

**IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS ACT, 1995***

BETWEEN:

**ELEMENTARY TEACHERS' FEDERATION OF ONTARIO.
"THE FEDERATION"**

(the Employer)

- and -

**SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2,
BREWERY, GENERAL AND PROFESSIONAL WORKERS' UNION (MOORE)
"SEIU"**

(the Union)

GAR-16158-2025

Sole Arbitrator Kelly Waddingham

APPEARANCES

For the Employer: Allison Taylor – Counsel, Stringer LLP

For the Union: Taylor Akin – Legal Counsel & Business Agent, SEIU

1. This is a grievance in which the union, Service Employees International Union, Local 2 (SEIU or the “Union”) alleges that the employer, the Elementary School Teachers’ Federation of Ontario (ETFO, the “Federation”, or the “Employer”) harassed and intentionally harmed the grievor (Ms. M) by failing to accommodate her in the workplace.

2. The dispute between Ms. M and the ETFO over workplace accommodation has a long history. Since 2014, Ms. M has sought to be allowed to work from home at least one day a week. This accommodation and others have been provided and withdrawn in the years since. Her most recent request for accommodation was made in March 2025. It was supported by a letter from her treating physician, Dr. Joseph Yuh. Ms. M maintains that the need for accommodations arises from a combination of physical and psychological conditions that are exacerbated by environmental factors and the Employer’s conduct towards her. The ETFO denied the accommodation request. SEIU filed a grievance on May 30, 2025.

3. This preliminary award addresses requests for orders for production made by both parties. The Federation requests an order requiring the SEIU to produce “all clinical notes and records” relating to psychological counselling the grievor received pursuant to the terms of Minutes of Settlement arising out of a discrimination and harassment complaint she made on November 22, 2021. The Federation also seeks production of “all other clinical notes and records of any practitioner of any kind” who treated the grievor for emotional stress or emotional distress arising from the workplace since November 22, 2021. It further requests production of any documents that are arguably relevant to the grievor’s decision to move to Pickering in 2023. For its part, the Union requests an order that the Federation produce the Investigation Report and the unredacted Minutes of Settlement pertaining to the grievor’s November 2021 human rights complaint.

THE SEIU’S POSITION

4. The Union asserts that the Federation’s request for clinical notes and records of the therapist associated with the receipts for counselling appointments (dated April 9, May 7, May 14, and May 21, 2025) submitted by the grievor for reimbursement constitutes a fishing expedition. The Union contends that there is no clear nexus between the records sought and the central issues raised in the grievance. It also maintains that the privacy interests and prejudicial effect of producing the records greatly outweigh any probative value residing in them. Producing such records, it says, would constitute a “severe invasion” of Ms. M’s privacy, would impact her ongoing relationship with her employer, and would be highly prejudicial.

5. SEIU maintains that in making the request for accommodation, neither it nor the grievor relied on any medical documentation from a psychotherapist or any other mental health professional. It points out that the only document presented by the grievor is the March 1, 2025 letter from Dr. Yuh. It notes that in arriving at his recommendation that Ms. M be allowed to work from home one day a week (and other days as needed), Dr. Yuh relies on his own observations of anxiety, panic attacks and depression experienced by the grievor, and not on records of a psychotherapist. Accordingly, it says, records of other

medical professionals are not potentially relevant to matters at issue here. Dr. Yuh's records, the Union insists, are sufficient for the Federation to test the evidence of emotional stress or emotional distress reported by the grievor.

6. With respect to the Federation's request for clinical notes and records of other practitioners who may have treated the grievor for emotional stress/distress arising from the workplace since November 22, 2021, SEIU asserts that such request is inappropriate, overly broad, and constitutes a fishing expedition. There is no clear nexus, it contends, between the records described and matters at issue in the grievance. Furthermore, it says, records going back that far fall well outside the scope of the grievance and, thus, are not potentially relevant to the current accommodation request.

7. In response to the request for records relating to the grievor's move, the Union says that it has asked Ms. M to conduct a search for any potentially relevant documents. It says that any responsive records unearthed by the grievor will be produced "in due course".

8. As set out above, SEIU seeks an order compelling the Federation to produce the unredacted Minutes of Settlement (dated October 30, 2024) and the Investigation Report arising out of the grievor's November 2021 harassment and discrimination complaint. Procedural fairness, the Union says, demands that the complete (unredacted) Minutes be produced.

9. The Union contends that the Federation relied upon Ms. M's human rights complaint and the resulting investigation as a basis for denying her request for accommodation. In this regard, it points out that in letters to the grievor dated March 18, and April 23, 2025, the Federation cites the complaint, the Federation's investigation, and the outcome of the complaint (including the absence from the workplace of the individual central to the complaint) as reasons for denying the accommodation request. By doing so, the Union says, the Federation has put the complaint, and the investigation and its outcome "directly in issue". Accordingly, it says, the Investigation Report and the Minutes of Settlement are arguably relevant, and ought to be produced.

10. SEIU referred to the following decisions in its argument: *Hamilton Health Sciences v. Ontario Nurses' Association*, 2007 CanLII 73923 (ON LA); *West Park Hospital and O.N.A., Re*, 1993 CanLII 16806 (ON LA), 37 L.A.C. (4th) 160; *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2016 CanLII 87623 (ON LA); and, *Canadian Union of Public Employees, Local 966 v Salvation Army Peel Shelters and Housing Services*, 2022 CanLII 79068 (ON LA).

THE FEDERATION'S REPLY

11. In reply, the Federation maintains that the counselling records it seeks are arguably relevant to matters directly at issue in this proceeding, including those put in issue by the grievor herself. It further asserts that its request does not amount to a fishing expedition. It is "self-evident", the Federation contends, that it does not want the records

to determine whether it has a case. The Federation points out that its case is based on the inconsistency between Dr. Yuh's medical report and the requested accommodation, which formed the basis of its decision to deny the request. Part of the context for the decision, it says, is the lack of any grievance or complaint after November 2021 alleging harassment in the workplace. The Federation insists that the grievor herself has put her mental health status since then at issue by producing (in this proceeding) her November 2021 harassment complaint, and stating (in correspondence to the Federation) that the workplace has an active and ongoing negative effect on her mental health, including causing "emotional stress".

12. The Federation maintains that as the grievor has put her mental health in issue, medical records relating to the counselling receipts she submitted for reimbursement (pursuant to the October 2024 Minutes of Settlement) are arguably relevant. In fact, the Federation says, nothing could be more relevant to the grievor's accommodation request than her use of the therapy sessions provided for in the settlement, and the matters discussed therein. The Federation submits that the only reason disclosure of these records might be prejudicial is if they do not contain any reference by the grievor to workplace stress or the workplace environment. It also asserts that as the counselling was not intended to deal with issues outside of workplace stress, there should be no privacy concerns around the records' disclosure. However, it says, any privacy concerns could be dealt with through redaction.

13. The Federation contends that records of other practitioners the grievor consulted regarding the effect of the workplace on her mental health are also arguably relevant. The Federation insists that its request is not overbroad, either temporally or in respect of the range of practitioners it might encompass. The Federation maintains that the grievor has expressly connected her mental health with her November 2021 complaint, and contends that whether and how the grievor discussed the circumstances of the complaint and their effect on her mental health is germane to establishing the existence (and extent) of her emotional stress, one of the bases of the accommodation request. The Federation further maintains that the breadth of its request reflects the "well-known fact" that a mental health practitioner can include a medical doctor, a psychotherapist, or a psychologist or other counsellor.

14. As with records relating directly to the receipts, the Federation maintains that only if such records contain no references to harassment-related stress would producing them cause prejudice to the grievor. However, it says, should such records contain no references to workplace-related stress they would also be relevant insofar as they afford it a defence to the grievance. Again, the Federation submits, any privacy issues related to production of the records can be dealt with by redaction.

15. The Federation insists that the Investigation Report and Minutes of Settlement of the November 2021 complaint are both in the possession of the Union and, thus, that no order to produce them is required. The Federation submits that it is open to the Union to add these documents – as either arguably relevant documents or as documents on which it intends to rely – if it wishes, subject to the Federation having the right to argue that they

are not admissible or are not probative. The Federation suggests that the Union – via this request – is seeking a ruling on the admissibility of these documents. If that is the case, the Federation says, that request is premature.

16. In any event, the Federation asserts, the redacted content of the Minutes of Settlement is not relevant to the workplace environment “as it stands in 2025”, to the grievor’s reaction to it, or to the accommodation issue. It contends that the only reason for the Union to use the unredacted Minutes of Settlement in this proceeding is to try to affect my “general opinion” of the Employer. The Federation maintains that the Investigation Report is also not relevant. The November 2021 complaint letter, it says, sets out the grievor’s concerns at the time, and is sufficient to understand the underpinnings of her current claim regarding the workplace environment and its alleged effect on her mental health. The Federation asserts that the report is not probative with respect to the grievor’s current mental health or the issue of accommodation. It also submits that introducing the report would unnecessarily complicate and prolong the hearing.

17. In its reply, ETFO relied upon the following decisions: *Neusch v. Ontario (Transportation)*, 2002 CanLII 46508 (ON HRT); *Mohammed v. Toronto Transit Commission*, 2013 HRTO 2038 (CanLII); *McWilliam v. Toronto Police Services Board*, 2017 HRTO 8 (CanLII); *Nestlé Canada Limited v Labourers’ International Union of North America, Local 3000*, 2022 CanLII 76361 (ON LA); *Re Toronto Star and Southern Ontario Newspaper Guild*, 1983 CanLII 4872 (ON LA); and, *Dufferin Concrete v Teamsters Local Union Local 230*, 2015 CanLII 68945 (ON LA).

DECISION

18. Pre-hearing disclosure of potentially relevant documents is encouraged in labour arbitration proceedings. The key reasons for pre-hearing disclosure include ensuring fairness and facilitating the speedy and efficient resolution of disputes. As pointed out by Arbitrator Knopf in *Re West Park Hospital and O.N.A.*, *supra* (at page 167):

Anything which can assist in the preparation of cases, the refining of issues or which will facilitate settlement should be encouraged. As a general proposition, pre-hearing disclosure will assist with all these matters and should occur whenever possible.

19. In Ontario, arbitrators have authority to order the parties to produce documents pursuant to the powers granted under section 48 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the “Act”). Subsection 48(12)(b) of the Act authorizes an arbitrator or chair of an arbitration board “to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing”.

20. Considerable case law has been issued regarding production of grievors’/complainants’ medical records. Needless to say, such records contain information that is not only highly personal, but subject to privilege and to statutory proscriptions regarding its use and disclosure (The statutory context regarding the

disclosure of personal medical information to employers was discussed in *Hamilton Health Sciences v. Ontario Nurses' Association*, *supra*, at paragraphs 48-49). However, it is clear from the jurisprudence that virtually any type of medical information – including information concerning a person's psychiatric or psychological condition – may be ordered to be produced if it meets the requirements for production (see: *Dufferin Concrete v Teamsters Union Local 230*, *supra*, at para. 24).

21. Much of the arbitral jurisprudence concerning production of medical records takes as its starting point the approach prescribed by Arbitrator Knopf in *West Park Hospital*. In that decision, Arbitrator Knopf set out the factors to be considered by an arbitrator when determining whether to order production (at page 167):

However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the board of arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the board should be satisfied that disclosure will not cause undue prejudice.

22. Other arbitrators have proposed additional considerations, such as "proportionality" (*Amalgamated Transit Union v. Toronto Transit Commission*, *supra*, at para. 37) and the breadth of the request (*Canadian Union of Public Employees, Local 966 v Salvation Army Peel Shelters and Housing Services*, *supra*, at para. 30). While Arbitrator Stout (in the former decision) did not expressly define "proportionality", I understand it to mean that the breadth of the request must be proportional to the probative value of the records requested (see his discussion of the term "fishing expedition" quoted below). In *Salvation Army Peel Shelters*, breadth limitations imposed by Arbitrator Lawrence included a temporal one (the time period in which the medical records originated), and one intended to limit duplication (hospital, emergency care and specialists' records to be sought directly only if the grievor did not have a primary care physician).

23. As indicated by the reasons of the HRTO in decisions cited by the Federation, "arguable relevance" and "nexus" are interrelated. In *Mohammed v. Toronto Transit Commission*, *supra*, the Tribunal explained arguable relevance as follows:

[38] It is well-established that a party seeking production of information must demonstrate that information is "arguably relevant", or in other words, establish a nexus between the sought-after material(s) and the subject-matter of the application: *McKay v. Toronto Police Service Board*, 2009 HRTO 1220. The Tribunal has described the analytical approach to assessing "arguable relevance" as follows at para 13 of that decision:

The first step in determining what is relevant is the identification of the cause of action's facts and the surrounding substantive law: *Neusch*, *supra*. A nexus may be established if the sought-after information goes

to prove or disprove a fact or issue in dispute or provides an inferential link to support a theory of the case or line of defence. If the materials sought meet this threshold standard of “arguable relevance”, the Tribunal must next consider whether there any other issues or concerns, such as privilege or privacy, which may require a determination of terms and conditions upon which production may be ordered. Further, a finding that a document is arguably relevant for production does not mean that such information will necessarily be admissible as evidence at the hearing on the merits.

24. This understanding of (and approach to) “arguable relevance” is equally applicable in other fora, including arbitration hearings.

25. The term “fishing expedition” is explained as follows in *ATU v. Toronto Transit Commission*:

43. This leads me to the issue of what is a “fishing expedition”. In my view, at a minimum, a fishing expedition is where a party seeks production of documents in order to determine if they have a case as opposed to supporting their case. Furthermore, a fishing expedition is casting a wide net of discovery as opposed to a proportionate and specific inquiry aimed at obtaining documents that assist in the determination of the issues in dispute. In my opinion, proportionality is a necessary element that must be applied in order to avoid promoting fishing expeditions

ETFO’s production request

26. The grievor submitted to the Federation receipts for eight sessions with a registered psychotherapist occurring between April 9 and May 21, 2025. The Federation seeks the therapist’s clinical notes and records of the sessions. It maintains that by identifying emotional stress as one of the bases of her accommodation request, the grievor has put her mental health in issue. It also asserts that the grievor has put the *cause* of her purported emotional stress in issue.

27. While the instant grievance arises out of the denial of a request for accommodation, its core allegation is that the Employer’s conduct towards the grievor constitutes harassment and intentional harm. The grievance also alleges that the Employer discriminated against the grievor, in violation of Article 6.4.1 of the Collective Agreement and provisions of the Ontario *Human Rights Code*. The basis of the alleged harassment and discrimination is the grievor’s purported disability. While the disability – as described by Dr. Yuh in his March 1 letter – is primarily physical in nature, it is clear from the letter that it also has a “mental health” component that includes anxiety, panic attacks and depression. That component, according to the doctor, is linked to “the work environment itself”, in particular to “emotional stress” the grievor experiences in the workplace. The grievor also made reference to “emotional stress” relating to the workplace in her response to the Federation’s letter denying the requested accommodation. That stress, she explained in her letter, “stems from several years of

experiencing racism and discrimination at ETFO” and is “tied to the way my disability has been and continues to be handled”.

28. As is clear from decisions put before me by the Federation (*Nestlé Canada v. LIUNA* and *McWilliam v. Toronto Police Services Board*, *supra*), a grievor’s (complainant’s, in the HRTO context) medical records may be arguably relevant if the individual has put their medical condition directly at issue in the proceeding. This applies to mental health records as well as to those relating to the individual’s physical health. In the instant case, it is clear that the grievor – via her doctor’s letter and her own statements to the Employer – has put her mental health and emotional stress (insofar as they relate to her experience in the workplace) in issue. Accordingly, I find that the clinical notes and records of the therapist associated with the April-May 2025 receipts arguably relevant to matters at issue in this proceeding. I also find that clinical notes and records of other practitioners who treated the grievor for emotional stress related to the workplace (should they exist) are arguably relevant to the proceeding. It is my view, also, that the requests are sufficiently particularized so that there can be no uncertainty as to what records are being sought.

29. I further find that the requests do not constitute a fishing expedition. The Federation is not seeking the records to determine if it has a case. As I have concluded, the records are arguably relevant to the grievor’s claim that she has a disability, and that she was harassed and/or discriminated against because of it. In my view, the Federation, in its request, is not casting an unduly wide net. Rather, the request is, in the words of Arbitrator Stout, a “proportionate and specific inquiry aimed at obtaining documents that [will] assist in the determination of the issues in dispute”. To paraphrase Arbitrator Wright, at paragraph 57 of *Nestlé Canada*, it is a request for specified records, in specified time frames, that relate to psychiatric conditions identified by the grievor as forming part of her disability. The Federation has proposed that any records responsive to its requests may be redacted so as to prevent disclosure of personal matters unrelated to the workplace. That, in my view, is sufficient to ensure that the grievor’s privacy is not invaded more than is necessary for the purposes of the hearing.

30. For essentially the same reasons that they are arguably relevant, I find that there is a clear nexus between the records sought and issues in dispute in the case. The extent of the grievor’s disability and the extent to which the psychiatric component of her disability is related to her experiences in the workplace are issues raised by the accommodation request that underlies the grievance. The records sought by the Federation either go directly to these matters, or provide an inferential link to support a theory of the case or a line of defence.

31. For the reasons set out by the Federation, I find that disclosure of the records – appropriately redacted – will not unduly prejudice the Union/grievor. The grievor has pointed to a connection between her mental health and the workplace environment in her accommodation request. Should the records contain no mention of workplace stress or the work environment, their disclosure will conceivably strengthen the Federation’s position on the grievance. However (as noted by Arbitrator Surdykowski in *Kaiser*

Aluminum & Chemical of Canada Ltd. v. USWA Local 4885, quoted in *Nestlé Canada, supra*, at para. 55), “the risk that parties take when they decide to litigate rather than settle is that they may have to produce a document that may be helpful to the party opposite”.

SEIU’s production request

32. SEIU requests production of the Minutes of Settlement and the Investigation Report arising out of Ms. M’s November 2021 harassment and discrimination complaint. It contends that the documents are potentially relevant, as the Federation “plainly” took into consideration the investigation and its outcome in assessing and ultimately denying Ms. M’s accommodation request. For its part, the Federation maintains that the requested documents should already be in the hands of the Union. In any event, it says, neither the redacted contents of the Minutes, nor the Investigation Report is material to the workplace environment as it exists in 2025, or to the accommodation issue.

33. I agree with the Federation that the Minutes of Settlement ought to be in the hands of the Union, as they were signed by SEIU counsel, Ms. Akin. Similarly, the Investigation Report should be in the hands of the grievor, if not the Union. However, assuming that the request for disclosure is based on the fact neither the Union nor the grievor has the documents, the Federation ought to produce them.

34. As pointed out by the Union, the Federation referred to the harassment complaint and its investigation of it in its March 18 and April 23, 2025 letters to the grievor. The second letter stated that the grievor’s allegations were almost exclusively related to how she was treated by Ms. C (ETFO Human Resources Officer at the time of the complaint). In the first letter, she asserted that because of the extended absence of Ms. C from the workplace, the grievor’s workplace stress should have diminished. As set out above, the grievor contends that workplace stress is an element of the mental health component of her disability. The Investigation Report and other text in the Minutes of Settlement may shed light on factors (including the conduct of other individuals) that make the workplace unduly stressful for the grievor. For this reason, I find that there is a clear nexus between the requested documents and facts at issue here, and, thus, that the documents are arguably relevant to matters in dispute in the proceeding. The Federation has not argued that the request is not sufficiently particularized, nor that it constitutes a fishing expedition, and I do not so find.

35. As SEIU has undertaken to obtain and produce documents responsive to the Federation’s request for records relating to the grievor’s move to Pickering, I will not make any findings with respect to this request at this time.

36. For the above-stated reasons, I order that:

1. SEIU produce clinical notes and records of the registered psychotherapist identified on the receipts submitted to the ETFO for reimbursement (dated April 9, May 7, May 14 and May 21, 2025). The

notes/records should be redacted so as to disclose only discussion of matters concerning the grievor's experience of the workplace;

2. SEIU produce clinical notes and records of any registered medical or mental health practitioner who has, subsequent to November 22, 2021, treated the grievor for emotional stress or emotional distress arising from the workplace. The notes/records should be redacted so as to disclose only discussion of matters concerning the grievor's experience of the workplace; and,
3. ETFO produce unredacted copies of the Minutes of Settlement and the Investigation Report associated with the grievor's November 22, 2021 complaint of workplace discrimination and harassment.

Dated, this 2 September, 2025 in the City of Toronto.

"Kelly Waddingham"

Kelly Waddingham