BRITISH COLUMBIA LABOUR RELATIONS BOARD

YUNKYUNG (JACOB) CHO
(the "Complainant")

-and-

THE UNIVERSITY OF BRITISH COLUMBIA
(the "University")

-and-

FACULTY ASSOCIATION OF THE UNIVERSITY OF
BRITISH COLUMBIA
(the "Faculty Association")

PANEL: Elena Miller, Vice-Chair

APPEARANCES: The Complainant, for himself

CASE NO.: 70954

DATE OF DECISION: August 14, 2017
DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Complainant applies under Section 12 of the Labour Relations Code (the "Code"), alleging the Faculty Association breached its statutory duty of fair representation in declining to pursue a tenure and promotion grievance on his behalf.

Under Section 13 of the Code, I must determine whether the complaint discloses a case that a contravention of Section 12 has apparently occurred.

II. BACKGROUND

In July 2008, the Complainant was hired as an Assistant Professor in the Faculty of Management at the University’s Okanagan campus in Kelowna, BC. He applied for tenure and promotion to an Associate Professor position in September 2014. His application was reviewed by a Departmental Committee and by the Dean, both of whom recommended against his tenure and promotion. The Complainant provided responses to the recommendations during the review period. He did not attach copies of the recommendations or his responses to his complaint.

The Complainant did attach a copy of the February 1, 2016 letter he received from the University President (the "President’s Letter"), in which she decided against his tenure and promotion application. The President’s Letter begins:

I am writing to inform you of my decision in the case of review for your tenure and promotion to the [sic] Associate Professor. As you know, the Departmental Committee’s recommendation was against tenure and against promotion; and your Head, the Faculty Committee and Dean have all recommend[ed] against both tenure and promotion. The Senior Appointments Committee recommended against tenure and promotion and my decision concurs with that recommendation. The following are the reasons for my decision.

After setting out the criteria for promotion to the rank of Associate Professor, the President’s Letter continues:

Judgment of scholarly activity, under the Agreement, is based on both the quality and significance of your research and the dissemination of the results of that scholarly activity. Published work is, in the usual assessment of scholarly activity, the primary evidence considered.

In making my decision, I have carefully considered the circumstances of your work within the context of traditional scholarship and reflected on the significance of your contributions, the dissemination of the results of your activity and the quantity of your scholarly contributions. I do not believe that you meet the requirement of sustained and productive scholarly activity for promotion to the rank of Associate Professor. I also do not believe
you have maintained the high standard of performance in your scholarly activity required for tenure as an Assistant Professor.

In considering your five published papers, the external referees and each level of internal review expressed concerns regarding the low quantity of scholarly output expected by the discipline of Management during the period under consideration. Further concerns were expressed related to your narrow publication strategy in that three of your papers were published in a single journal and although the quality of that journal was high, it raised concerns regarding the ability to maintain a sustained level of scholarly activity.

Of the first three papers published, two were with your thesis supervisor, which does not fully support the ability to establish an independent line of inquiry. Two of your subsequent papers were published in journals characterized as being of lesser quality. Further concerns regarding the methodological quality of your work were raised in consideration of a statistical error that appeared to be made in one of the manuscripts. These observations raise concerns regarding the overall quality of your scholarly output against the performance criteria of achieving and maintaining a high standard.

The President's Letter goes on to state that the Complainant's teaching performance met the standards for tenure and promotion, and that although his service contributions were "minimal" and "light", she did not use this assessment as a basis for her decision to deny tenure and promotion.

The President's Letter concludes by noting that, as a consequence of not being granted tenure, the Complainant would receive a "terminal appointment" beginning February 1, 2016 and ending June 30, 2017, at which time his employment with the University would end.

The Complainant approached the Faculty Association about grieving the President's decision against granting him tenure and promotion. On March 8, 2016, the Faculty Association filed a grievance appealing the President's decision. The remedy sought was that the Complainant be granted tenure and promotion to the rank of Associate Professor.

The Complainant worked with Robin Roff ("Roff"), the Senior Membership Services Officer of the Faculty Association, on the grievance. He attaches an undated written communication he sent to Roff on May 16, 2016 (the "May 2016 Communication"). The May 2016 Communication indicates the Complainant and Roff met in Kelowna on May 4, 2016 to discuss the grievance, and states that the Complainant explained to Roff why he believed the reasons given in the President's Letter for denying his tenure and promotion application were unreasonable.

The May 2016 Communication set out the Complainant's responses to points made in the President's Letter, including with respect to the quantity and quality of his five publications, his publication strategy, whether his publication history demonstrated an ability to establish an independent line of inquiry, and whether his work contained an
error and if so the significance of the error. The Complainant also described in the May 2016 Communication what he considered to be "several unreasonable practices or findings that I have encountered during my tenure and promotion process".

It appears that the Union sent the May 2016 Communication (or a version of it) to the University's Human Resources Department for consideration, as Roff forwarded to the Complainant the University's response to it on August 12, 2016. The Complainant does not attach a copy of the University's response to his complaint. He does attach his own September 1, 2016 written communication to Roff (the "September 2016 Communication"), in which he stated that he has "carefully read the response from Human Resources (HR) on the issues we raised earlier".

In the September 2016 Communication, the Complainant continued to take issue with the President's decision to deny him tenure and promotion. Among other things, he argued that too high a standard had been applied in evaluating the quantity and quality of his publications, and that there were "double standards" because he believed others in his department who had achieved tenure and promotion could not have met those standards. He also complained of a "faultfinding" approach to his application by the Departmental Committee, the Dean and the President.

The Complainant provides a copy of a letter dated October 24, 2016 which he wrote to the Union's Member Services Grievance Committee ("MSGC") regarding his desire to grieve the President's decision to deny him tenure and promotion (the "October 2016 Communication"). The letter indicates that Roff advised the Complainant on October 4, 2016 that she would not be advancing his grievance, and that he would need to take the matter up with the MSGC if he wished to pursue it. The Complainant's October 2016 Communication to the MSGC attached his May 2016 and September 2016 Communications to Roff and reiterated the points he made in them.

Among other things, the Complainant's October 2016 Communication to the MSGC repeated his assertions that five papers is not a small number of publications in his field; that it should not have been a concern that three of those papers were published in one journal; that his publication output showed he was capable of independent inquiry and research; and that either he had not made a statistical error in one of his papers or it was "unreasonable to generalize one observation in one publication to all my research publications".

The October 2016 Communication also reiterated his arguments that he was never specifically told he needed to publish one paper per year on average; that it was unreasonable to measure his performance against that expected of faculty at top tier universities; and that "double standards" had been applied to him because he believed others in his department had not been held to the standards which were applied to him. He also complained again that a "fault-finding approach" had been applied to his application.

Roff emailed the Complainant on November 1, 2016. In the email, she advised that the Faculty Association had asked its legal counsel (the "Legal Counsel") to "provide us with an opinion on possible avenues further with the appeal". The email advised that this process would take a couple of weeks and the Legal Counsel would likely want to meet with them. Roff added in the email:
It is my sincere hope that [Legal Counsel] is able to find sufficient grounds based on the latest legal findings to continue to move forward with the appeal.

She continued:

To this point I have put to George [Athans, the University's representative] every argument that I can find in support of a reconsideration. On October 4th you and I spent most of our time discussing the concept of reasonableness within the context of a promotion and tenure appeal. I understand how hard this situation is for you and that you do not agree with the limited definition that is available to us under the current jurisprudence. The appeals process is not about asking whether you have met the appropriate standards or the bar set by the University. It is much more circumscribed and limited by the grounds set out in the CA [Collective Agreement] — a procedural error that might have led to a wrong decision or unreasonableness in this context refers to whether or not there is a line of analysis between the evidence in the file and the President's decision. As much as I would like to, I cannot argue whether or not the President made the right decision, or interpreted the information in the right way. In other words, this process isn’t about proving that you’ve met the standards, it is about looking for technical/procedural errors in the file that might have influenced the decision. ...

Roff continued her email by explaining that, even if an appeal were successful, "the only thing an Arbitrator can order is a reconsideration of the material, she/he cannot grant you tenure or impose a different interpretation of the information". Roff added:

It has come to my attention that you may not have fully understood the things we discussed on October 4th. I have also received some additional information from George since our last conversation. So, to make sure that I [sic] you have a clear picture of my reasoning here, I have summarized my thoughts below regarding the arguments you've provided to me and those I have been discussing with the University, most of which we reviewed on October 4th or at an earlier time. My goal here is not to tell you why we can’t move forward, but to clarify the challenges with the arguments so that we can think more creatively through them and so that our time with [Legal Counsel] is productive.

As a last note, I want to emphasize that at no time did I think that your file was completely free of errors. Rather, I have not been able to find strong enough arguments to bring into question all the President's findings, which would be necessary at arbitration.

Here are my thoughts: ...

Roff then addressed a number of points argued by the Complainant, indicating that she had asked the Union's Legal Counsel to be prepared to address some of them. With respect to the Complainant's allegation that he had been subject to "double
standards" because he believed others who had received tenure would not have met the high standards against which his work was being evaluated, she stated:

I have asked legal counsel to comment on this specifically. However, the University has consistently denied challenges based on comparisons between files. This is because the assessment is based on a review of the quantity, quality, impact and significance of the scholarly activity, therefore it is not possible to make a direct comparison between files. I recently put this argument to Human Resources. Here is the response I received (I have redacted it for confidentiality):

"As you know, the t/p standard is not a comparison of scholarships between individual files, but on significance, quality and sustainability relevant to the disciplinary standards at UBC. The Standing Committee, Dean, DAC, SAC and the President must have drawn the conclusion that XXXX's work met the criteria for tenure and promotion. The Dean has consistently argued that quantity and quality are not uncoupled and that there is a single standard at UBC. On that basis, XXXX could have only produced one paper but if its significance was equivalent to say, the Theory of Relativity, then a negative recommendation based on low output would be unlikely."

This response is consistent with the general interpretation of the Collective Agreement as it pertains to tenure and promotion appeals.

The Complainant wrote an email to Roff dated November 7, 2016 (the "November 2016 Communication"), responding to her November 1, 2016 email. He continued to argue that the President's decision to deny him tenure and promotion was unreasonable for the reasons he had identified in his earlier written communications. He concluded:

This and my other documents during my tenure and appeal process provide that the President's decision was arrived on an unreasonable ground. The University has applied to me many specific research requirements which presumably support the President's decision. However, these requirements had not been announced to me before my tenure application. In addition, every candidate whose tenure and promotion was granted in our department can not [sic] withstand all these requirements. I wish that FA [Faculty Association] would defend my position more willingly.

The Faculty Association's MSGC met on March 7, 2017 to consider the Complainant's arguments that the grievance/appeal of the President's decision should proceed. On March 20, 2017, the MSGC sent a letter (the "MSGC Letter") to the Complainant advising him that it had decided against proceeding, stating in part:
After a lengthy discussion regarding the facts and substantive merits of the case, the MSGC voted against proceeding to arbitration and will be recommending such to the Executive Committee. While we understand that this matter is of the utmost importance to you, we do not believe the case is likely to be successful at arbitration.

The MSCG Letter went on to advise the Complainant that he had the right to seek a reconsideration of its decision from the Executive Committee of the Faculty Association. He was advised he could submit a written appeal and make oral submissions at a meeting of the Executive Committee, which he did.

A copy of the Complainant's written submission to the Faculty Association's Executive Committee, dated May 9, 2017, is attached to the complaint (the "May 2017 Submission"). It is lengthy and detailed and sets out his position as to why he believed the President's decision to deny him tenure and promotion was "arrived on an unreasonable ground and there were procedural errors in my tenure and promotion review which led to the negative decision". He notes that he had "already explained what the unreasonable ground was and what procedural errors were" in his earlier written communications. In the May 2017 Submission, he alleged for the first time that the "inappropriate metrics and procedures for performance evaluation" applied by the University in assessing his tenure and promotion application constituted "bullying". He concluded his submission by stating:

The recent grievance summary by MSGC concluded that the President's decision was reasonable because there is a line of analysis from the evidence to the decision. However, the line of analysis was distorted by inappropriate metrics and problematic procedures. Creating inappropriate metrics to selectively fail an employee should not lead to a final decision. Using inappropriate metrics and procedures, a school can, technically or tactically, make a negative tenure decision to a targeted candidate regardless of the candidate’s scholarly performance. Every candidate in any workplace does not deserve this kind of bullying. I hope FA [Faculty Association] takes an action to protect me from this bullying.

About procedural errors, MSGC concluded that FA [Faculty Association] was unable to show that procedural errors led to a wrong decision because primary concern regarding the quantity and quality of scholarly activity remains. However, the University including the Faculty of Management has not informed the required quantity and quality of scholarly activity to me and to the external referees. Instead, the Faculty of Management created the required quantity and quality of scholarly activity during my tenure and promotion review such as one paper per year requirement from global top 30 university’s standards. Under this circumstance, procedural errors and the quantity and quality of scholarly activity are two separate issues to be investigated.

If there was no intention to fail me, the University including the Faculty of Management at UBCO would not need to use such
inappropriate metrics nor hide them until my tenure and promotion review. Likewise, they would not violate the UBC Guideline nor use a double standard. Informing appropriate metrics to a candidate and complying with the school's guideline are simple and basic principles of a tenure review to avoid bias, bullying, and discrimination. My scholarly performance is competitive in business schools that the UBCO Provost Office perceives to be in a similar rank with the Faculty of Management, as seen in the selection of external referees for the Dean's reappointment. According to the Collective Agreement, the President's decision on my tenure and promotion should be reversed because it was arrived on an unreasonable ground. I wish that Executive Committee Members agree with me and pursue remedy.

The Executive Committee of the Faculty Association met with the Complainant on May 16, 2017 to consider his appeal of the MSGC's recommendation not to proceed with his promotion and tenure grievance. The Executive Committee advised the Complainant in a letter sent by email on May 25, 2017 (the Executive Committee's Letter) that it had voted not to proceed. The letter stated in part:

The Executive Committee's role is to review the MSGC's decision and to examine whether there are sufficient grounds to advance your file to arbitration. Specifically, the Committee reviewed the material presented to determine whether there were procedural errors that may have resulted in a wrong decision or whether the Interim President's decision was unreasonable in light of the evidence before her. These are the only grounds that can be considered when taking a promotion and tenure denial case to arbitration.

The Executive Committee's Letter concluded by stating that it understood its decision would be disappointing to the Complainant and that it "did not reach this decision lightly". It added that the Faculty Association's internal appeal process was now at an end, and the Complainant had the option of filing a Section 12 complaint against the Faculty Association "If you do not feel that you have been fairly represented in this matter". The link to information about that process on the Board's website was provided.

On June 5, 2017 the Faculty Association wrote to the University, stating that it was withdrawing the tenure and promotion grievance. It copied the Complainant on the letter. The Complainant's employment with the University ended on June 30, 2017.

III. COMPLAINANT'S POSITION

The Complainant submits the President was required to provide specific reasons why she declined his tenure and promotion application, and the reasons provided in her February 1, 2016 letter were:

...inappropriate because 1) they were from specific metrics for tenure and promotion that were created by the school during my tenure review process. There was no prior announcement of these metrics although they directed specific and unusual requirements
regarding publication quantity and strategy, and coauthorship. 2) the metrics used were unfair and discriminatory. If the same metrics were used, no one should have been granted tenure and promotion in our department in the past. However six had succeeded. 3) some reasons including the statistical error that the school claimed that I made in one of my papers were false or inaccurate information from their part. I kept asking for clarity of the information during the tenure and appeal process for three years, but the school or UBCFA did not give me an answer. I informed UBCFA on May 9, 2017 that the school’s behaviour above matched typical examples of workplace bullying set by the Canadian Centre for Occupational Health and Safety ("CCOHS"). UBCFA did not respond to this critical issue by neither confirming or opposing to the issue.

The Complainant alleges the Faculty Association’s representation of him was "both arbitrary and in bad faith". He submits it was arbitrary "because UBCFA did not examine whether the metrics that the President used to decline my tenure and promotion were appropriate or not". He adds:

The metric issue was important because it determined the reasonableness of the President’s decision ground, but UBCFA did not formally confirm or deny it. Those metrics in fact came from the department committee or the Dean, and their negative recommendations had no reasonably ground either if they are proven to be inappropriate. In addition, there were multiple procedural errors that the school made in my tenure and promotion review, ranging from the selection of the external referees and their reviewing process to [the] Dean’s advisory committee constitution. Every procedural error was critical for the final decision. UBCFA neglected examining each error individually and its criticality for the final decision. I informed UBCFA of the inappropriate metrics and procedural problems by sending my appeal summaries repeatedly as attached, but UBCFA did not formally respond to them or confirm their seriousness, and further examination was not proceeded.

The Complainant alleges the Faculty Association’s representation was also in bad faith because "UBCFA did not accidentally neglect these issues above but it did intentionally". He adds:

I provided details on the issues of inappropriate metrics and procedural problems repeatedly attached. There was no chance that UBCFA accidentally neglected these issues. In addition, I was able to realize after I found the CCOHS website that I was bullied by the school during my tenure and promotion review process. I provided the evidence of bullying in my appeal dated May 9, 2017 in detail (see Attachment 8: Appeal by Cho dated May 9, 2017 bullying explained). However, UBCFA did not respond to this by asking me any questions regarding the evidence of bullying itself, or denying it. Overall, UBCFA was indifferent to critical issues for the grievance such as 1) inappropriateness of metrics used by the
school, 2) procedural errors that the school committed, and 3) bullying occurred to me in my workplace. These issues explain why the decisions on my tenure and promotion made by the department committee, the Dean and President were negative, but UBCFA did not formally accept or confirm these critical issues. The grievance took almost one year and three months which was, I believe, a sufficient time for UBCFA to investigate them.

The Complainant concludes that his "appeal document dated on May 9, 2017 [the May 2016 Submission] is the most updated one and I believe that the document explains all the issues in detail that I addressed here".

IV. ANALYSIS AND DECISION

Under Section 12 of the Code, a union must not represent a member of the bargaining unit in a manner that is arbitrary, discriminatory or in bad faith. Aside from this restriction, it is up to the Union to represent the bargaining unit as it sees fit. As explained in James W.D. Judd, BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 ("Judd"):  

Once employees have chosen a union as their exclusive bargaining agent, any decisions regarding the negotiation and administration of the collective agreement are the union's to make. Thus, for example, if an employee feels he was denied a promotion in violation of the collective agreement, or disciplined or dismissed without just and reasonable cause, it is up to the union to decide what to do about that. Generally, it is up to the union to decide whether to file a grievance against the employer on behalf of an employee. Once a grievance is under way, it is up to the union to then decide whether to abandon the grievance, try to negotiate a settlement with the employer, or take the grievance to arbitration. Such decisions are not up to the employee. However, the employee is responsible for making the union aware of potential grievances and asking the union to act on his or her behalf. (para. 34)

In the present case, the Complainant made the Faculty Association aware that he wished to grieve the President's decision to deny his application for tenure and promotion. The Faculty Association filed a grievance on his behalf on March 8, 2016, in which the remedy sought was that the Complainant be granted tenure and promotion to the rank of Associate Professor. The Complainant says he then worked with Roff on the grievance.

As described in greater detail above, the Faculty Association through Roff spent considerable time liaising and communicating with the Complainant about the grievance. The Complainant's May 2016 Communication to Roff states they met in Kelowna on May 4, 2016 to discuss the grievance, and the Complainant explained to Roff why he believed the reasons given by in the President's Letter for denying his tenure and promotion application were unreasonable. The May 2016 Communication then sets out the Complainant's detailed responses to points made in the President's Letter. Roff sent the May 2016 Communication (or a version of it) to the University's
The Complainant then wrote his September 2016 Communication to Roff, in which he stated he had "carefully read the response from [the Human Resources Department] on the issues we raised" and reiterated his arguments as to why the President's decision was unreasonable and unfair. As described above, Roff responded to the points raised by the Complainant in her November 1, 2016 email to him. Her response was specific and detailed and addressed the matters the Complainant was raising. She indicated advice would be sought from the Union's Legal Counsel on some of the arguments raised.

The Complainant wrote his October 2016 Communication to the MSGC setting out his arguments, which were also set out in his May 2017 submission to the Executive Committee, to whom he had an opportunity to make oral as well as written submissions. Thus, the Complainant's arguments regarding the grievance were heard and considered not only by Roff, but also by the Faculty Association's MSGC and Executive Committee. The Faculty Association also sought advice from its Legal Counsel on some of the matters raised by the Complainant.

I find it is clear from the Complainant's May 2016, September 2016 and November 2016 Communications to Roff, his October 2016 Communication to the MSGC, and his May 2017 Submission to the Executive Committee that the Faculty Association provided the Complainant with ample opportunity to present his views and arguments to it on why the President's decision was unreasonable and procedurally unfair.

I also find it is evident from Roff's email to the Complainant of November 1, 2016, the MSGC Letter to him of March 20, 2017, and the Executive Committee Letter to him of May 25, 2017, that the Faculty Association considered his arguments, turned its mind to the issues, and made a reasoned decision what to do with respect to the grievance. Specifically, the Faculty Association considered whether the grievance was likely to succeed on the basis that the President's decision to deny the Complainant tenure and promotion was unreasonable or procedurally unfair. The Executive Committee Letter stated in that regard:

Before meeting with you, we reviewed your entire file, including your dossier at the time of the Interim President's decision, the Interim President's letter explaining her decision, the case summary prepared by Robin Roff, advice from our legal counsel, and your submission to the Executive Committee. We also considered your presentation at the meeting, and your response to questions posed at that time.

The Executive Committee voted unanimously against taking your case to arbitration, concurring with the decisions of the MSGC. The Executive Committee carefully considered all the evidence, with considerable attention being paid to context of the Faculty of Management and processes used in arising at the negative decision. While the University has acknowledged the existence of procedural errors in the file, the Executive Committee did not find
that these were sufficient to lead to a wrong decision and the Committee did not find additional evidence of procedural error(s) that would rise to this standard. The Committee also found that, on the balance of evidence, the Interim President was not unreasonable. Thus, despite this extensive review, we do not believe we have the grounds to successfully argue your case at arbitration and will be withdrawing the grievance in this matter.

In her November 1, 2016 email to the Complainant, Roff addressed the arguments the Complainant had raised to her in his written communications to her. She indicated that, in her view, they did not establish unreasonable or unfairness of a nature that would persuade an arbitrator to overturn the President's decision. In that regard, Roff stated in part:

On October 4th you and I spent most of our time discussing the concept of reasonableness within the context of a promotion and tenure appeal. I understand how hard this situation is for you and that you do not agree with the limited definition that is available to us under the current jurisprudence. The appeals process is not about asking whether you have met the appropriate standards or the bar set by the University. It is much more circumscribed and limited by the grounds set out in the CA [Collective Agreement] — a procedural error that might have led to a wrong decision or unreasonable in this context refers to whether or not: there is a line of analysis between the evidence in the file and the President's decision. As much as I would like to, I cannot argue whether or not the President made the right decision, or interpreted the information in the right way. In other words, this process isn't about proving that you've met the standards, it is about looking for technical/procedural errors in the file that might have influenced the decision. ...

It is clear the Complainant does not agree with the Faculty Association's assessment that it is unlikely an arbitrator would overturn the President's decision on the basis of unreasonable or procedural unfairness. However, the fact that the Complainant disagrees with the Union's assessment of the merits of the grievance does not establish a contravention of Section 12. As stated in Judd:

Section 12 is not an avenue of "appeal" of the merits of union decisions. Rather it is designed to ensure the union exercises its judgment and acts based on proper considerations. If it does, it has done what is required to do by Section 12 and the Board has no jurisdiction to overturn or change the union's decision. (para. 44)

As further stated in Judd, the Board has "no jurisdiction to overturn a union's decision simply because an employee thinks it was wrong.... it is not the Board's role to decide if a union was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner" (para. 30). Accordingly, the question is not whether the Faculty Association was right in thinking that the grievance was unlikely to succeed, but whether its decision was made in an arbitrary, discriminatory or bad faith manner.
The Complainant submits the Faculty Association's decision was arbitrary because it "did not examine whether the metrics that the President used to decline my tenure and promotion were appropriate or not" and because it "neglected examining each [procedural] error individually and its criticality for the final decision". However, I find the Executive Committee Letter and Roff's November 1, 2016 email to the Complainant evidences that the Faculty Association considered the matters raised by the Complainant regarding the reasonableness and procedural fairness of the President's decision, and concluded that any substantive weaknesses or procedural flaws were not of such a nature as to make it likely an arbitrator would overturn the President's decision and remit it back for reconsideration.

As already noted, the question under Section 12 is not whether the Faculty Association was right in this assessment. Having reviewed the complaint, I find it does not disclose an apparent case that the Faculty Association's assessment of the issues and decision not to pursue the grievance was arbitrary. It is evident from its communications discussed above the Faculty Association turned its mind to the issues and made a reasoned decision what to do. As stated in *Judd*:

> Typically where a union gives reasons for its decision it will not be arbitrary. Although it is possible for a union to consider a matter and give "reasons" for rejecting a grievor's position that are so unresponsive to the topic or so divorced from reason that they amount to arbitrariness, it is rare. (para. 66)

I find the Faculty Association's reasons for not pursuing the grievance are responsive and reasonable. The complaint does not disclose an apparent case that the Faculty Association acted arbitrarily.

The Complainant also alleges the Faculty Association's representation of him was "in bad faith", claiming the Faculty Association "did not accidentally" fail to properly consider the issues he raised but rather did so "intentionally". The basis he provides for this allegation is the fact that he repeatedly presented his arguments to the Faculty Association in his written communications summarized above, and the Faculty Association remained unconvinced by them. This does not provide an evidentiary basis for an allegation of bad faith. As set out above, I find it is evident the Faculty Association considered the issues and arguments the Complainant raised, but found it was not likely they would cause an arbitrator to overturn the President's decision and remit it to be reconsidered. The Faculty Association did not fail to consider the issues the Complainant raised, either accidentally or intentionally. It simply was not persuaded they – or any other arguments – were likely to result in a successful grievance.

With respect to the Complainant's assertion that the Faculty Association was unresponsive to his allegation that the University "bullied" him, I find this assertion does not disclose an apparent breach of Section 12. The Complainant's allegation of bullying by the University was raised for the first time in his May 2017 Submission to the Executive Committee, long after the Complainant first sought to grieve the President's decision and provided his arguments in favour of the grievance. It was based on the Complainant's view that the University's alleged failure to make clear to him the quantity and quality of scholarship activity it expected of him met a definition of bullying. Roff had already addressed the Complainant's view that the University had not
communicated its expectations to him in her November 1, 2016 email to him, and I find the Faculty Association was not required to expressly address it again merely because the Complainant later characterized it as a form of "bullying" by the University.

I appreciate that the Complainant is understandably disappointed first that the University decided not to grant his application for tenure and promotion and second that the Faculty Association decided not to pursue a grievance of that decision. However, Section 12 is not concerned with the conduct of the employer (in this case, the University). With respect to the conduct of the Faculty Association, I find it is clear that the Faculty Association made a reasoned decision after hearing extensively from the Complainant and turning its mind to the issues. The Faculty Association also sought legal advice, and the decision of its MSGC was reviewed by its Executive Committee after hearing from the Complainant orally and in writing. Looking at the Faculty Association's conduct as a whole, I find the complaint does not disclose a case of an apparent contravention of Section 12.

V. CONCLUSION

For the reasons given, the complaint is dismissed.

LABOUR RELATIONS BOARD

ELENA MILLER
VICE-CHAIR