of sexual

misconduct. It is the definition of sexual misconduct provided in SMP that is overarching and encompassing of many forms of sexual misconduct. In addition, SMP is supplemented by particular forms of conduct which may be found in other university policies as noted in section 13 SMP.

[42] The appellant focused upon the interpretation section of the SMP noting that 'unwanted attention' had to be unwanted by a particular person and from a particular time. He submitted that while the survivor is the particular person, the attention only becomes 'unwanted' when the parties are no longer in good standing with each other. In this case, that time arose approximately in March/April when the behavioural contracts had come into play.

[43] On the definition of 'unsolicited gift', the appellant submitted that the gift had to fall within the qualifiers that are part of the definition, namely 'romantic, bizarre, sinister, or sexualized'. This gift could not be characterized as falling within those qualifiers. The gift was similar to one given between friends at Christmas time.

ADJUDICATOR'S FINDINGS AND REASONS FOR DECISION

[44] Let me state clearly from the outset that the behaviour of the appellant is morally deplorable. Fifty-year-old married men with three children should not act in the way the appellant has in this case. However, moral delinquency is not the nub of the SMP, sexual misconduct is. I also agree with the Associate Vice-President Student Experience that the appellant wished to have more than a platonic relationship with M. There is no other way to construe the language of the e-mail sent by the appellant on February 2nd (Exhibit 8), the language of the subsequent texts, which talk of losing 'my precious jewel', the covenant document, and the Valentine's Day card, all of which profess more than a friendship confined to sharing the study of [REDACTED] material learned in shared classes. The appellant may have been battling with his conscience, and with good reason, but he appeared to be losing that battle as evidenced by his behaviour.

[45] I also agree with the Associate Vice-President Student Experience that the volume of correspondence was not of itself 'unwanted' by M as I understand the use of the term in the SMP. There is too much evidence that M continued with the relationship even after the breakdown on February 4th when M texted, "...Enjoy the rest of your [REDACTED] school experience". In the days and weeks following this text, M made repeated phone calls to the appellant, accepted the covenant and Valentine's Day card, and continued to converse with the appellant over a number of personal matters concerning family circumstances in her life. I accept that M did not wish an intimate relationship with the appellant, and what relationship existed was breaking down. I place importance on the return of the annotated covenant and the fact that M agreed to sign the behavioural contract that made specific mention of her agreement to stop 'taunting' the appellant.

[46] I disagree with the Associate Vice-President Student Experience with respect to the importance he placed on the unsolicited gift. Unlike the Associate Vice-President Student Experience, as indicated above, where there is a conflict between the evidence given by the appellant in oral testimony that withstands any challenge in cross-examination, and the indirect evidence of the facts adduced through the Associate Vice-President Student Experience's testimony alone, I must prefer that of the appellant. The appellant has testified, that he did have the implicit consent of M to send her daughter a gift as part of his effort to prove his commitment to M. In addition, the covenant expressed the promise by the appellant, "to treat and love her child/children as mine". M did not object to this when she received the covenant nor in her annotations to it when she returned the covenant.

[47] I also accept that the language in SMP covering sending unsolicited gifts is qualified by the terms in the definition, 'romantic, bizarre, sinister, or sexualized'. The gift of a LEGO DUPLO Disney Minnie's Café Building Kit cannot be characterized as 'sexualized' or 'romantic'. It may well be 'bizarre' in certain contexts, although not this one given the appellant's cultural explanation. However, an unsolicited gift to a very young child without parental consent or knowledge would almost always be 'sinister'. The specter of enticing young children through the offer of gifts by a stranger without parental consent is thoroughly repugnant in our society.

[48] The Associate Vice-President Student Experience placed particular attention on the apparent discrepancy in the appellant's answers to Dr. Arbex concerning the gift. I have quoted the relevant passages above at paragraph [38] of this decision. I must confess to not seeing the discrepancy. Dr. Arbex's report (exhibit 4) notes that M stated that [the appellant] "sent a gift to [M's] daughter without asking her for permission. [M's] daughter never became aware or received the gift. [M] was surprised that [the appellant] had her permanent address." After interviewing the appellant, Dr. Arbex reports, [the appellant] "sent a gift to [M's] daughter after talking to [M], who was very grateful for it. [M's] daughter was also pleased with the gift. (no evidence to confirm it). [The appellant] said he knew [M's] address because he helped her with her resume." It appears to me that this is consistent with the appellant's oral testimony that he got the address from M's resume, but that he spoke to M about the gift to her daughter on February 5th.

[50] As excerpted above at paragraph [32] of this decision the major concern of M in filing her complaint was her belief that the appellant had breached his behavioural contract and was assailing her character by claiming that the appellant had a more sexually intimate relationship with M, which was totally false. Unexplainably, Ms. Bebbington did not place the appellant's behavioural contract into evidence, and it only came in through the appellant's admission into evidence. I assume that this was not an important element of the Associate Vice-President Student Experience's case, which was focused upon the unwanted attention and unsolicited gift. However, and I assume as a consequence of the focus of the Associate Vice-President Student Experience's case toward a different direction, the evidence of breach of the appellant's behavioural contract was extremely weak, it amounting to the Facebook

excerpts (exhibit 16) made on March 30th and quoted above at paragraph [33], and the complaint filed by M. The excerpts make no explicit identifying reference to the appellant. Nor do they carry any explicit reference to the slander committed by the appellant of claiming to being engaged in a sexual relationship with M. In any case, if there was a breach of the behavioural contract, that would have been grounds for the Associate Vice-President Student Experience to bring a separate charge of non-academic misconduct under the SNAMP. That option remains if there is any breach by the appellant of his behavioural contract.

[51] The Associate Vice-President Student Experience chose to impose 'admonition', the lowest sanction under SNAMP. This was obviously a proportionate response to the severity of the alleged violation of the SMP. Mr. Flannagan did not accept the recommendation of Dr. Arbex to impose a higher sanction of 'censure – one year'. The impact of any disciplinary sanction for sexual misconduct is of particular concern to [REDACTED]. When filing to [REDACTED] they are required to disclose any matters which go to the good character of the applicant. I did not get clarification, despite my seeking it, from the appellant as to whether this particular disciplinary action would have to be reported, or would in any way effect, delay or embarrass the appellant's application. Nevertheless, I accept that such actions, and any level of sanction imposed, do potentially have a disproportionate impact on [REDACTED].

[52] It is my opinion that this matter should have stopped once the behavioural contracts were signed and the complaint of harassment not pursued. I believe this was also the conclusion of the Campus Police and administration in the [REDACTED] School. If the behavioural contracts were breached, this could have generated their own charges or non-academic misconduct under SNAMP. In making my decision, I wish it to be known that I make no criticism of the Associate Vice-President Student Experience. I believe he acted appropriately and honourably in all his dealings with the appellant. As I indicated above, the SMP and SNAMP deal with sexual misconduct not moral delinquency.

ADJUDICATOR'S DECISION

[53] The appeal is allowed and the sanction of 'admonition' is quashed.

Signed: this 18th day of January, 2018


Professor Jeff Berryman
Adjudicator,
Associate Vice-President Academic
Distinguished University Professor and Professor of Law