

**In the Matter of an Arbitration
Under Minutes of Settlement Re: Expedited Exclusion Grievances**

BETWEEN:

YORK UNIVERSITY STAFF ASSOCIATION

(THE "ASSOCIATION")

AND

YORK UNIVERSITY

(THE "UNIVERSITY")

**(Grievance No. 2020-082: Manager, Student Success,
Student Services & International Relations, Schulich School of
Business)**

BEFORE: Eli A. Gedalof, Sole Arbitrator

APPEARANCES

For YUSA

Adrienne Lei, Counsel, Dewart Gleason LLP
Virginia Duarte Walsh, Counsel, Dewart Gleason LLP
Sonny Day, YUSA President
Wanda Hollingshead, YUSA 1st VP
Sandra Bell, YUSA 2nd VP
Elspeth Staniland, Chair, Grievance Committee

For the University

Kate McNeill-Keller, Counsel, McCarthy Tétrault LLP
Kim Lennon, Counsel, McCarthy Tétrault LLP
Tish Lewis, Articling Student, McCarthy Tétrault
Shirly Ashfield, York University
Kathryn Aim, York University
Ryan Piper, York University

AWARD

INTRODUCTION AND BACKGROUND

1. This grievance arises from the University's decision in 2020 to post and fill the position of Manager, Student Success in the Schulich School of Business, as a Confidential/Professional/Managerial ("CPM") position outside of the Association's bargaining unit (the "disputed position"). The grievance was referred to me under the terms of the 2022 Minutes of Settlement between the parties *Re: Expedited Exclusion Grievances*. The Minutes set out a prescriptive protocol that is designed to expedite the resolution of many outstanding exclusion grievances, of which this case is but one. In accordance with the protocol, these reasons will be brief. I will not provide an exhaustive summary of the evidence and argument and will focus on the essential basis for my decision.

2. This award is being released concurrently with my award in *York University Staff Association and York University (Communications Manager, Office of the Dean, Lassonde School of Engineering)*, unreported, March 19, 2025 (the "*Communications Manager Award*"). That award provides the relevant background concerning the expedited protocol and the scope of the Association's bargaining rights, which I incorporate by reference here. As in that case, the University seeks to exclude the position in dispute under both elements of s.1(3)(b) of the *Labour Relations Act*, i.e., as an individual who "exercise[s] managerial functions" and who is "employed in a confidential capacity in matters relating to labour relations" as employees in a bargaining unit.

3. For the reasons that follow, I have concluded that the position is properly excluded as one that exercises managerial functions within the meaning of s.1(3)(b) of the *Act*.

EVIDENCE

4. The University filed will-say statements on behalf of two key witnesses in this matter who were also cross examined. The first was Amir Khan, who is the incumbent in the position. The second was Luba Pan, Director, Student

and Enrolment Services, to whom Mr. Khan reports. The Association did not call any witnesses with knowledge of the specific position in issue. It does, however, rely on the same secondary witnesses as were addressed in the *Communications Manager Award*. The University, for its part, relies on the witnesses it called in response to those secondary witnesses. I address the limited utility of that evidence at paras. 13 and 14 of the *Communications Manager Award*. Those comments are equally applicable in this matter, and I repeat and rely upon them here.

5. In broad terms, the Manager, Student Success is responsible for overseeing academic orientations, advising, and strategies to improve student experience at Schulich. The position has five reports, including two student success coordinators, one academic advisor, and one student engagement coordinator (all YUSA 1 positions), in addition to a work/study student worker.

6. According to the job description, Mr. Khan and Ms. Pan, the position entails authority which, considered in the aggregate, entails substantial managerial duties. This includes all of the day-to-day oversight of his team, including providing direction, feedback, training, and handling substantive issues that are escalated to him, as well as formal performance and attendance management, conducting investigations, discipline and—in consultation with the director—discharge, and attending grievance meetings. It also includes the ability to recommend changes to the structure of the team, recruiting and serving as the hiring manager. Mr. Khan is also responsible for approving time off, overtime, and leaves of absence. According to Ms. Pan, the scope of her own role would make it impossible for her to carry out these duties in respect of Mr. Khan's team, and absent Mr. Khan's role, the team would be left without adequate managerial support. Mr. Khan spends at least half of his time on staff management and supervision, and it is the largest component of his role on a weekly basis.

7. The challenge in this case is that at the time Mr. Khan prepared his will say statement in the summer of 2024, he had only been in the role for a few months. He was effectively still being trained for the job by Ms. Pan, and had had limited opportunities to exercise the authority attributed to him by the job description and Ms. Pan, and as affirmed in his own evidence. For example, in the sole round of hiring he had participated in, he sat as a panel member, and Ms. Pan took the lead role. Both he and Ms. Pan maintained, however, that

she only participated because it was Mr. Khan's first time in the role, and that in the future he would serve as hiring manager without her participation. Neither had he participated in the discipline or formal performance process.

8. The lack of extensive evidence based on Mr. Khan's experience in the role does not, however, tell the whole story. Ms. Pan testified about the scope of responsibility of Mr. Khan's predecessors in the role, and the University relies on a variety of documents supporting her testimony. The Association takes issue with the limited scope of the documentary record and the absence of additional documents in support of the full breadth of Ms. Pan's testimony. In the final analysis, I must determine whether, on the balance of probabilities, the University has met its onus to prove that the position is managerial. Bald and conclusory statements warrant little if any weight. But neither is it necessary to lead evidence of every instance in which management authority was exercised. The question is whether in this case the University has led sufficient evidence to establish that the authority attributed to the role is real, or "effective", and that they are not merely "paper powers".

9. Mr. Khan's daily supervisory responsibilities are not contested; his evidence with respect to this aspect of his role was direct and it is not contradicted. There is no other person carrying out this role within his work group. Neither was his evidence undermined that he has the authority to shape the manner in which the work is carried out. Broader policy and objectives are set by higher levels of management, albeit with his input, but within his area of responsibility the evidence establishes that he retains discretion to shape how the work is performed. As addressed below, however, these features of his role would not on their own establish managerial authority.

10. With respect to the authority to determine the nature of future hires and to act as the effective decision maker, I am satisfied that this is a genuine feature of the role. Ms. Pan's testimony and supporting documents confirm that Mr. Khan's predecessor carried out these functions, creating job descriptions and hiring, and there is no basis for doubting Ms. Pan and Mr. Khan's evidence that he will do the same in the role, including completing tasks left unfinished by his predecessor. I am also satisfied that the role encompasses the power to carry out formal performance management, including Article 7.07 meetings under the Collective Agreement. The

documents support Ms. Pan's testimony that it would be the Manager, Student Success, and not her, that would carry out these meetings in respect of his reports. I also accept Ms. Pan's testimony that a prior incumbent in the position had held such a meeting. Ms. Pan did not adduce any documents but was unequivocal in her recollection and advised that she knew the identity of the Union representative that attended the meeting, a name she was then not asked to provide. Further, Ms. Pan testified that Mr. Khan's immediate predecessor had in one instance rejected her recommendation to carry out a formal Article 7.07 meeting "because it is their decision". There does appear to be some discrepancy in the documentation surrounding this incident, but Ms. Pan was steadfast in her cross examination

11. The evidence that Mr. Khan, as were his predecessors, is solely responsible for approving overtime and time off is also uncontradicted. Ms. Pan referenced an instance where she was clearly unsatisfied with the manner in which one of Mr. Khan's predecessors had exercised this unilateral authority, illustrating that it is not her that makes these decisions for the work group. Ms. Pan's evidence also established that the position is responsible for managing medical accommodations, albeit potentially in conjunction with EWB and/or HR. She was aware that accommodations were in place, but did not know any of the details because it is Mr. Khan, not her, that is responsible for managing them.

12. As in the *Communications Manager Award*, the evidence with respect to Mr. Khan's access to confidential information was thin. It amounts to assertions that Mr. Khan has access to his report's personal information and to the University's time reporting tool, attends management meetings, had some involvement in implementing the YUSA Voluntary Exit Program, has participated in unparticularized conversations about strategic objectives, and could be involved in meetings around strike planning. As in the *Communications Manager Award*, I find that such bald assertions of access to information would not, on their own, substantiate a managerial exclusion on the basis of access to confidential information. To exclude an employee on the basis that they are "employed in a confidential capacity in matters relating to labour relations" requires more substantial evidence that access to such information is essential to their role.

DECISION

13. The parties rely on most of the same authorities addressed in the *Communications Manager Award* and the general principles articulated in that case, which I incorporate by reference, are equally applicable here.

14. The evidentiary challenge presented in this case is that the incumbent in the role in dispute that testified is relatively new in the position. Consequently, while both witnesses attributed substantial managerial authority to Mr. Khan's role—including the authority to hire, discipline and performance manage—there was no evidence that Mr. Khan had carried out any of these functions in practice (beyond sitting as a panel member on a hiring committee, which would not of itself warrant a managerial exclusion). I am very mindful of the concerns articulated by Arbitrator Goodfellow in *York v. YUSA*, 2010 CanLII 33087 (Ont. Arb.) at pp.30 to 32 and *Communications, Energy and Paperworkers Union v. Corporation of the Town of Innisfil*, 1994 CanLII 9809 (ON LRB) at paras. 23, among other cases cited by the parties. Where alleged managerial powers are not actually exercised, one should be highly skeptical that those powers in fact exist. Further, where the evidence establishes that those powers are exercised only very rarely, especially where there are other levels of management available to carry out those functions, it may not be appropriate to exclude the employee. The answer to a "sprinkling" of managerial authority is not to exclude a surplus of managers from the bargaining unit where the employer has the option of consolidating those powers in the hands of a true "manager" with effective control over employees' working lives.

15. Arbitrator Goodfellow's summary of the evidence before him in *York v. YUSA* dealing with the exclusion of the Research Officer, Office of the Dean, Faculty of Arts, both illustrates the problem with bald assertions of authority, and provides a useful contrast to the instant case (at pp. 30-32):

As to the former, the University submits that the incumbent directly supervises two YUSA 1 bargaining unit members, a YUSA 2 employee, one or two "work-study" students, and several project assistants who input teaching evaluation data from students. If this were true, in a *labour relations sense*, I would find the basis for the exclusion to be established. In my view, however, there is insufficient proof of the *actual exercise of managerial/supervisory responsibilities* to support any such exclusion.

On the hiring side, for example, the most that can be said is that the incumbent "participated" in the hiring of one of the YUSA 1 employees; however she did so as part of a committee along with two other persons who *are* clearly managerial. And, with respect to that participation, the most that could be said was that the incumbent's assessment of a given candidate's qualifications *would* carry "greater weight" in the event of a dispute; there was, of course, no dispute. Grievance meetings, which have never occurred – neither the incumbent nor her predecessor (it would appear) have ever meted out discipline of even the *lowest possible* (i.e. Article 7.07) kind – would appear to be similar. Here, it is noteworthy that Ms. McKee, when asked about the incumbent's role in discipline, first replied that she would (not has) "*recommend[ed]*" discipline or discharge, before circling back to add, as if by rote learning, "*effectively*". It was obvious to me that the former was the more accurate answer and that the decision, effectively or otherwise, would definitely not be that of Ms. Martin.

In my view, the absence of any practical labour-relations type authority is no doubt related to the fact that there is yet *another* (undisputed) member of management (i.e. the Personnel Advisor/Office Manager who, in turn, reports to the AO) on scene, beyond those already identified, who is closely involved in the working lives of the bargaining unit members – only one of whom who is presently shown *on the organizational chart* and, there, as having a dotted-line reporting relationship to the incumbent. And, even though, as noted a second position, Financial Assistant (Research), has been added to the area and is said to report to the Research Officer in the same way, the evidence was only that the incumbent had "*input*" into the Job Summary. The summary was actually prepared by the AO and the Office Manager. With this many possible "managers" for the very few individuals in question there would appear to be no need for there to be, nor, to repeat, is there any evidence of, *real, concrete or tangible* managerial decision-making authority reposed in the position.

16. In the instant case, I have no similar concerns that either Mr. Khan or Ms. Pan sought to exaggerate Mr. Khan's authority. There is nothing in the evidence akin to the red flags identified by Arbitrator Goodfellow, that would cause me to doubt that the degree of oversight exercised by Ms. Pan was anything other than a temporary intervention as Mr. Khan is oriented to his new role. Neither is there evidence of a surplus of other managers "on scene". The evidence is that Mr. Khan is *the* supervisor on scene with his reports and the person they go to for direction not only in respect of their work flow, but

with respect to labour relations matters. Ms. Pan's uncontradicted evidence was that the broader demands of her role did not leave her with the capacity to carry out essential managerial functions *vis a vis* Mr. Khan's reports, and there does not appear to be any other manager available who could. Further, unlike the exclusion before Arbitrator Goodfellow, I have at least some evidence that Mr. Khan's predecessor *did* carry out managerial functions such as defining jobs, hiring and formal performance management. I accept, as the Union argues, that the documents relied on by the University to support this position were not extensive. I also emphasize that the onus rests with the University. But Ms. Pan's evidence in this regard was, again, uncontradicted, and is consistent with the documents that were produced. The University has met its onus through the direct testimony of two credible witnesses, in the absence of any contradicting evidence from the Association. This evidence is sufficient, on a balance of probabilities, to establish that the role in dispute exercises managerial functions within the meaning of s.1(3)(b) of the *Act*.

CONCLUSION

17. For all these reasons, I find that the position Manager, Student Success in the Schulich School of Business of was properly excluded from the bargaining unit as a supervisory position.

18. The grievance is therefore dismissed.

Dated at Toronto, Ontario, this 19th day of March 2025.

"Eli Gedalof"

Eli A. Gedalof
Sole Arbitrator