

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SIMON FRASER UNIVERSITY

(the "University")

AND:

SIMON FRASER UNIVERSITY FACULTY ASSOCIATION

(the "Faculty Association")

CONCERNING:

John-Henry Harter – Continuing Appointment Grievance

ARBITRATOR:

Karen F. Nordlinger, Q.C.

FOR THE UNIVERSITY:

Patrick Gilligan-Hackett

FOR THE FACULTY ASSOCIATION:

Stephanie Mayor and
Kas Pavanantharajah

FOR THE APPLICANT ON
INTERESTED PARTY APPLICATION:

Donovan Plomp

DATE OF HEARING:

April 21, 2022

PLACE OF HEARING:

Vancouver, BC
Via Zoom Conference

DATE OF DECISION:

APRIL 22, 2022

DECISION ON INTERESTED PARTY STATUS AND ADJOURNMENT APPLICATIONS

For the reasons set out below the applications for adjournment and interested party status are denied.

1. This Grievance was filed January 22, 2021 and the arbitration was initially set to be heard in February 2022. It was adjourned by agreement on the basis that an early date be found. It was set to proceed on April 19 for 7 days. Counsel for the parties requested a delay of 2 days to engage in settlement discussions. Those discussions did not result in settlement and the matter was to commence April 21, 2022. During the weekend prior to April 21, applications were filed by the University for an adjournment of the hearing and by Dr. Pulkingham, the former Dean of the Faculty of Arts and Social Sciences (FASS), for interested party status, alternatively, observer status with leave to apply for interested party status if the evidence revealed a reason to do so. Dr. Pulkingham also applied for an adjournment of the hearing in order that her counsel could prepare for the hearing. Most of the day of April 21 was taken up with submissions relating to these applications. Both parties and counsel for Dr. Pulkingham provided substantive and thoughtful submissions which, in the interest of time, I am not going to deal with at length. I will deal with both applications in this decision.

Application for Interested Party Status

2. Counsel for the former Dean submits that the grievance and particulars filed by SFUFA contain allegations of breach of trust and fair dealing which, if proved, would be damaging to her reputation. The grievance and particulars allege that the University breached provisions of the Collective Agreement including the preamble, Articles 35.41, 35.42, 35.53, 51.1 and all other related provisions. The FASS particulars state that "The university arbitrarily unjustifiably, and contrary to the arbitral principles of trust and fair dealing, denied a conversion of Dr. Harter's term appointment under Article 35.23. Over the course of several years, the University has provided shifting, conflicting and unsupported excuses to avoid converting Dr. Harter's appointment...".

3. They further state the Dean's office has "improperly interfered, on a repeated basis, in the governance of the Program and the History Department, by overriding their requests and recommendations for the appointment of Dr. Harter".

4. Counsel for Dr. Pulkingham points out that the office of the Dean is also referred to in many parts of the grievance which also, it is submitted, if proved would reflect badly, on Dr. Pulkingham. Counsel for Dr. Pulkingham refers to the following comments from the grievance, as evidence of serious, personal allegations against Dr Pulkingham:

- a) "The FASS Dean's office has thwarted the Department's efforts at each turn to obtain a continuing appointment for the Grievor;
- b) The Dean's office has been interfering with the collegial governance of the Labour Studies Program to the extent that it has made adherence to the Code of Faculty Ethics and Responsibilities...impossible for its continuing faculty members;
- c) ...the Dean's office has been actively and deliberately placing ever-changing barriers in its path, effectively undermining the collegial governance of the unit."

5. Dr. Pulkingham refers to the following cases: *Andromeda Productions Ltd. v. I.A.T.S.E.* (2001) 94 LAC (4th) 405, *C.U.P.E., Local 101 v. London (City)*, 131 L.A.C. (4th) 56, *Surrey School District 36 v. Surrey Teachers Assn.* (1998), 74 L.A.C. (4th) 129.

6. It is asserted that the allegations made in the Grievance and particulars of SFUFA are serious allegations against Dr. Pulkingham who has enjoyed a lengthy and distinguished career at the University. She thus has a significant personal interest in the arbitration and, in fairness, must be represented to protect her reputation. Counsel has only been recently retained and submits he requires an adjournment to adequately prepare.

7. The SFUFA responds that Dr. Pulkingham has been aware of the allegations in this matter for some time and has only latterly sought to become involved in the arbitration. It submits that this application is simply a delaying tactic on the part of the University. It points out that the allegations are against the Dean's office and not specifically against the Dean. It asserts that many employees in that office were involved in the conduct alleged. The SFUFA submits further that Dr. Pulkingham's interest does not fall within the exception to the general well recognized rule that only the parties to a Collective Agreement may participate in arbitral proceedings. It relies on *Hoogendorn v. Greening Metal Products & Screening Equipment Co.* 1968 SCR 30 and *Bradley et al v. Corporation of the City of Ottawa* 1967 63 D.L.R. (2d) 376 for the principle that as a matter of natural justice, employees who would be displaced or would lose their jobs as a result of an arbitral decision may be granted interested party status. Dr. Pulkingham is not a member of the bargaining unit and there is no danger to her in losing her job. It is submitted that she has a higher onus given her remoteness in position. The SFUFA distinguishes the University's cases on the basis that they relate to sexual harassment and discrimination allegations against the employee found to have interested party status. Such allegations have an elevated importance considering the underpinning policies and legislation and thus have a more detrimental effect on the reputation of the employee.

Decision

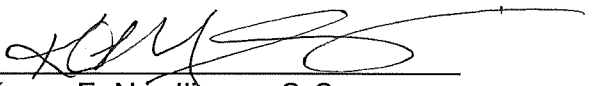
8. In this case Dr Pulkingham has applied late in the process to become involved in this arbitration. To allow her to do so would prejudice the Grievor by further delay. It appears the delay would be several months, given everyone's schedules. I am not persuaded that Dr. Pulkingham meets the test to obtain interested party status, as she has no direct interest in the matter. I refer to the criteria for status as set out in paragraph 10 of *City of London*. Sub-paragraph 3 refers to "a threat to a significant personal attribute, such as reputation or privacy" as forming a basis for such status, but here, that threat is vague. It does not rise to the level of a sexual harassment or discrimination allegation that could do significant damage to a person. Any witness faces a threat to their reputation, depending on what happens in the case. I also find

that her interests are not divergent from those of the University and that Counsel for the University, who is experienced labour counsel, will be able to assert her position in the events leading to the grievance, as part of the University's case.

9. I agree with the SFUFA submission that to allow Dr. Pulkingham to sit as an observer is problematic, given that she is a likely witness and the SFUFA has raised the possibility of an application for exclusion of witnesses. The application is denied.

University's Application for Adjournment

10. This application arises from an email sent late in the day by the SFUFA asserting recent knowledge of a change in University's practice to require a home Department for LTLs. It refers specifically to the Grievor, although the University takes the position that it amounts to an expansion of the Grievance. As it is likely that this matter will extend beyond the days set for it next week, I believe the parties can, in the adjourned time, sort out what is needed, if anything, by the University to deal with the SFUFA's position. I do not see the email as an expansion of the grievance at this point and I have already said an expansion will not be permitted. However, if things develop that require further clarification, you have liberty to apply. As such, I do not grant an adjournment on this application.



Karen F. Nordlinger, Q.C.
Arbitrator