Report of the Grievance Review Panel

(In the matter of an arbitrability objection)

Before:	William Kaplan Chair, GRP
Appearances	
For the University:	John Brooks Hicks Morley Barristers & Solicitors
For UTFA:	Emma Phillips / Mary-Elizabeth Dill Goldblatt Partners Barristers & Solicitors

A hearing in this matter took place on October 3, 2019.

Introduction

On June 4, 2019, the University of Toronto Faculty Association (hereafter "the Association") filed an Association Grievance:

Specifically, UTFA grieves that there exists a systemic, persistent, pervasive and significant gender pay gap at the University of Toronto, as well as a pay gap on the basis of other equity grounds such as racialization, creed, Indigenous identity, gender expression, gender identity, ability and/or sexual orientation. This discrimination in compensation affects faculty and librarians who identify as female and as non-male (hereinafter "female members"), and who identify as members of other equity-seeking communities. The affected groups include full-time and part-time faculty and librarians, including those who are in the tenure stream and teaching stream, as well as those with Contract Limited Term Appointments (CLTAs).

In brief, the Association claims that the University of Toronto's compensation practices contravene the Memorandum of Agreement between the University of Toronto (hereafter "the University") and the Association, the University's Employment Equity Policy, the *Human Rights Code* and the *Employment Standards Act.*

The background to this case is well-known and described in detail in the briefs and submissions of the parties. Suffice it to say, the Association is seeking extensive remedies for its complaint. At issue in this proceeding is a preliminary arbitrability objection brought by the University. By agreement of the parties, and without prejudice to any position either may take in any future proceeding, I am hearing this objection sitting alone in my capacity as Chair of the Grievance Review Panel (hereafter "GRP").

University Objection

In the University's submission, the GRP lacked the jurisdiction to hear and decide the grievance because it did not meet the requirements for an Association grievance under the Memorandum of Agreement and, moreover, was untimely.

It was settled law, in the University's submission, that the parties to an agreement can voluntarily negotiate limits on arbitrability. The University and the Association had, the University argued, done just that. Article 7 of the Memorandum of Agreement was dispositive. It provided for individual and group grievances (hereafter "Grievances") and Association Grievances (hereafter "Association Grievances").

Article 7: Grievance Procedure

A grievance is any complaint by a faculty member or librarian or two or more faculty members or librarians arising from the interpretation or application or alleged violation of an established or recognized policy, practice, or procedure of the University of Toronto, referred to or stipulated in this Agreement or otherwise, other than a complaint by the Association about breach of any of the undertakings or provisions of this Agreement that directly relate to the Association as such…

…

Group Grievance

A Group grievance, which is a grievance as defined above which is commenced by two or more faculty members or librarians…

…

Association Grievance

An Association grievance is any complaint by the Association that any of the undertakings or provisions in this Agreement that directly relate to the Association as such have been breached….

The University noted that the parties provided different procedures for Grievances and Association Grievances reflecting the fact that they had separate and distinct scopes. Association Grievances did not cover the same broad range of disputes that might properly form part of Grievances. Simply put, unless the Association Grievance related to the undertakings or provisions of the Memorandum of Agreement that "directly relate to the Association as such," it could not be pursued before the GRP. In the University's submission, that was exactly this case. Individual or Group Grievances could proceed, but an Association Grievance could not.

The University candidly acknowledged that this was not the first time that this kind of preliminary arbitrability objection has been brought before the GRP. In *Healy* (March 25, 2002), the GRP dismissed the objection but it did so, in the University's submission, without a full – and in some places highly questionable – analysis of the provisions in question, not to mention improper reliance on two earlier awards, a reliance that did not withstand analytical scrutiny . In the result, the earlier GRP improperly interpreted the applicable provisions and incorrectly dismissed the preliminary arbitrability objection. Also noteworthy about *Healy*, compared to this case, was that *Healy* allegedly involved academic freedom. In this case, the Association was seeking remedies that were personal to individuals: individuals (and groups) who had full access to the grievance procedure to seek redress for any wrongs. *Healy* was not, therefore, a decision that could, or should, be followed. And further supporting the University's objection was the fact that this grievance was untimely. This provided an independent reason, the University argued, for the preliminary arbitrability objection to be upheld.

Association Submissions

In the Association's view, the University's preliminary arbitrability objection was completely without merit. The Association asked that it be dismissed.

There was no question, in the Association's submission, that the grievance raised matters that "directly relate to the Association as such." The Association was alleging that there was a persistent and pervasive pattern of discrimination in compensation at the University. Over one thousand Association members who identify as female, along with hundreds of other members of equity seeking groups, were potentially impacted. The grievance alleged a violation of Article 9 of the Memorandum of Agreement that prohibited discrimination. It alleged a violation of the University's Employment Equity Policy, not to mention two statutes: the *Human Rights Code* and the *Employment Standards* Act. There was no question, in the circumstances, that these allegations concerned violations that "directly relate to the Association as such" as set out in Article 7.

The allegations did not turn on the facts or circumstances of individuals *per se*, but concerned persistent and systemic violations, most especially of Article 9 and the *Human Rights Code.* Article 9 incorporated the quasi-constitutional obligations of the *Human Rights Code*, enjoyed exceptional status within the Memorandum of Agreement, and conferred upon the Association both the right and the responsibility to ensure a discrimination-free workplace. The fact that the Association negotiated compensation for its members made it even more manifest that a

complaint about discrimination in compensation came directly within the purview of an Association Grievance.

Elaborating on that submission, Association counsel pointed out that the grievance was not one that could be meaningfully pursued by individuals or groups. The reason for that, Association counsel explained, was that this was a systemic grievance. The discrimination being complained about was not specifically individual but the result of historical practices, policies and procedures, not to mention many other factors too numerous to list, all of which must be considered in the aggregate and over time.

In addition, the GRP's decision in *Healy* was dispositive and should be followed unless it was clearly wrong, a position that the Association categorically rejected. Moreover, while the *Healy* decision may not be legally binding, it had effectively governed relations between the parties since 2002. The University's interpretation of *Healy* was narrow and technical. The scope of policy grievances was only limited where the parties chose language that illustrated that they were doing so deliberately and explicitly – not this case as the authorities on point amply illustrated. What mattered was adjudication on the merits, and that could only occur in the context of an Association Grievance.

At the very least, the University was, for reasons Association counsel explained, estopped from raising this objection in any event. No application for judicial review of *Healy* was filed. It was noteworthy that in the seventeen years since *Healy* was decided the University advanced no

proposals to "clarify" the language of Article 7 to make clear the interpretation upon which it now relied. And the University's current position was at complete odds with the long-established practice of the parties to discuss Association Grievances, in draft or otherwise, and about a wide variety of matters. The parties did so because of their shared commitment to collegially resolve disputes – a longstanding practice unhindered by preliminary objections on arbitrability as raised here. The extent and retroactivity of any remedy was something the GRP could turn its attention to at some future point. Insofar as the timeliness objection was concerned, there were no time lines for the initial filing of an Association Grievance. The grievance was a continuing one and, in any event, was a timely one: Dated June 4, 2019, it came soon after the April 26, 2019 recommendation of the Provostial Review of a 1.3% salary increase for tenured female professors; a recommendation that was implemented on July 1, 2019. For all of these reasons and others, the Association asked that the preliminary objection on arbitrability be dismissed.

Decision

Having carefully considered the submissions and authorities, I am of the view that the University's preliminary arbitrability objection should be dismissed.

It is true enough – as argued by the University – that no panel of the GRP is bound by previous GRP decisions. There is no *stare decisis*. It is also correct, however, that earlier decisions are to be given appropriate consideration, especially where the same issue is in dispute. Such a case, of course, is *Healy* (March 25, 2002). The University asserts both that that decision is not

binding, and that it is incorrectly decided. The Association disagrees: whether binding or not, it is correct and should be followed.

In *Healy,* the University asked the GRP to dismiss an Association Grievance filed on behalf of a professor (who was seeking redress in the civil courts). The University argued there, as here, that the Memorandum of Agreement limited Association Grievances to matters that touched on the interests and rights of the Association itself as distinct from the interests and rights of the individuals whom the Association represents. A corollary of this submission was that the what gave rise to an individual grievance could not give rise to an Association Grievance.

Following a thorough review, this earlier GRP concluded that the parties intended that individuals be prohibited from pursuing issues relating to the Association's' interests, but that the Association was not prohibited from pursuing Association Grievances relating to individuals or groups. Put another way, that "the definition of Association grievance does not expressly exclude the subject matter of individual or group grievances" (at 2). I agree with this result. Indeed, even absent the *Healy* decision, this is an appropriate Association Grievance to come before the GRP. In my view, there is nothing in the Memorandum of Agreement that would lead to the conclusion that the Association is prohibited from pursuing this Association Grievance.

For an Association Grievance to be limited in the manner proposed by the University, clear and explicit language is required. It is absent here. Even more important, the fact is that the matters

being grieved "directly relate to the Association as such." To describe them as fundamental to the Association would not be an overstatement. They concern a possible violation of the no-discrimination provision of the Memorandum of Agreement, the Pay Equity Policy, and statute, most especially the *Human Rights Code*.

Article 9 of the Memorandum of Agreement states: "The parties agree that there shall be no discrimination…practised toward any faculty member or librarian with respect to salaries…by reason of age, race, creed, colour, disability, national origin, citizenship, religious or political affiliation or belief, sex, sexual orientation, gender identity, gender expression, marital status or family status, place of residence…as well as any other ground included in or added to the *Ontario Human Rights Code*." These obligations are quasi-constitutional. They directly engage the Association. Assertions of breach "directly relate to the Association as such."

The Association has an incontrovertible interest in ensuring that University compensation, which it negotiates, is equitable and non-discriminatory. It is legally and factually material that the claim here is not individual (or group) but systemic. This is another reason why it is best addressed in an Association Grievance. Taking the Association Grievance at its highest, the rights and interest of 43% of UTFA members who identify as female or non-male, and 17% of UTFA members who identify as members of equity-seeking groups, are engaged. It is hard to imagine the Association not having a direct interest in this dispute. Simply put, in the University context, comparing isolated individuals (who had filed grievances) in a compensation

discrimination case would be unproductive. While not infinite, the variables would make the exercise unwieldly and quite possibly impossible.

It is probably fair to say that Grievances, if they were to be filed, would not ultimately prove enlightening about whether the allegations have substance. What needs to be examined is aggregate salary data, as the University itself did when it carried out its Provostial Review (which in turn, as noted above, led to a 1.3% increase for female tenure stream faculty members). In these circumstances, one would be hard pressed to find that the allegations at issue could be successfully engaged in Grievances. Efficiency and due process would not be advanced. Further informing this decision is section 2 of the Interim Rules of the GRP which provides: "The objective of the Panel is to decide grievances fairly, according to the terms and spirit of the Memorandum of Agreement."

Conclusion

As was the case in *Healy*, I can only conclude that the Association, on behalf of its members, has a direct interest in pursuing this Association Grievance, whatever the outcome, and that it is arbitrable. Association interests are engaged. Accordingly, the Association Grievance is an appropriate one and the University's preliminary objection on arbitrability is dismissed. Timeliness, for obvious reasons, is important. Article 7 evidences a shared intention of the parties that *all* grievances be promptly advanced and processed. This grievance is timely. However, the temporal scope of the grievance, and disputes about retroactivity, just like remedy, if any, are questions for the future, not today.

Various case management matters remain to be addressed, including an Association disclosure request. As agreed by the parties, that request will proceed on November 12, 2019.

I certify this to be the decision of the GRP.

"William Kaplan"

William Kaplan, Chair, GRP

October 30, 2019