

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF PRINCE EDWARD ISLAND FACULTY ASSOCIATION

(the "Union/Association")

-and-

UNIVERSITY OF PRINCE EDWARD ISLAND

(the "Employer")

Re: Grievance FA-21-03-A
Preliminary matters: Arbitrability of the Grievance
(Employer),
and Disclosure Request (Union)

Arbitration Board:

Susan M. Ashley, Chair
Neil Tudiver, Union Nominee
Kerri Carpenter, Employer Nominee

Submissions Received:

December 17, 2021
December 21, 2021

Counsel for the Union:

Jillian Houlihan

Counsel for the Employer:

Murray Murphy
Kate Profit

Date of Preliminary Award:

February 22, 2022

1. Certain preliminary matters have arisen with regards to this policy grievance. The Employer has raised the issue of arbitrability, while the Union seeks an Order for Production of certain documents. It was agreed that the parties would make written submissions to the Board of Arbitration. The merits of the grievance are set down for hearing in late May, 2022, in the event that we rule that the grievance is arbitrable.

Background

2. This is a policy grievance brought by the Union, concerning privacy issues relating to complaints under the University's *Fair Treatment Policy* ('FTP'). The Policy appoints a Fair Treatment Advocate ('FTA') who receives and deals with complaints. It is not disputed that the FTA disclosed personal information (i.e. the home address) about the Complainant to the Respondent in a complaint under the Policy.

3. The grievance letter is dated February 18, 2021, and states as follows:

In accordance with Article F-2 (Grievance and Arbitration Procedures) of the Collective Agreement (CA) for the UPEIFA Bargaining Unit #1, the UPEIFA formally submits this grievance to address the Employer's unauthorized and inappropriate release of personal information in the process of investigating a formal complaint under the *UPEI Fair Treatment Policy* (CA-F6..22).

Under the *UPEI Fair Treatment Policy* (FTP), the Fair Treatment Advocate (FTA) – acting under authority delegated by the Employer – is responsible for conducting investigations of alleged harassment (FTP – 5.1.9). The Employer has retained the services of [RM] to serve as the FTA for all issues arising under the *UPEI Fair Treatment Policy* (CA – F6.22).

It has come to our attention that in several formal fair treatment investigations of alleged harassment, the FTA has inappropriately and without explicit authorization shared the home address of a Complainant with the Respondent to the harassment allegations. A significant contributing factor in this privacy

violation is the Employer's practice of requiring Complainants to provide their home address when completing the UPEI Fair Treatment Complaint form. On February 12th, we notified UPEI Senior Management about these privacy violations.

At this time, we can confirm that at least one of our members as well as a UPEI student have had their privacy compromised. We remain uncertain as to how many other individuals have been negatively impacted by the inappropriate and unauthorized release of their information in the course of a fair treatment investigation.

One of our members – who had her privacy compromised by the FTA – is a Complainant in a harassment case currently under investigation by the FTA. On behalf of our members involved in this case, we formally notified UPEI Senior Management (February 17) that we objected to the participation of the FTA in this investigation and requested that an investigator not affiliated with [his/her firm] be appointed to complete the investigation (FTP – 10.5.4). Unfortunately, UPEI Senior Management denied our request and declined to coordinate this process. As a result, we find it necessary to file a grievance in this matter.

We believe the Employer is in violation of:

- A2.4, A5, A6, F6.22 (UPEI/UPEIFA collective agreement)
- 4.2, 4.4, 5.1.13, 7.1, 8.4, 10.5.4, 12.4.1 – (UPEI Fair Treatment Policy)
- 11a-h – (UPEI Access to Information and Protection of Personal Information and Privacy)
- 36, 37.1.b, 37.1.c, 37.1.z.1, 37.2 – (UPEI Freedom of Information and Protection of Privacy Act)
- Any other relevant sections of our collective agreement, UPEI policies, and PEI FOIPP.

...The Association seeks the following redress in this matter:

1. A ruling that the Employer has violated the above mentioned and any other applicable articles and sections of the UPEI/UPEIFA Collective Agreement, UPEI Fair Treatment Policy, UPEI Access to Information and Protection of Personal Information and Privacy, and PEI Freedom of Information and Protection of Privacy Act.

2. A ruling that the Employer will exclude the Fair Treatment Advocate (FTA) from any investigations in which personal information has been released in violation of any of the aforementioned agreements, policies, or Acts.
3. A ruling that the Employer will arrange for a qualified investigator external to the University and [the FTA's firm] to complete any investigations that are currently in progress and in which personal information has been released in violation of any of the aforementioned agreements, policies, or Acts.
4. A ruling that the Employer will conduct a thorough investigation (to be shared with the Faculty Association) to identify and notify any members of the University community who have been impacted by the Employer's unauthorized and inappropriate release of their personal information.
5. Any other remedies that will provide full redress for Faculty Association members impacted by these violations of the UPEI/UPEIFA Collective Agreement.

4. Documents submitted by the Employer disclose that the Union filed a personal grievance dated March 2, 2021 on behalf of the Respondent in the FTP complaint, concerning the Employer's "failure to appoint an alternate investigator following the Respondent's objection to the involvement of the FTA in the investigation". In the response to that grievance, the Employer appointed an alternative investigator in accordance with the FTP.

5. The Employer also submitted a letter from the FTA dated May 7, 2021, responding to a request from senior administration to review his files from January 1, 2020 to May 7, 2021. He indicated that in that period, there were two formal complaints involving a member of the Association as Complainant. He indicated that he reviewed each of the files, and that

... You are familiar with the circumstances regarding one file, in which personal information (home address and personal contact information) was included on the complaint, and that information was shared with the Respondent.

In the other matter, I confirm that no personal information was included on the complaint document, and no personal information was shared with the Respondent.

6. The March 16, 2021 response to the grievance indicates that

... The grievance is denied for the reasons set out in this letter.

The Faculty Association contends that the personal information (home address) of a Complainant in a Fair Treatment complaint was inappropriately disclosed to the Respondent.

The University acknowledges the inappropriate disclosure of the Complainant's home address.

The Complainant followed the appropriate course of action by making a complaint to the Chief Access to Information and Privacy Officer ("Privacy Officer"). The Privacy Officer acknowledged and apologized for the breach and required that the Fair Treatment complaint form be updated to better address privacy and the disclosure of information. In addition, the Fair Treatment Advocate apologized to the faculty member in question for the disclosure of personal information.

In addition, the University has appointed another external investigator to act as the Fair Treatment Advocate with respect to the complaint in question. The alternate investigator will administer and investigate the complaint in accordance with the Fair Treatment Policy.

In summary, the privacy disclosure was addressed in accordance with the appropriate procedure, the Complainant was granted relief, steps were taken to ensure that a similar circumstance will not occur in future, and the University has appointed an alternate investigator to handle the Fair Treatment complaint. That is the end of the matter, and no further relief is available. This matter is beyond the jurisdiction of the collective agreement and the grievance process. The allegation is inarbitrable, and in addition, offends the principle against multiplicity of proceedings.

The grievance also contains allegations and requested relief in respect of the Fair Treatment Advocate. Those allegations are generally speculative, and consequently, inarbitrable. There is no merit to the allegations about the Fair

Treatment Advocate and no authority for the relief sought with respect to the Fair Treatment Advocate.

It is my determination that the University has not violated the faculty collective agreement.

7. The Union also seeks production of the following information from the Employer:

1. A copy of all complaint forms provided to complainants under UPEI's Fair Treatment Policy, including all correspondence sent from the Fair Treatment Advocate to complainants regarding the complaint form, with identifying information redacted, from September 2015 to present;
2. A copy of all completed complaint forms sent to respondents under the Fair Treatment Policy with identifying information redacted but showing whether the complainant's address or any other personal information protected by legislation, UPEI privacy policy, or the UPEI and UPEIFA Collective Agreement was provided to the respondent, from September 2015 to present.

Submissions

8. Counsel for the Employer, while acknowledging that the Complainant's personal information was inappropriately provided to the Respondent in the course of investigating her Fair Treatment complaint, argues that the member did not grieve this disclosure. Rather, she filed a complaint with the University's Privacy Officer, which complaint was resolved. While the FTP is incorporated by reference into the collective agreement by article F6.22, the Union improperly filed this policy grievance on February 18 in response to the Privacy complaint.

9. The Respondent to the original complaint then filed a grievance on March 2, 2021 to address the Employer's failure to appoint an alternate FTA, and this grievance was "abandoned" by the Union, on the Employer indicating that it had in fact engaged an alternate FTA to pursue the complaint. The Employer and the FTA have both

apologized for the inappropriate disclosure; it has amended the Fair Treatment Complaint form, and appointed an alternate FTA. In its view, the matter has been resolved in its entirety.

10. Further, Section 11.4.1 of the FTP gives the right to appeal under the policy to “any Complainant or Respondent”, which terms are defined in Section 13.2 and 13.11 respectively. The definitions do not include the Association. If there are any remaining issues to resolve, they must be addressed through the Privacy Officer, rather than by way of a policy grievance.

11. The Employer argues that the grievance contains no facts or specific allegations that could reasonably establish a breach of the collective agreement. The only specific allegations in the grievance relate to the disclosure of the Complainant’s personal information, which has been resolved in the Privacy complaint. No other members have come forward to complain of an alleged breach. The grievance is a “fishing expedition” designed to unearth other potential breaches which may have occurred previously. The Union has provided no factual or evidentiary basis on which an arbitrator could reasonably allow the grievance: *Re IBEW Local 424 and Devonian Electrical Services Ltd.* 1971 CarswellAlta 151 (Lucas), *Re Domtar Inc. and USWA Local 2693* 2006 CarswellOnt 10353 (Surdykowski). Without further specifics from the Union as to the nature of the grievance, the Employer cannot reasonably respond to the allegations of any breach.

12. The Employer argues as well that the grievance does not comply with the timelines of the collective agreement. The Privacy complaint was filed on January 17, 2020, while the grievance was not filed until February 18, 2021, clearly outside the required timelines.

13. Counsel for the Union noted that the privacy breach resulted from the complaint form used by the FTA and the apparent practice of disclosing the form, unredacted, to Respondents. The nature of the breach was such that it gave rise to a reasonable inference that this was likely not the first time a Complainant's personal information was disclosed to a Respondent.

14. She argued that the collective agreement includes provisions to protect members' privacy rights with respect to their personal information (Article H-7). Further, the FTP is incorporated into the collective agreement, in Article F6.22, and decisions and processes followed under the FTP are subject to the grievance procedure (Article F6.24). The Employer must exercise its managements rights (Article A2.4) in accordance with employment-related provincial legislation: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, para. 49, citing *Re Parry Sound (District) Social Services Administration Board and OPSEU Local 324*, 2003 SCC 42. The University is subject to the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c, F-15.01, which restricts the use and disclosure of personal information.

15. Counsel for the Union also noted that the *Labour Act* RSPEI 1988, c L-1 requires all collective agreements to have a provision for the final and binding settlement of disputes by arbitration (s. 37).

16. In the view of the Union, the grievance is about the Employer's inappropriate actions under a policy which is incorporated into the collective agreement. This is a dispute arising, in its "essential character, from the interpretation, application, or alleged violation of the collective agreement": see *Horrocks (supra)*, and therefore falls within the exclusive jurisdiction of the Arbitration Board.

17. The Employer's reply did not address arbitrability. On the disclosure issue, it argued that it is prevented from disclosing identifying documentation unless it is necessary for the purpose of investigating the complaint under the *Occupational Health and Safety Act* and the *Freedom of Information and Protection of Privacy Act*. Even if the information were redacted, it would not comply with the legislation (Section 15). Disclosure is only permitted when all parties to a complaint have provided consent (S. 15 (2)).

18. In its reply, the Union argued that the FTA does not limit its right to access the grievance process. The fact that the member filed a privacy complaint does not limit the Association's right to grieve the Employer's actions under the FTA. The fact that another member – the Respondent in the complaint under the FTP – filed a grievance which was resolved is not relevant to the Association's right to file a policy grievance. Further,

the grievance provides sufficient information for the Employer to understand the allegations.

19. Counsel for the Association gave information on the timeliness of the grievance. This satisfies the Arbitration Board that it was, in fact, filed in a timely way.

20. The Association addressed the confidentiality issue in its request for production. The provisions of the FTP contemplate that records may be subject to the powers of legal authorities such as arbitration boards.

Analysis and Conclusion

21. The parties agree that the FTP is incorporated into the collective agreement. However, the Employer has argued that the grievance is not arbitrable for a number of reasons. One is that it is not sufficiently specific to allow the Employer to adequately respond to allegations of breach. It is not generally the practice that grievances are written in precise language, though policy grievances are often more specific; in the University environment, certainly, grievances tend to contain more detail than in some other workplaces.

22. It is true that this grievance does not contain specific allegations. However, it is also clear that it relates to the fact that the FTA disclosed personal information of a complainant under the Policy. That is admitted. The grievance notes that the

Association was aware that “several” investigations may have involved inappropriate sharing of personal information, and the proposed Production Order confirms that the Association is seeking detail on whether this may have happened before. This is information that only the FTA would have. The scope of policy grievances is by definition broader than a member grievance.

23. The fact that the member herself did not grieve the privacy breach does not limit the right of the Association to do so on behalf of members as a whole. Nor, in our view, does the fact that another member who filed an individual grievance arising from the same complaint under the FTP, and was satisfied with the resolve, limit the Association’s right to file a policy grievance.

24. We are not convinced by the Employer’s argument that the fact that the FTP defines “complainant” and “respondent” in a way that does not include the Faculty Association, limits the Association’s right to file a policy grievance, for the same reason. This grievance does not quarrel with any findings the FTA may have made in the course of that or other complaints, but rather the manner in which confidential information was handled.

25. The fact that no other members have come forward to the Association with similar complaints is not particularly surprising, because of the personal nature of the incidents, and also because other members may not be aware whether confidential information was disclosed or not.

26. The Board finds that the grievance is sufficiently specific to indicate the matters in dispute, as is the requested remedy, and contains enough detail to allow the Employer to make its case at arbitration. The detailed response to the grievance reveals no lack of clarity regarding the nature of the grievance. The Arbitration Board has concluded that the Association is entitled to file a policy grievance in this situation, and rules that the grievance is arbitrable.

27. We find that the documents sought by the Association are relevant or arguably relevant to the subject matter of the grievance. Having said that, we are concerned with the reach of the information being sought, that is, going back to September 2015. After receiving the submissions of counsel, the Board specifically asked counsel for the Association whether there was a particular rationale for the 2015 date, and we were told that there was not. However, in our view, a time frame of three years prior to the filing of the grievance would be a more reasonable lens by which to analyse if there have been other privacy breaches.

28. The Board is satisfied that such information, if any, can be appropriately redacted and that it can be provided in a way that does not raise privacy concerns. We note as well section 3 (d) of the *Freedom of Information and the Protection of Privacy Act* regarding production of documents.

For these reasons, we find the grievance to be arbitrable, and approve the Order for Production, subject to the change noted above.

Dated this 22nd day of February, 2022



Susan M. Ashley, Chair
On behalf of the Arbitration Board