KOSKIE GLAVIN GORDON

May 13, 2020

VIA E-MAIL

BC Labour Relations Board
600 Oceanic Plaza
1066 Hastings Street West
Vancouver, BC V6E 3X1

Attention: Najeeb Hassan, Vice-Chair and Registrar

Dear Mr. Hassan:

Re: University of Northern British Columbia Faculty Association's Unfair Labour Practice Complaint against the University of Northern British Columbia – Market Differential Demand

We are counsel for the University of Northern British Columbia Faculty Association (the "Union"). We file this complaint on behalf of the Union pursuant to sections 11 and 14 of the *Labour Relations Code* (the *"Code"*).

There is some urgency to this matter, as a final offer interest arbitration before Arbitrator Arnold Peltz is scheduled to be heard July 22 and 23, 2020. The outcome of this complaint will have a significant impact of the issues the Arbitrator has jurisdiction to decide, as set out in paragraph 17 below.

Parties

The Applicant

University of Northern BC Faculty Association
Attn: Stephen Rader, President
Office Administration Building
Room 3084/3089 3333
University Way, Prince George, BC
V2N 4Z9
Tel: 250-960-5816
E-mail: Stephen.Rader@unbc.ca

The Respondent

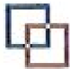
University of Northern British Columbia
Attn: Dan Ryan, Provost and Vice-President, Academic
3333 University Way
Prince George, BC V2N 4Z9
Resources
Tel: 250-960-5521
Fax 250-960-5695
E-mail: Dan.Ryan@unbc.ca

Counsel for the Applicant

Leo McGrady Q.C.
Koskie Glavin Gordon
1650-409 Granville St.
Vancouver BC, V6C 1T2

Counsel for the Respondent

Michael Wagner
Roper Greyell
1850-745 Thurlow St
Vancouver BC V6E OC5



Tel: 604-317-5068
E-mail: lmcgrady@mcgradylaw.ca

Tel: 604-806-3853
E-mail: mwagner@ropergreyell.com

Service is being effected on the Respondent by e-mail only.

Background

1. The recent historical background of the relationship between the two parties to this complaint has been set out in the December 17, 2019 *Report and Recommendations For Settlement* by Special Mediator Trevor Sones. I will not reproduce that here, but rather have included a copy of the Report as **Appendix 1.**

2. However, I have incorporated a paragraph from that Report describing the current circumstances. I have inserted additional paragraph spacing:

> "In this round of negotiations, the parties met in collective bargaining 23 times between March 5 and October 8, 2019. The parties then met with me in mediation on October 20 and 21. They continued to collectively bargain, meeting together another six times before job action commenced. At the time that job action commenced, there were a significant number of articles outstanding, but the appropriate compensation model was one of the fundamental differences between the parties.
>
> On November 7, 2019 the UNBC FA commenced job action and initiated picket lines. While there was full-scale job action, the parties continued to meet with each other another 10 times with successful agreements on some additional articles; however, the parties continued to remain apart on a number of significant issues including the compensation model.
>
> On November 26, 2019 the UNBC FA contacted the Minister of Labour with the request for the appointment of a Special Mediator under Section 76 of the Code: UNBC supported the appointment. On that same day, I was appointed as Special Mediator by the Minister of Labour. I met with the parties on November 27 and 28, 2019 and although the parties were able to sign-off on a number of agreed to articles at that time, the parties were still definitively stuck on ten Articles and five MOUs outstanding. It was then clear that resolution of all outstanding issues by agreement between the parties was not possible. I adjourned the mediation process providing the opportunity for the parties to consider the various options available to them and to consider the impacts of job action on the semester.
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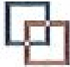
> The UNBC FA removed its picket lines on the afternoon of Friday November 29 and returned to teaching duties; however, they continued to engage in job action through the withdrawal of internal university service work. I remained in contact with the parties throughout the following



> week and they indicated their interest in further mediation dates to see if they could reach resolution on outstanding issues.
>
> I met with the parties once again on December 11 and 12, 2019 and we engaged in an extensive in-depth dialogue regarding: the parties outstanding proposals; the rationale for their positions; the concerns and risks each party faced with respect to possible compromise positions; and the significant consequences to both the student body and the university as a whole if a resolution could not be reached. It is based on these in-depth discussions and debates that I make the following recommendation, as a whole package, to the parties for settlement with a high degree of confidence that this represents the best compromise position that each party could accept."

Facts and Argument

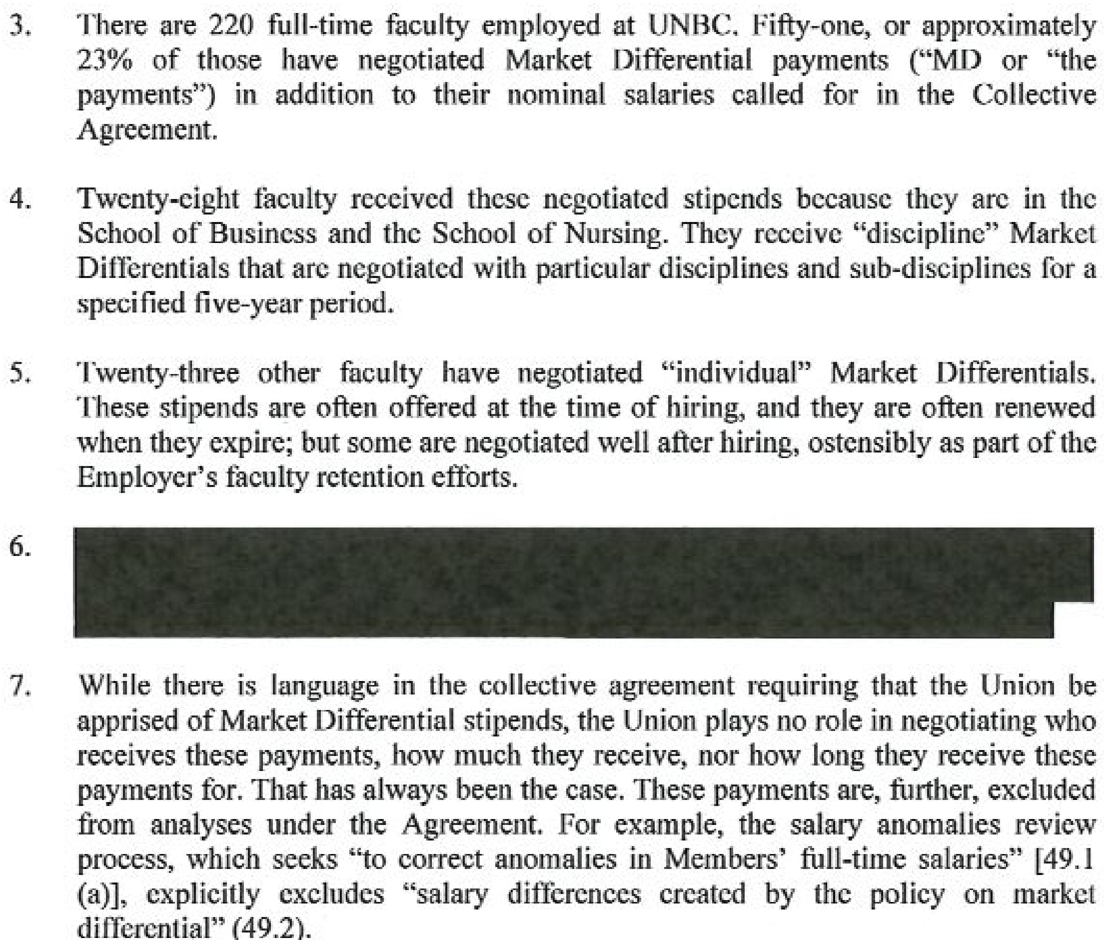
Market Differentials

3. There are 220 full-time faculty employed at UNBC. Fifty-one, or approximately 23% of those have negotiated Market Differential payments ("MD or "the payments") in addition to their nominal salaries called for in the Collective Agreement.

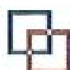
4. Twenty-eight faculty received these negotiated stipends because they are in the School of Business and the School of Nursing. They receive "discipline" Market Differentials that are negotiated with particular disciplines and sub-disciplines for a specified five-year period.

5. Twenty-three other faculty have negotiated "individual" Market Differentials. These stipends are often offered at the time of hiring, and they are often renewed when they expire; but some are negotiated well after hiring, ostensibly as part of the Employer's faculty retention efforts.

6.



7. While there is language in the collective agreement requiring that the Union be apprised of Market Differential stipends, the Union plays no role in negotiating who receives these payments, how much they receive, nor how long they receive these payments for. That has always been the case. These payments are, further, excluded from analyses under the Agreement. For example, the salary anomalies review process, which seeks "to correct anomalies in Members' full-time salaries" [49.1 (a)], explicitly excludes "salary differences created by the policy on market differential" (49.2).



8. The terms for the negotiations of the MD are set out in the University Policies established by the UNBC Board of Governors. Section 8 of the policy **(Appendix 4)** states:

> Market differential stipends shall be paid to Members within an identified discipline or sub-discipline, or as an individual, for a period of up to five (5) years. In the September semester, prior to the expiration of the Market Differential period, a discipline, sub-discipline or individual will be reviewed for continuation of the market differential stipend on submission of written application. There shall be no limit to the number of terms for which a market differential stipend can be continued. The 5-year period for disciplines or sub-disciplines commences on July 1st following approval of the market differential application.

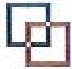
9. The Market Differential payments are granted as dollar amounts in addition to the Members' nominal salaries. They are often quite substantial. For example, a member might have a Market Differential payment of $49,000, a sum that might constitute as much as a 65% increase in her or his salary. According to the policy, this payment is in addition to any other salary that the member receives. So, when Members' salaries increase as a result of the Collective Agreement, their Market Differential stipends are not reduced. Again, this has always been the case.

Current Negotiations

10. In the current round of contract negotiations, from March 5, 2019 to the present, the Employer tabled a number of variations in the actual language, but all the variations had the same effect - "Members receiving Market Differentials as of June 30, 2019 will have their nominal salaries adjusted to include the market differential amount." In other words, the Employer proposes to break its contractual obligations to those members by 'clawing back' a portion of the salary increases to which they would be entitled by virtue of the salary increases in the new Collective Agreement.

11. The Union long hoped that the Employer would drop its demand, but it became clear that they would not. The problem is that adjusting salaries this way violates the Market Differential policy, would be contrary to all past practice, but most importantly, it would violate many letters of appointment. It would also result in some of faculty members receiving much less pay than promised in their letters of appointment.

12. The net effect of the Employer's demand, if they had been successful, would have been to force the Union to agree to a dramatic change in many of their members'



individual contracts of employment, to which it was not a party, and which it could not legally agree to.

13. To re-state the Union's concern - the heart of the Union's complaint is that the Employer tabled proposals that required the Union to agree to the Employer's plan to renege on its own contractual obligations, to which the Union has not been a party. To do so would represent a dramatic change in agreements between the University and individual faculty members—dramatic in the sense that some Members would see no salary increase at all under the new Collective Agreement.

14. The Employer illegally took that proposal to impasse, and continues to do so.

15. The unfair labour practice was complete at that point in time – at the point the Employer took that proposal to impasse - but it is continuing. The employer was and is attempting to force the Union to bargain away a benefit the Union had no role in bargaining, and has no legal capacity to bargain.

16. That proposal was a key factor in the Union's 21-day strike in November 2019.

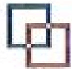
17. It is part of the Employer's Final Offer Selection proposal currently scheduled to be heard by Arbitrator Arne S. Peltz on July 22 and 23, 2020. Under the FOS process, the Arbitrator must award one or other complete package. He cannot pick and choose different proposals from each party's package.

18. Should the Arbitrator select the Employer's proposal, he will be awarding a clause that should never have been part of the Employer's FOS proposal. It would be illegal.

19. The Arbitrator's mandate is a narrow one. He does not have the authority of an arbitrator acting under Part 8 of the *Labour Relations Code*. That authority, if it was applicable, has been narrowed by the Parties' agreement.

20. In a January 7, 2012 decision, Arbitrator Colin Taylor described the process this way:

> [6] In Final Offer selection (FOS) arbitration, the two parties to a dispute submit final offers to an arbitrator. The arbitrator then chooses as the binding solution that offer which is closest to his view of the appropriate outcome. Unlike interest arbitration where the terms of a contract between the parties are settled, the FOS arbitrator cannot compromise. He must select the final offer made by one or the other party which in his view is the closest to the appropriate outcome even if it is not (in the arbitrator's view) the most appropriate outcome.



British Columbia Public School Employers Association/The Board of Education of School District #41 (Burnaby) and BCTF/Burnaby Teachers Association, 2012 CanLII 8376. Paragraph 6.

Deferral Issue

21. Similarly, for this reason, we respectfully submit this is not an occasion on which the Board should follow its deferral to arbitration policy. This is one of the exceptions referred to in the original decision on that issue:

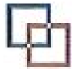
> (d)The policy of deferral to arbitration and the jurisdiction of arbitrators to interpret and apply the statute are not without limitation. Exceptions arise, and the Board will take jurisdiction where: the grievance and arbitration provisions will be incapable of affording an adequate remedy; the issue is unusual and not a matter normally subject to third party arbitration; the contract interpretation dispute is inextricably intertwined with the law and policy of the statute; or a collective agreement interpretation issue is necessarily incidental to the disposition of a matter properly before the Board: Nanaimo Times, supra, at pp. 206-208 and cases referred to therein.
>
> *Repap Carnaby Inc.*, 1994 BCLRBD No. 30

22. The Employer's proposal in article 74.B completely overrides the long-standing existing policy on market differential, as well as the numerous provisions contained in the existing collective agreement language referencing the concept of market differential, including articles 13, 15, 16, 48, 49, and 54. Attached as **Appendix 5** is an electronic copy of the parties' existing collective agreement.

23. As stated above, historically negotiations respecting a member's entitlement to a market differential have not been negotiated between the Faculty Association and the Employer. Rather, they are negotiated between the individual faculty and the Provost in conformity with the terms of policy – 48.1.2.

24. The purpose of the policy is to address market conditions which are required to maintain the viability of the program. The Employer's proposal completely eliminates that purpose.

25. Agreeing to such a proposal would undermine the contractual commitment by the University to award members Market Differential payments that would be potentially renewable after the existing term expires, according to the terms and conditions of the Market Differential Policy. That contractual commitment is in addition to general wage increases the member would receive along with other members of the bargaining unit – a wage increase that is negotiated with the Faculty Association.



26. The policy is a policy of the Board of Governors. It is not a negotiable item to be amended or eliminated as a result of collective bargaining.

Individual Agreements Do Co-Exist with Collective Agreements in Many Sectors

27. Individual agreements co-exist with collective agreements with the agreement of all three parties – the employer, the union, and the individual faculty. Examples exist in the sports world, the entertainment world, and academia, to name a few, and have for decades.

28. The value of demonstrating the breadth of the usage of individual contracts co-existing with collective agreements is that the impact of allowing what UNBC has done to proceed unchecked is dramatic, not only for Union, but other university faculty, professional athletes, and film employees, to name a few.

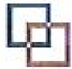
29. We respectfully say, this is not an issue that should be deferred to the collective agreement arbitration, but requires an adjudication by the Labour Relations Board.

30. Also, the conventional wisdom is that individual agreements are not permitted in modern Canadian and British Columbian labour relations. That is true in the majority of cases, but there are 100s of employment relationships across sectors, in which individual agreements co-exist with collective agreements – legally. They cannot be unilaterally terminated. Nor can they be terminated by agreement between union and management. They can only be terminated by agreement between the employer and the individual.

31. We respectfully submit the implications of this case are far reaching. For that reason, as well, the matter ought not to be deferred to arbitration.

32. Some of the better-known relationships in which individual contracts co-exist with collective agreements is in the world of unionized professional athletes. I have set out below the language taken from the current professional hockey and professional soccer collective agreements as two examples amongst many:

> **NHL and NHLPA Collective Agreement September 16, 2012 – September 15, 2022**
>
> "Agent Certification Program" means the program by which the NHLPA certifies agents to represent Players in individual SPC negotiations with clubs
>
> "Certified Agent" means an agent duly certified by the NHLPA to represent Players in individual SPC negotiations with Clubs. "Certified



Agent List" shall have the meaning set forth in Section 6.1 of this Agreement.

ARTICLE 6 (excerpt only) NHLPA AGENT CERTIFICATION

6.1 Exclusive Representation. The NHL and the Clubs recognize that the NHLPA, in accordance with its role as exclusive bargaining agent for Players, certifies and regulates the conduct of agents who are authorized to represent Players in individual SPC negotiations with Clubs. The Clubs may not engage in negotiations for a Player's individual SPC with any person other than the Player or an agent certified by the NHLPA ("Certified Agent").

Major League Soccer and Major League Soccer Players Union - February 1, 2015 – January 31, 2020

Section 1.1 Recognition: MLS recognizes the Union as the exclusive bargaining representative of all present and future players employed as such in the League, but not including any other MLS employees. MLS and the Union agree that, notwithstanding the foregoing, such Players may, acting individually or through a player-agent, on an individual basis, bargain with MLS with respect to and agree upon terms over and above the minimum requirements established by this CBA, to the extent not inconsistent with this CBA (including the Standard Player Agreement and any other exhibits hereto).

33. Similar arrangements exist in the world of unionized professional baseball (MLB and MLBPA), and football (NFL and NFLPA).

34. The coexistence of individual and collective agreements governing relationships is common in the academic world as well. As an example, I have included language from the current University of Victoria and UVFA collective agreement:

Collective Agreement University of Victoria Faculty Association and University of Victoria July 1, 2019 – June 30, 2022

Supplementary Salary Amounts

50.35 The Vice-President Academic and Provost may authorize a Unit to offer a market supplement as a recruiting measure or a retention adjustment to secure the retention of a Member.

50.36 The amount and terms of a market supplement will be stated in an offer letter to a candidate for an appointment. A market supplement may be a permanent salary increase or may be of a limited duration, in which case it may decline during the payment period, and may be renewable. A market supplement does not form part of a Member's regular base salary, but it is

included in a Member's salary for the purpose of all benefits and Study Leave salary calculations.

50.37 A retention adjustment is added to the regular base salary of a current Member without any time limitation. The letter informing the Member of the retention adjustment will include the procedure to be followed in the calculation of the Member's salary when the Member is promoted, if that promotion involves a raise to the salary floor of the rank to which the Member is being promoted.

35. Similar examples abound in the entertainment world:

BC Master Animation Agreement – UBCP/ACTRA and the Canadian Media Producers Association 2020-2023

A110 Territorial Jurisdiction and Application of this Agreement

(b) Before assigning a Performer to perform duties at a location outside of Canada, the Producer will sign a written individual contract with that person. The individual contract must specify the duration of assignment, rate of pay, working conditions, payment of expenses, accommodation arrangement, and it may include any other pertinent information or other terms and conditions of engagement no less favorable than those provided under this Agreement. A111 Money Defined All references to "dollars" or money rates of any kind in this Agreement, including

36. Various examples may also be found in the case law, include the following sectors:

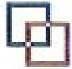
National Ballet of Canada v Canadian Actors Equity Association, [2000] OLRD No. 209

Anishinabek Police Service and PSAC, [2018] OLRD No. 2647

CBC and Canadian Media Guild, [1997] CLAD No. 230

Elk Island Catholic Separate Regional Division No. 41 and Alberta Teachers Association, [1999] AGAA No. 98

Vancouver Symphony Society v. Vancouver Musicians Association (1998), BCCAAA No. 372



Law

37. The Board has issued many decisions over the years, including recently, dealing with the issue of individual contracts. However, this is one of the first, perhaps *the* first occasion in recent years in which the Board has had to deal with the specific issue of one of three parties attempting to compel another party to agree to a change to an agreement to which it is not a party.

38. We also note that the Board has a long experience dealing with a similar impasse issues – in which one party attempts to force a change in the bargaining format and takes that demand to impasse. That issue was dealt with by the Board just a few months ago in *Sheraton Vancouver Airport Hotel, Hospitality Industrial Relations and UNITE HERE Local* 40, 2020 BCLRB 31 (CanLII).

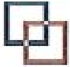
39. In that decision, the Board referred with approval to the following frequently cited passage from *Interior Forest Labour Relations Association*, BCLRB No. B179/99, paragraph 66:

> 20 An alteration in voting constituency destroys the existing decision-making framework and replaces it with another. *It is accordingly the prospect of a change in bargaining format from the status quo that renders an attempt to pursue a different format beyond the stage of impasse a failure to bargain in good faith.* It is irrelevant whether the change pursued is a change from a certified format to a voluntarily recognized format or vice versa. Northwood is dispositive. While the voluntarily recognized bargaining structure exists, neither the IFLRA nor the IWA Committee can attempt to pursue a different structure beyond the stage of impasse without failing to bargain in good faith. (Italics added)

40. For many years, the Ontario Board has also applied a similar principle, that it is an unfair labour practice to press illegal demands to impasse. In *United Steelworkers of America, Local 9011 v. Radio Shack,* 1985 CanLII 1105 (ON LRB) the Board recited a long list of examples, although none referring to the specific facts in the instant complaint.

41. The *Radio Shack* decision was the subject of favourable comment by the B.C. Board in *Sunlover Holdings Co. Ltd v. Unifor Local Union VCTA,* 2016 CanLII 22159, paragraphs 45 to 50.

42. On the basis of this authority, we say the Employer has violated section 11 of the *Code*. Its conduct amounts to a failure to bargain in good faith and make every reasonable effort to conclude a collective agreement.



Remedy

43. The Union seeks a declaration that the Employer has bargained in bad faith, contrary to section 11 of the *Code*. It also seeks a declaration that the Employer's demand of the Union with respect to the Market differential is illegal.

All of which is respectfully submitted.

Yours truly,

Koskie Glavin Gordon
Per:

Leo McGrady, QC

LM/kg

Encls.

cc Client (Via E-mail)
Michael Wagner, Roper Greyell (Via E-mail)
Dan Ryan, UNBC (Via E-mail)

(119)002 LRB01 re UFLP (May 13 2020)