

**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. 2022-036-Faculty Administrative Lead (Formerly
Senior Administrative Assistant), Faculty of Liberal Arts and
Professional Studies)**

BEFORE: Eli A. Gedalof, Sole Arbitrator

APPEARANCES

For YUSA

Adrienne Lei, Counsel, Dewart Gleason LLP

Andrea Vitopoulos, Counsel, Dewart Gleason LLP

For the University

Kate McNeill-Keller, Counsel, McCarthy Tétrault LLP

Andrew Weizman, Counsel, McCarthy Tétrault LLP

INTRODUCTION AND BACKGROUND

1. This matter is an April 29, 2022 bargaining unit exclusion grievance concerning the Faculty Administrative Lead position in the Faculty of Liberal Arts and Professional Studies ("LA&PS")(the "disputed position"). The position was originally posted and filled in June of 2018 as a Senior Administrative Assistant and was subsequently re-named. The University relies on the

exclusion of (Confidential/Professional/Managerial) ("CPM") employees from the bargaining unit. The University also argues that the grievance should be dismissed as untimely or based on the doctrine of laches.

2. 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 a large number of outstanding exclusion grievances, of which this case is but one. At this stage in the process there are two relevant features of the protocol. First, the parties agreed to present their evidence by will-say statements, with *viva voce* evidence limited to cross examination on those will-say statements. Second, the parties stipulate that it is their "expectation that the arbitrator's decision will be no longer than five (5) pages per grievance." Consequently, these reasons will not include an exhaustive summary of the evidence and argument before me and will instead focus on communicating the substantive basis for my decision.

3. The Association represents a bargaining unit of employees performing office, clerical, laboratory or technical work, save and except positions excluded by the Ontario Labour Relations Board's certificate certifying the bargaining unit in 1975. As addressed by Arbitrator Goodfellow in *York University and York University Staff Association*, 2010 CanLII 33087 (ON LA), exclusions from the scope of the Board's certificate must be understood as embracing the criteria under s.1(3)(b) of the *Labour Relations Act, 1995*. Section 1(3)(b), in turn, excludes individuals who "exercise managerial functions" or who are "employed in a confidential capacity in matters relating to labour relations" as employees in a bargaining unit. In this case, the University concedes that the disputed position is not "managerial" but maintains that the incumbent is "employed in a confidential capacity in matters relating to labour relations" within the meaning of s.1(3)(b).

4. The Association filed will-say statements on behalf of six witnesses, only one of whom, Lynn Moynihan, spoke directly to the position in issue. The Association's remaining witnesses provided more general evidence, largely concerning functions carried out by other Association members in other positions. I addressed the limited utility of these witness's evidence in *York University Staff Association and York University (Lassonde)*, 2025 CanLII 24240 (ON LA) at paras. 13-14. I repeat and rely on that assessment here.

5. For the reasons that follow I would not dismiss the grievance as untimely or based on the doctrine of laches. I have, however, concluded that the position should be excluded as employed in confidential capacity within the meaning of s.1(3)(b) of the *Act*.

TIMELINESS AND LACHES

6. The University argues that the grievance, filed almost four years after the disputed position was created, should be dismissed as untimely or based on the equitable doctrine of laches. Article 8.07 of the parties' Collective Agreement provides that "no grievance shall be considered where the grievance is submitted more than fifteen (15) working days after YusApuY became aware or ought reasonably to been aware of the circumstances giving rise to the grievance". The disputed position was publicly posted as excluded and the posting was available to YUSA at the time, it interacted with YUSA-represented positions and was filled by a former YUSA member. YUSA has provided no explanation for why it did not grieve when the position was first posted. The Association did not seek an extension for filing, none was granted, and it has provided no explanation for why it waited until the job was posted for a second time before filing its grievance.

7. In the University's submission, none of the usual conditions for extending the time limits under s.48(16) of the *Labour Relations Act* are met: the issues in dispute are at the low end of the spectrum of importance, a delay of nearly four years prejudices the University's ability to access evidence from the time the position was created, YUSA is responsible for the delay, it has provided no explanation for the delay, and it was reasonable for the University to assume the position was not in dispute. In the alternative, the University argues that the Association has clearly acquiesced to the exclusion and the University has relied upon that acquiescence to its detriment, satisfying the chief considerations under the doctrine of laches. In support of its position, it relies on *York University and YUSA, Re*, 2010 CarswellOnt 11701 (Ont. Arb.) (Goodfellow) (the "*Goodfellow 2010 Award*") and *Cybermedix Health Services Ltd. and O.P.S.E.U., Loc 544*, 1990 CanLII 12775 (ON LA) (Brown).

8. The Association responds with its own objection, that the University's timeliness objection was itself untimely. The grievance was filed on April 29,

2022 and was processed to hearing. The University did not raise its timeliness objections until the first day of hearing in this matter on June 17, 2025. Citing *Ontario Public Service Employees Union (McDonald) v Ontario (Finance)*, 2024 CanLII 106430 ("*McDonald*") the Association argues that the University, by sitting on its hands for over three years, has waived any timeliness objection.

9. Citing *York Region District School Board v OSSTF, Re*, 2021 CarswellOnt 14527 (Flaherty), the Association also argues that the grievance is in any event timely as a "continuing grievance". In the alternative, it argues that there are good reasons for extending any time limits under s.48(16) of the *Act*: i) the Union established a posting review committee only after the initial job posting, and grieved the next time it was posted; ii) the grievance is of high importance as it goes to the heart of the integrity of the Association's bargaining unit; and iii) the University has not established that it suffered any actual prejudice. Further, it submits that in the alternative I ought to exercise my jurisdiction to extend the time limits. Finally, it argues that the doctrine of laches should not apply as the University has not established any detrimental reliance.

10. Having considered the parties' arguments, I am not prepared to dismiss the grievance as untimely.

11. First, I accept the Association's argument that the timeliness objection was itself untimely. It is trite to note that every case must be assessed on its own facts. The University seeks to distinguish the facts in *McDonald*, where the timeliness objection was raised almost two years after there had already been a first hearing date, and the arbitrator found that the conclusion that the employer had waived any objection was indisputable. In the instant case, the University raised its objection *on* the first hearing date, but until that time, for a period of over three years, the Association had no reason to expect it would face a timeliness objection. Applying the principles articulated in *McDonald*, what I find most significant is that the University did not raise its objection until *after* the parties had filed their will say statements, including the University's initial evidence, the Association's response, and the University's reply. This grievance is being heard under what is supposed to be an expedited process, and by the first day of hearing, the parties had taken numerous fresh steps toward concluding that process in the absence of any timeliness

objection. In my view, the failure to raise the timeliness objection before all of those steps were taken constitutes a clear waiver of any objection.

12. In light of this conclusion, I need not address the question whether the grievance was actually untimely or whether it was a continuing grievance. I note, however, that the issue is not as straightforward as either party presents in their arguments. As the cited authorities clearly establish, an extended delay in challenging the exclusion of a position can result in a finding of acquiescence even in the case of a continuing grievance. But neither can one assume that the clock on delay begins to run from the posting and filling of an excluded position. A central issue in many exclusion grievances is whether an incumbent actually carries out the job functions as described in the posting. Timeliness should be judged based on whether the Association ought reasonably to have known the material facts underlying its grievance, and divergence from a job posting can take time to manifest. Neither does the clock necessarily start to run on a policy grievance the moment a rank-and-file member interacts with an excluded position. As the evidence in this case establishes, the Association's members may not have a line of sight on the full breadth of an excluded employee's duties.

THE MERITS

13. In broad terms, the disputed position provides administrative support to the Executive Director, Strategy & Administration in the Office of the Dean, LA&PS (the "EDSA"). Initially, the position reported directly to the Executive Assistant to the Dean, and indirectly to the EDSA. In 2025, the position began reporting directly to the EDSA. At all times, however, the main function of the role has been to provide support to the EDSA.

14. LA&PS is the largest faculty at York. The EDSA has 18 CPM direct reports, including managers, directors and senior directors with a management team of 39. Critically, these 39 CPM employees are in turn responsible for over 200 YUSA represented staff at LA&PS. The evidence before me establishes that the EDSA plays a very significant, high level labour relations role which directly impacts YUSA bargaining units. In essence, the EDSA is in charge of the managers who are in charge of the YUSA bargaining unit members, and the disputed position provides administrative support to the EDSA in carrying out that function.

15. As discussed by Arbitrator Goodfellow in the *Goodfellow 2010 Award*, the test for exclusion under the second branch of s.1(3)(b) is a narrow one. It must be applied with particular care in a work environment such as the University where decision making is less streamlined than in a typical workplace (at p. 16):

Finally, I would note that the University's bottom-up, inclusive, or co-operative approach to workplace decision-making or regulation cannot be relied on as the basis for excluding a host of positions under the second branch of the 1(3)(b) test: "employment in a confidential capacity in matters relating to labour relations". The test here is a narrow one: the requirement is for "employment in" this capacity – meaning a regular and material involvement, as an inherent part of the job – not peripheral, very occasional or non-essential involvement. Mere access to personnel files or attendance at "management meetings" where unspecified, but allegedly "confidential", labour relations issues are discussed, without any real indication as to frequency, necessity, or the content, nature or extent of participation, if any, by the individuals in question, will not be enough.

16. Further, and central to the Association's argument, the confidential information related to labour relations must relate to the bargaining unit in issue. In the Association's submission, to the extent that the University has demonstrated that the position has access to sensitive labour relations information, this information is largely related to the CPM positions that report to the EDSA. The University disputes this characterization of the evidence, pointing to evidence that the disputed position provides support to the EDSA in respect of hiring, compensation, performance management, restructuring, job closures, terminations, grievances, arbitrations, mediations, human rights cases, strike contingency planning and budget and finance. In the University's submission, to put the disputed position in the bargaining unit would require stripping away the majority of the job duties, rendering the position's ability to provide meaningful support to the EDSA moot.

17. Having carefully considered the evidence, I am satisfied that the disputed position does not merely access confidential labour relations information in a peripheral, occasional or non-essential manner. The incumbent in the position is rather, as Arbitrator Goodfellow emphasized, "employed" in a confidential capacity.

18. The Association points to prior awards where the exercise of various functions carried out by the incumbent, such as attending meetings or accessing personnel files, were not sufficient to justify exclusion. But what is not present in those awards is anything like the broad range of confidential activities in which the disputed position provides necessary support to the EDSA here. Of particular significance, this case does not engage the legitimate concern identified by Arbitrator Goodfellow arising from the “bottom up” management and decision-making structure of the University. This case does not concern a sprinkling of responsibilities across an unduly wide cohort of alleged managers or those providing supporting to those managers. The disputed position does not merely provide occasional support to a mid-level manager with limited impact on the broader labour relations of the University and the YUSA bargaining units in particular. It is instead the primary administrative support role for the labour relations functions carried out by an Executive Director near the top of the organizational structure for the University’s largest faculty.

CONCLUSION

19. For all these reasons, I find that the disputed position is properly excluded from the bargaining unit as employed in a confidential capacity in matters relating to labour relations.

20. The grievance is therefore dismissed.

Dated at Toronto, Ontario, this 30th day of April 2026.

“Eli Gedalof”

Eli A. Gedalof
Sole Arbitrator