

# Sexual relations between students and faculty

A look at the sexual harassment policies at Canadian universities.

By SHIRLEY KATZ | December 1, 2000

The recent decision of the [British Columbia Human Rights Tribunal](#) in the case of Fariba Mahmoodi, a student who accused her professor of sexual harassment, has once again focused attention on a controversial issue. Ms. Mahmoodi complained to the tribunal that Donald Dutton, a psychology professor at the University of British Columbia, and UBC as his employer, had sexually harassed her. The tribunal agreed, awarding her a total of \$13,000 including \$4,000 for injury to her dignity, feelings and self-respect, and \$5,200 for counseling expenses.

Sexual relationships between students and faculty are fraught with peril. Although all of us have personal examples of a faculty member who married a student and lived happily ever after, many, if not most, of these relationships have a very short shelf life. When they turn sour, the risks to all parties to the relationship can be very high. If the student complains of sexual harassment, the risks to the faculty member and the university are high indeed.

In my experience, the topic of sexual relationships between faculty and the students is not openly discussed at universities. It is the subject of gossip and idle conversation, and from time to time, of something more. As York's associate dean of arts, more than 10 years ago, I learned that a faculty member had been the instructor in all the courses his lover had taken in her major. This had been a cause of great distress for the department chair and

undergraduate program director, who had mistakenly believed they could do nothing about the situation because the university had no policy. I then wrote a policy on close personal relationships between instructors and students which was subsequently adopted by senate. This policy requires the instructor to disclose a close personal relationship with a student and make other arrangements for the evaluation or supervision of the student's work. Many Canadian universities have similar policies.

The topic of consensual sexual relationships between students and faculty is a "hot button" topic. It elicits a lot of heat, but not much light. I'd like to remove some of the emotion from the topic, and raise awareness of the risks inherent in these relationships for the student, the faculty member and the university.

Let me flag my own position regarding sexual or intimate relationships between faculty and students. For me personally, such relationships are always and without exception out of the question. I don't think it's professional or ethical to have such a relationship with a student you are currently teaching, or even with any student currently at your university. Institutionally, however, I don't believe the university should censor or prohibit such relationships, even if it were legally possible to do so. Whether or not the student is taking any courses from the professor, if the relationship turns sour and the student makes a complaint of sexual harassment, then faculty members should know that they will bear most of the risks.

Not all, since the university may also be at risk. To minimize its own liability, the university needs to take all reasonable steps to prevent harassment and discrimination from occurring in the first place, and if harassment does occur, to deal with it promptly and effectively to bring it to an end.

### **Student's choices**

What are the options for the complaining student? Typically, the student first makes a complaint under the university's sexual harassment policy. If the student isn't satisfied with the outcome or wants to take other avenues, she can make a complaint under the Human Rights Code. (I am using "she"

because most cases involve complaints of female students against male professors, but there have also been cases of male students making complaints against female professors as well as same-sex complaints.)

In fact, there have been just four reported legal cases of sexual harassment regarding faculty members and students in Canada, three of them in British Columbia and one in Newfoundland. Two cases were heard by tribunals of the B.C. Human Rights Council, and two were dealt with by arbitrators when the faculty member grieved against disciplinary action taken by the institution.

There are at least two issues that make sexual relationships between faculty and students problematic: the issue of consent and the issue of conflict of interest.

Many critics of student-faculty relationships argue that because of the power differential that exists between students and faculty, students can never give meaningful consent. They note that professors have all sorts of power over students – the power to grade and evaluate the student’s work, the power to provide references for graduate and professional schools and for jobs, the power to serve as intellectual or career mentors and sometimes as role models. Whatever powers the student may have, they are not of the same sort. Because the professor’s powers affect the student’s life in a significant way, say these observers, the student cannot say no to the relationship, so her consent is actually coerced compliance. A female student may enter willingly into a sexual relationship with a male professor, “willingly” in the sense that there is no promise of reward or threat of punishment. But her vulnerability and her desire to please make the relationship always exploitative.

There is some statistical as well as anecdotal support for the view that students know that these relationships are exploitative. Studies of graduate students in psychology who had sexual relationships with their professors show that a significant number of students had, with the passage of time, changed their views regarding these relationships which at first they hadn’t viewed as exploitative. In an individual account, a former student tells of the

rule she has derived from her experience as the paramour of one of her professors: “Do not have sex with anyone you sometimes have to call Mister, Doctor, or Professor.”

There is, of course, another view of the issue of consent. People holding this opinion argue that “life occurs under conditions of inequality” and university students are capable of meaningful choice and of giving valid and effective consent. Put briefly, if no means no, then why can’t yes mean yes?

### **Abuse of trust**

The other problem for faculty who begin sexual relationships with students is the issue of conflict of interest and abuse of trust. It’s well recognized both within and outside the academy that professors occupy positions of special trust and confidence. Professors enjoy autonomy to determine how and what they teach, how they go about their research activities and how they serve the university and the larger community. Because of that autonomy, they have been called fiduciaries under the law. As fiduciaries, they have a duty to avoid conflict of interest and to exercise their powers over students only in the students’ interests, and not in their own interests.

Many Canadian universities now have conflict-of-interest policies that expressly prohibit close relationships – including friendships and familial relations, as well as sexual ones – between faculty and those whose work they supervise. At York University, for example, the policy doesn’t say that you must end the relationship, but you must end the supervisory part of your role with that person. The principle is that if you can’t be impartial or objective because it’s being filtered through a *personal* feeling you have for the student, then get out of the advisory or supervisory or evaluative role.

The four cases that *do* exist in Canada are cautionary tales for faculty members. As the powerful persons in the relationship, they will be held accountable and liable, should a student with whom they had what they *thought* was a consensual sexual relationship make a complaint of sexual harassment. In the end, it will be the student, and not they, who will prevail.

How does that happen?

Professors should realize that if a student complains of sexual harassment once the relationship is over, the fact that she entered into the relationship willingly will not be a determining factor in a legal judgment. As case law has made clear, the question to be decided will not be whether the complainant participated willingly in the claimed sexual activity but rather, whether the sexual advances were unwelcome and unwanted.

Sexual harassment is defined in human rights legislation and in university policies as “unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought to know that such attention is unwanted”. It is the *unwanted* nature of the attention that is the most important part of any sexual harassment claim. If the complainant can show that she acted consistently with her allegations that the conduct was unwanted, and that the respondent knew or should have known it was unwanted, then there will be a finding of sexual harassment.

### **Dupuis vs. B.C.**

The following is what happened in *Dupuis v. British Columbia* (Ministry of Forests), a 1993 case that was heard by the British Columbia Council of Human Rights. [The case](#) concerned Linda Dupuis, a graduate student in zoology at the University of British Columbia. As part of her fieldwork, she coordinated a survey of forest birds in the Queen Charlotte Islands during the summer of 1990. Her supervisor was Dale Seip, a wildlife biologist with the Ministry of Forests and an adjunct professor at UBC.

Mr. Seip and Ms. Dupuis had a very brief sexual relationship that began when they were en route to the Queen Charlotte Islands and Mr. Seip rented a single room for the two of them without first ensuring that she was comfortable with those arrangements. When Ms. Dupuis ended the relationship, she informed her supervisor at UBC that she did not want Mr. Seip involved in her work, and she changed her thesis topic to be outside his area of expertise. She then complained of sexual harassment, first to the sexual harassment

office at UBC in the fall of 1990 and then to the Council of Human Rights in March 1991.

In its decision, the council noted that human rights legislation does not prohibit consensual social and sexual conduct between managers and employees (or between university students and faculty). However, because of the power imbalance, the burden rests with the manager to ensure that any sexual conduct is welcome and continues to be welcome.

The report of the hearing shows that Ms. Dupuis, when faced with sexual advances from Mr. Seip, acted ambiguously. The council ruled that although some of Ms. Dupuis' behaviour was inconsistent with her assertion that she didn't welcome her supervisor's advances, taking all the evidence into account, it was more likely than not that she did not welcome the sexual conduct.

On the question of whether Mr. Seip knew or ought to have known that the conduct was unwelcome, his perceptions did not determine the matter. The standard under human rights legislation is "whether a reasonable person in those circumstances" would have recognized that the conduct was unwelcome. What is reasonable depends on all the circumstances, including the nature of the conduct and the relationship.

The council said that Ms. Dupuis was in a relatively weak and vulnerable position because Mr. Seip was not only her supervisor but also had influence in funding decisions in the ministry that could affect her thesis, and he was affiliated with UBC. Moreover, she had recently arrived in British Columbia and was travelling alone with him in isolated parts of the province where she knew no one. Based on the power imbalance between them, Seip should have known that the conduct was unwelcome, the council stated.

The Human Rights Council found that Mr. Seip had sexually harassed Ms. Dupuis and ordered the ministry to pay her \$5,000 in general damages for the distress caused her and \$14,976 as compensation for lost wages, because her thesis was delayed, largely due to the sexual harassment.

## **Mahmoodi vs. Dutton**

In the case concerning Ms. Mahmoodi and Dr. Dutton referred to earlier, the record is even more striking. Ms. Mahmoodi was a student who had come to Canada in 1988 as a refugee from Iran and had graduated from York in 1994 with a BA in psychology. Her transcript from York showed that in 21 of her 25 courses, she had grades between F and C+. Nonetheless, she registered as a student at UBC in 1994 with the hope of qualifying for graduate school the following year. She signed up for Dr. Dutton's applied social psychology course in the academic year 1994-95.

That fall Dr. Dutton announced to the class that he was looking for subjects for a cultural study, and Ms. Mahmoodi offered to locate Iranian subjects and to act as a translator. They had two meetings at his home, on December 30 and January 6. It was on the basis of what transpired on those occasions that Mahmoodi lodged a complaint of sexual harassment.

According to Ms. Mahmoodi, Dr. Dutton initiated sexual conduct with her, which she acquiesced to because he would help her get into graduate school. According to Dr. Dutton, there was no sexual conduct of any kind. However, there was dinner at his home, with candles, wine and music. Although he argued that this was the way he lived and that the atmosphere in his house was merely cosy rather than romantic, the tribunal found his arguments either disingenuous or profoundly ignorant of common courting behaviour. It found that he had blurred the distinction between the personal and professional and, in the end, found he had sexually harassed Ms. Mahmoodi. The sexual harassment was not based on the sexual touching as she alleged, but rather on "the imposition of a sexualized environment consisting of seductive music, low lighting, candles, a burning fireplace, dinner, wine, a gift, rides home and personal and intimate conversation."

The case is troublesome for a lot of reasons, not least of which concern the findings on credibility. The tribunal found Ms. Mahmoodi's credibility was seriously impugned. She had fabricated a letter of reference and when confronted by this fabrication, said that she had not been "that dishonest"

since she could have gone further and fabricated her marks. She also obtained student loan funds to which she knew she wasn't entitled and fraudulently obtained social assistance payments. When she found out that Dr. Dutton had not recommended her for admission to graduate school, her own evidence was that she would do "whatever it took" to get revenge. Briefly put, the tribunal found her to be untruthful.

But Dr. Dutton's credibility was also found to be seriously impugned. The tribunal said he consistently tried to put "an innocent gloss on his actions while shifting the blame onto Mahmoodi for his own lack of judgement." It concluded that it could not rely on Dr. Dutton's evidence where it was not corroborated with other evidence. Taking all the evidence (notably an audiotape) and circumstances into account, the tribunal found the professor and the university liable for sexual harassment.

### **Okanagan and Memorial**

Two other cases show that even where no sexual harassment occurred, professors may still be subject to disciplinary action. The reason is not that they sexually harassed the student with whom they has a sexual relationship, that is, that the conduct was found to be unwelcome. Rather, they breached their position of trust and were in a conflict of interest position, which they had failed to disclose.

The two cases, both in 1997, involved Okanagan University College and a fine arts instructor, Briar Craig, and Memorial University of Newfoundland and a professor, W. Schipper. In both cases, the faculty members had been dismissed as a result of internal sexual harassment hearings. Their faculty associations grieved the terminations on their behalf, and the cases went to arbitration.

In *Okanagan University College and Okanagan University College Faculty Association*, the arbitrator found no harassment. He said both complainants, Tanis Champagne and Tara Erickson, repeatedly admitted "that the conduct was both welcome and wanted". However, this didn't end the matter as far as

the instructor's liability was concerned. He was guilty of breach of trust, towards the complainants and toward other students of the college. The penalty of dismissal was found to be excessive, however, and the arbitrator imposed a one-year suspension instead.

In *Memorial University and Memorial University Faculty Association*, the arbitrator also found that the student (whom he didn't name) had entered into the relationship willingly and that the professor had no reason to believe his attention was unwanted. Again, a finding of no sexual harassment didn't end the matter. The arbitrator said the professor's consensual sexual relationship with the student was a breach of his employment obligations as a fiduciary. The arbitrator found that firing him had been excessive and substituted a four-part penalty including a written reprimand and mandatory counseling to be paid for by the professor.

These four cases should be read by any faculty member contemplating or presently engaged in a relationship with a student at their university. They would make any reasonable person think at least twice.

How should the university protect itself from remedial consequences of its own liability? In keeping with its educative mission, it should do more to teach students and faculty of the risks inherent in close personal relationships. At present, most do not know or fully understand how risky, problematic and dangerous an intimate relationship between a professor and a student can be.

The challenge for the university is to find the proper balance between the right of adults to engage in mutually beneficial relationships, on the one hand, and the need to address the problems arising from such faculty-student relationships, on the other. Some people would have us ban all such relationships, but that would mean conflating private and public realms, which I don't think we should do. At the same time, we cannot say and do nothing about these relationships. If we don't find the right point of balance between the competing interests, the risk for the university is that we will end up where we don't want to be. And that is either ignoring the issue, or delving into personal and private matters in a way that is needlessly intrusive and serves no legitimate purpose.

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