

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The University of Ottawa,

Employer,

- and -

The Association of Professors of the University of Ottawa,

Union

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Union:

Sean McGee, Counsel
Jennifer Dekker, President
Brianne Carlson, Grievance Officer
François Rocher, Liaison Officer

For the Employer:

David M. Bolger, Legal Counsel
Jules Carrière, Associate Vice-President, Academic Affairs
Michel Laurier, Vice-President, Academic and Provost
Aline Germain-Rutherford, Associate Vice-President, Teaching and Learning
Support

Heard in Ottawa, Ontario, on May 11, and July 4 & 5, 2017.

ARBITRAL AWARD

I

In its grievance, dated January 31, 2017, the union challenges the material the employer intends to use in reaching decisions and recommendations relating to professors' careers. Specifically, it claims that, since it has not consented to the use of data and analyses obtained pursuant to certain recent changes to the system of student evaluations, the employer is prohibited by the collective agreement from using them.

Although five witnesses testified at the hearing, there was very little, if any, conflict in their evidence and, in my view, nothing turns on the marginal differences revealed. It is therefore not necessary to provide a detailed account of the evidence received.

II

"Student evaluations" are the evaluations made by students, through their responses to questionnaires, of the quality of the courses in which they are enrolled, as well as of the quality of the teaching in those courses. These evaluations, which are provided for in detail in the collective agreement, date back to the 1970's. The results of student evaluations constitute one of the elements identified in the agreement for reaching decisions or recommendations on different aspects of professors' careers, including promotion, tenure, and formal course evaluations.

Before the contested changes, students completed written questionnaires, for every course in which they were enrolled, during the last 20 minutes of a designated class, after the professor had withdrawn from the class. The questions were “multiple choice”. The completed paper questionnaires were collected by a student from the class, who was made responsible for handing them to an administrator in the faculty (or department). From there, they were sent to a university administrator, who arranged for them to be scanned by an optical reader and for the results to be analyzed and tabulated within the university. Once a professor had reported the grades in his or her course, results showing students’ evaluations of the quality of the course and the quality of the teaching were shared with the professor and were available to be used as an element in appraising the professor’s professional contribution to the university. The forms completed by the students were physically stored by the employer on site.

Under the amended system, students receive an e-mail invitation to participate online in the process of student evaluations. They are given personalized login information to enable them to fill out the questionnaires online. The questions asked of students about the quality of the course and the quality of the teaching are identical to those used under the old system. The students have a two-week period in which to complete their evaluations. Professors are asked to allow students 20 minutes during one of their classes to complete the questionnaires by laptop computer, tablet or smartphone, but it is up to each professor to decide if he or she will comply with this request since the questionnaire can be filled out at any time during the two-week window. The completed questionnaires are transmitted electronically by the students to an outside contractor, eXplorance, which analyzes and tabulates the results for each course. The tabulation of the results, bearing the university’s logo and containing no reference to the contractor, is similar, but not identical, to the format used under the old system. The contractor has been given access, through an interface, to the employer’s student information platform, which enables it, among other things,

to know which students are enrolled in each course. The contractor, headquartered in Montreal, provides the same service to numerous other universities and colleges in Canada, the United States and overseas.

The evidence indicated that what prompted the employer to change the system for student evaluations was the launching of a new student information platform, which did not support the optical readers previously used to scan the paper questionnaires. In addition, it appears that professors and students had already expressed interest in moving to an online system. Several universities in Canada had made the switch and others were discussing it. Academic papers had been published on various aspects of online course evaluations, particularly on the effect on response rates, which had generally been lower following the switch, and on differences in results between the two methods. Online evaluations had been described as more accessible to the student body as a whole, particularly for students with special needs and students who happened to be absent from class on the designated day. They had also been described as more environmentally friendly, since they eliminated the need for large volumes of paper. In addition, substantial cost savings could be realized with the elimination of the task of managing the paper-based questionnaires.

The employer decided to run a pilot project on the use of online student evaluations. The pilot project, conducted between November 2013 and April 2014, revealed that while response rates were lower for the online evaluations than for the paper-based ones, the average scores remained the same, all of which was consistent with the published research. The professors and students who participated in the pilot project gave generally positive reviews of the experience.

In March 2015, the Senate, which is responsible for setting the employer's educational policies, decided to approve the use of online student evaluations in place of the traditional system.

The pertinent provisions of the collective agreement are these:

Section 24.3 Student evaluations

24.3.1 General The parties agree that the evaluation of courses and teaching by means of student responses to questionnaires is an important source of information regarding student opinions and degree of satisfaction, and regarding a Member's preparation for class and effectiveness in conveying the subject matter. Therefore the parties agree that:

(a) the Employer shall continue to operate, for such evaluations, the system put in place by the Senate in 1978, as amended from time to time;

(b) information derived from that system, in the form of so-called *A reports*, shall be used -- subject to the provisions of this article -- in relation to the annual review, pursuant to 23.2.2.2, and in the formal evaluation of a Member's teaching.

...

24.3.3 Changes to the system of student evaluations

24.3.3.1 Subject to 24.3.3.2 and 24.3.3.3, the Senate may modify various aspects of the system of evaluation of courses by means of student questionnaires, such as the questionnaire itself, procedures, data-reporting and analysis procedures and forms, dissemination of data and analyses, and types of classes or other pedagogic activity subjected to such evaluation.

24.3.3.2 Changes in the system of student evaluation of courses and teaching introduced by the Senate are subject to the following.

(a) The Association shall be consulted at least three (3) months before the proposed changes are submitted to the Senate for approval. The Association's written response, if any, shall be made available to members of the Senate prior to their deliberations in this regard.

(b) Data and analyses obtained pursuant to changes approved by the Senate on an experimental basis shall not be used by the Employer for career recommendations or decisions under this agreement. Such data shall not be published and shall be available only to the Members concerned, and to the Senate, its committees or its duly appointed agents.

(c) Data and analyses obtained pursuant to changes approved by the Senate on a permanent basis shall not be used by the Employer for career recommendations or decisions under this agreement without the prior consent of the Association, it being understood that the situation prevailing before the Senate approval of changes shall continue to apply until the granting of such consent.

IV

There were several communications between the employer and the union concerning the move to online student evaluations, which it would be useful to summarize.

On December 16, 2014, the employer had written to the union to inform it of its intention to seek Senate approval of the proposed introduction of a system of online student evaluations, and had asked for the union's opinion on its proposals, adding that representatives of the employer were available to make a presentation and answer questions about the changes. The employer's letter referred to Article 24.3.3.2 of the agreement.

The union did not reply to the employer's letter, but the matter was reviewed several times at the union's Executive Committee, which also met on one occasion during that winter with the employer's Associate Vice-President, Teaching and Learning Support, to discuss the subject. The union also included a summary of its reservations about the employer's proposals in its Bulletin to its members in May 2015, which was posted on its website but not formally sent to the employer.

On April 23, 2015, after the Senate had approved the changes, the employer again wrote to the union, this time seeking its consent to the use, for the purpose of career recommendations or decisions, of data and analyses obtained pursuant to the changes. The employer's letter referred to Article 24.3.3.2 (c) of the collective agreement.

To this letter from the employer, the union replied by e-mail on May 25, 2015. It informed the employer that its Executive Committee had unanimously adopted a motion to refuse its consent to the changes. The motion had added that the issue should be discussed at the forthcoming round of bargaining.

A year later, on June 7, 2016, the employer wrote to the union to point out that, contrary to what the union had suggested in the motion adopted by its Executive Committee, no discussion of the proposed changes to the system of student evaluations had been held during the recently concluded collective bargaining. The employer renewed its request for the union's consent for the data and analyses obtained pursuant to the changes to be used to reach decisions or recommendations dealing with professors' careers, in accordance with Article 24.3.3.2 (c).

On June 16, 2016, the union replied that, while it had been ready and willing to discuss the matter at the bargaining table, the employer had failed to make any proposals on the subject or even to raise the subject for discussion. The union reiterated its view that the question should be dealt with in bargaining and expressed the hope that it would be resolved at the next round of bargaining, due to take place in 2018.

On January 4, 2017, the employer sent the union an advance copy of an e-mail intended for all professors, in which it announced the launch of the new online student evaluation system.

In a letter dated January 11, 2017, the union reminded the employer that it had not provided its consent under Article 24.3.3.2 (c), and stated that it reserved the right to challenge the employer's plans by means of a grievance.

On January 18, 2017, the employer wrote to the union to confirm that it would be using the results obtained from the new platform for career recommendations and decisions. It explained that it did not believe that the switch to online evaluations was a change of the kind envisaged in Article 24.3.3, with the result that union consent was not required. Its previous requests for the union's consent had been made as a courtesy, it stated.

On January 31, 2017, the union presented this grievance.

On February 2, 2017, the union wrote to the employer to seek some information about the online course evaluation system, specifically having to do with security and confidentiality. The employer replied to the union's questions on February 13, adding that it was ready to provide any additional information the union needed.

In her testimony, Ms. Jennifer Dekker, the union president, summarized the union's concerns with the changes as follows:

- the pilot project had been problematical, with the university failing to heed any of the union's suggestions;
- anonymous online evaluations would allow students who had failed to attend class to complete questionnaires;
- online evaluations had lower response rates than paper evaluations;
- the security of the system was suspect;
- students would be able to change a partially completed online evaluation;

- it was complicated to evaluate adequately a course taught by more than one professor under the online system;
- the experience at other universities had been mixed; and
- the confidentiality of data under the online system was suspect.

Apart from the discussion with the employer's Associate Vice-President, Teaching and Learning Support, at the meeting during the winter of 2014-15, there was no evidence that the union's concerns had been communicated to the employer before the grievance was filed.

V

Mr. McGee, union counsel, argued that, while the employer was not precluded from making the changes it wanted to the system of student evaluations, Article 24.3.3.2 (c) expressly prohibited the use, in relation to career recommendations and decisions, of changes to the system of student evaluations unless the union gave its prior consent. There could be no doubt that the Senate had approved changes to the system of student evaluations to which the union had not consented. Article 24.3.3.1 described the type of changes that would trigger a requirement for the union's consent, and the change from a paper-based questionnaire to an online questionnaire had to be understood as included in this listing.

Mr. McGee maintained that the union's reasons for refusing its consent were irrelevant. The union was entitled to withhold its consent for any reason it chose, even if it acted unreasonably. The union had a veto power over a wide range of changes to the system of student evaluations, according to

counsel. Since the parties had provided, in numerous other provisions of the collective agreement, that consent could not be withheld unreasonably, their failure so to specify in Article 24.3.3.2 (c) served to underline that they wished to place no fetter on the union's power to refuse its consent to the use of data and analyses obtained pursuant to changes in the system of student evaluations. Counsel referred to Canadian Postmasters and Assistants Association v. Canada Post Corporation (unreported award of arbitrator Oakley, dated January 14, 2015).

Mr. Bolger, employer counsel, maintained the position stated by the employer in its letter of January 18, 2017, namely that the switch to online evaluations was not a change of the kind envisaged in Article 24.3.3, with the result that the union's consent was not required, under Article 24.3.3.2 (c), for the employer to use the results of the evaluations in making career recommendations or decisions.

Counsel observed that the employer had reached out to the union to seek its input and its consent on several occasions, but the union had failed to explain why it was opposed to the electronic evaluations. After the union had stated on May 25, 2015, that it felt that collective bargaining was the appropriate setting to discuss the employer's, proposed changes, it failed to raise the issue at the bargaining table.

According to Mr. Bolger, there had been no changes to the "data and analyses" resulting from the evaluations, within the meaning of Article 24.3.3.2 (c) of the collective agreement, and therefore no requirement for the union's consent.

Mr. Bolger added that, if the employer were held to be wrong on this question, the employer would be unable to move forward with professors' applications for tenure and promotion since the

results of student evaluations were a necessary element, under the collective agreement, in decisions on these matters.

VI

There is no claim by the union that the employer failed to comply with Article 24.3.3.2 (a), having to do with consultation on proposed changes before their submission to the Senate for approval. The employer, it will be recalled, offered to consult with the union, and the employer's Associate Vice-President, Teaching and Learning Support engaged in discussion with the union during the winter of 2014-15. The union expressed no interest in pursuing the discussions.

There is also no claim that the employer violated Article 24.3.3.2 (b), which relates to changes approved "on an experimental basis".

The issue in dispute arises from Article 24.3.3.2 (c): is the employer at liberty to use data and analyses obtained pursuant to the modified system in the absence of the union's prior consent to such use?

The essential role of the grievance arbitrator was described in Re Massey-Harris Co. Ltd. and United Auto Workers, Local 458 (1953), 4 L.A.C. 1579 (Gale), an award frequently cited, in the following terms (at page 1580):

... [W]e must ascertain the meaning of what is written into [a] clause and to give effect to the intention of the signatories to the Agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used

notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or to add words to accomplish a different result.

It would thus be improper for an arbitrator to depart from the ordinary and plain meaning of a collective agreement so as to replace the parties' clearly expressed intention with what he or she feels would lead to a more reasonable or desirable outcome, or so as to penalize a party which, in the arbitrator's opinion, had acted unreasonably. Such a rejection of the ordinary meaning of the agreement would be tantamount to the arbitrator assuming the power to supervise collective bargaining outcomes, which would usurp the role of the parties to collective bargaining. It would be quite alien to accepted labour relations principles in this jurisdiction and would be indefensible.

The changes to which Article 24.3.3.2 (c) of the collective agreement refers are described as follows (in Article 24.3.3.1):

various aspects of the system of evaluation of courses by means of student questionnaires, such as the questionnaire itself, procedures, data-reporting and analysis procedures and forms, dissemination of data and analyses, and types of classes or other pedagogic activity subject to such evaluation.

The data and analyses obtained pursuant to the changes so described may not be used by the employer without the union's prior consent.

I am satisfied that the changes effected by the employer come within the description in Article 24.3.3.1. In the first place, "the questionnaire itself" has changed: previously, it was a paper form, now it is an electronic one. In addition, "procedures" have changed: previously, the questionnaire had to be

filled out by pencil in the designated class, now it can be filled out over a two-week period by electronic means. I am also inclined to hold that “data-reporting and analysis procedures and forms” have changed.

Substantively, I regard the new student evaluation system as identical to the old system, although form can influence substance. However, it is obvious from the language of the agreement that the parties included matters of form in the basket of “aspects” of the system which, if changed, would prohibit the results of student evaluations being used without the union’s consent.

I should add that it is impossible for me to say, on the basis of any evidence I received, that any feature of the new system would disadvantage any professors or be in any way problematical for them. But I agree with the union that it bears no onus to satisfy me that it had a rational or legitimate objection to the changes. As Mr. McGee has argued - correctly, in my view - the collective agreement grants the union a veto power in this regard.

The grievance is therefore allowed. I declare that the employer may not use any data or analyses obtained pursuant to the new electronic system of student evaluations in making career recommendations or decisions without the union’s prior consent.

DATED at Thornhill, Ontario, this 19th day of July 2017.

A handwritten signature in black ink, appearing to read 'MB', with a horizontal line underneath it.

Michael Bendel,
Arbitrator