QUFA VOICES
Your Queen's University Faculty Association Newsletter

July 2017

EXECUTIVE DIRECTOR'S VOICE

To Grieve or Not to Grieve

QUFA's decision to grieve on behalf of a Member is driven by legislative and policy frameworks

By Leslie Jermyn
Executive Director, QUFA

QUFA staff and leadership are often asked about decisions taken to grieve on behalf of a Member or to pursue the grievance through to formal arbitration. These questions are driven fairly equally by those who think we're doing "too much" and by those who think we're "not doing enough" to defend Members. While every case is different, QUFA does not arrive at these decisions in a singular or arbitrary way each time; much of what guides the process is given by the legislative and policy context within which we work.

Ontario labour law dictates that if you are a member of a union, you have the right to be represented in your dealings with the employer by your union. You pay dues to enable the union to provide you with competent representation at the bargaining table and through grievance, in the case your rights under the collective agreement are abrogated. In return for those dues, the union has to give consideration to concerns you raise, and if it decides there is merit, it takes your concerns forward as a grievance. There are caveats here that are explained in a QUFA Infosheet,[1] so that the union can choose not to grieve if there is no remedy or if the risk to you or the wider Membership is too great, for example. The union can make mistakes in these decisions as long as it acts fairly, non-arbitrarily, and without discrimination in considering each issue raised.

In return for the collective power and protection afforded by a union, you give up the right to access other

ANNOUNCEMENT

Queen's University New Budget Model

A Report Prepared by Professor John Holmes for QUFA

QUFA asked John Holmes to prepare a comprehensive document that QUFA Members could use as a tool to understand how Activity-Based Budgeting (ABB) works, where it comes from, and how it has been implemented at Queen's. The report is now available on the QUFA Web site:

http://www.qufa.ca/wp-content/uploads/2017/06/QUFA-New-Budget-Model-Report-2017.pdf

Tables and figures are grouped at the end of the report to make reading easier, and each section begins with a "Section Highlights Bar" to help orient the reader. As well, there is a list of acronyms and an Executive Summary. The report is both comprehensive and comprehensible, regardless of one's level of accounting and budgeting knowledge, or numeracy.

If you aren't familiar with ABB, Section 2 provides an excellent overview of its history in postsecondary education, including an explanation of its basic principles. Section 3 examines ABB at Queen's, and subsequent sections consider a variety of critical perspectives on the implementation of the model in different faculties.

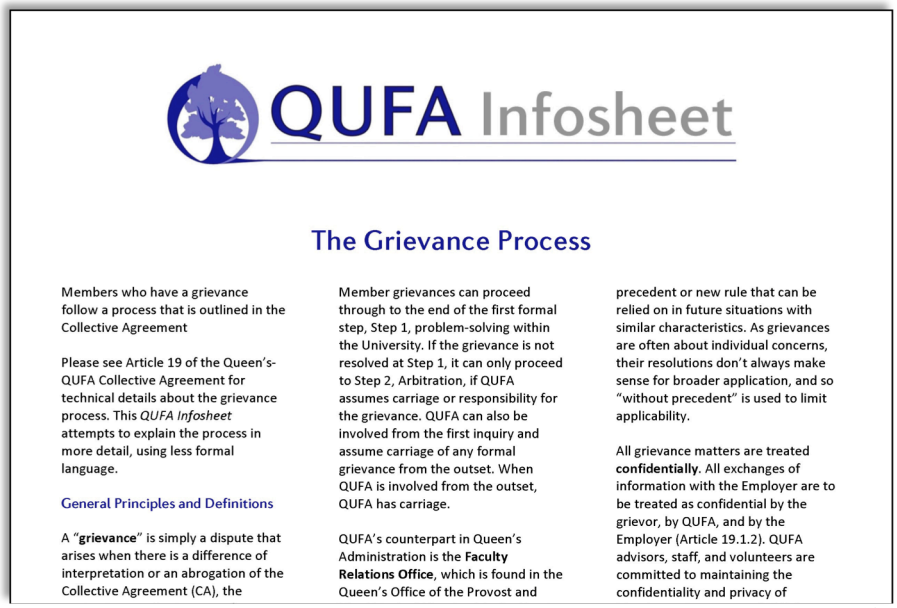
Professor Holmes interviewed administrators and heads to canvass a wide variety of experiences of the new budget model, and the report makes clear why QUFA Members across the campus have such different views of the success of this model.

Please direct any questions or comments about the report to Leslie Jermyn, at jermynl@queensu.ca.

channels of dispute resolution. One exception to this rule is that you may still access the Human Rights Tribunal of Ontario (HRTO) before, after, or in place of coming to the union. In some circumstances, the HRTO will ask that you exhaust union processes first, but you will not be denied HRTO access because you have a union. You will not be permitted to file a civil suit against Queen's, however, because you are deemed to have access to a suitable forum for addressing your concerns: the grievance arbitration process (see Article 19 in the Queen's QUFA Collective Agreement[2]). This restriction is in place to prevent "forum shopping," where litigants take the same complaint through a variety of legal venues seeking a particular outcome.

The fact that unionized workers cannot effect alternative and independent legal processes puts a greater onus on the union to give careful consideration to requests for union representation. In situations that are job threatening, the union must be very sure of its facts and position before refusing to grieve or abandoning a grievance because, once either of those things happens, the terminated member has no other recourse. They cannot go down the street, engage a labour lawyer, and sue for wrongful dismissal or damages; they will take away only what the union and the employer have negotiated as part of the grievance arbitration process. QUFA's policy on deciding when to take a grievance to arbitration[3] makes clear that job-ending employer actions are always top priority. This may help those who think we sometimes do "too much" to see why we grieve in these situations.

On the other side of the coin, the union doesn't always pursue a grievance through to formal arbitration hearings, or even when it does, it may sometimes opt to negotiate a settlement before the conclusion of the hearings. There are


QUFA Infosheet

The Grievance Process

Members who have a grievance follow a process that is outlined in the Collective Agreement

Please see Article 19 of the Queen's-QUFA Collective Agreement for technical details about the grievance process. This *QUFA Infosheet* attempts to explain the process in more detail, using less formal language.

General Principles and Definitions

A "**grievance**" is simply a dispute that arises when there is a difference of interpretation or an abrogation of the Collective Agreement (CA), the

Member grievances can proceed through to the end of the first formal step, Step 1, problem-solving within the University. If the grievance is not resolved at Step 1, it can only proceed to Step 2, Arbitration, if QUFA assumes carriage or responsibility for the grievance. QUFA can also be involved from the first inquiry and assume carriage of any formal grievance from the outset. When QUFA is involved from the outset, QUFA has carriage.

QUFA's counterpart in Queen's Administration is the **Faculty Relations Office**, which is found in the Queen's Office of the Provost and

precedent or new rule that can be relied on in future situations with similar characteristics. As grievances are often about individual concerns, their resolutions don't always make sense for broader application, and so "without precedent" is used to limit applicability.

All grievance matters are treated **confidentially**. All exchanges of information with the Employer are to be treated as confidential by the grievor, by QUFA, and by the Employer (Article 19.1.2). QUFA advisors, staff, and volunteers are committed to maintaining the confidentiality and privacy of

QUFA

For more information about the grievance process, see the *QUFA Infosheet* on QUFA's Web site: http://www.qufa.ca/wp-content/uploads/2017/02/The-Grievance-Process-2017.pdf

myriad reasons for these decisions, and some of the more common ones are:

- The member does not want to or is not able to proceed;
- There is no abrogation of the collective agreement;
- Evidence isn't strong or is successfully challenged by the employer as the process unfolds;
- There is a grievance, but no real remedy, so there is little to be gained by a formal process;
- As much or more can be gained in negotiated settlement as with a formal decision from the arbitrator;
- Proceeding risks a core right or principle.

Usually, some combination of factors emerges that makes withdrawal or negotiated settlement the best alternative at the time, and usually these factors are all confidential so that QUFA staff and leadership cannot explain the situation publicly. "No comment" is cold comfort to those thinking we should be doing more for a particular Member, but it's all we can say most times.

Despite the limitations of the grievance arbitration process and despite sometimes having the individual's concerns weighed against broader, collective principles, having the support afforded by a well-managed union ensures that all members' concerns are heard and assessed and that when members face a job-threatening situation, the union will be there to inquire, defend or negotiate on their behalf.

Notes

[1]http://www.qufa.ca/wp-content/uploads/2017/02/The-Grievance-Process-2017.pdf

[2]http://www.qufa.ca/collective-agreement/

[3]http://www.qufa.ca/member-services/main/grievances/policy-for-step-2-grievances/

Leslie Jermyn can be reached at jermynl@queensu.ca.

FYI

Protecting Your Research Confidentiality

"The Wigmore Test" determines when research confidentiality cannot be breached by the courts or police

By David Robinson
Executive Director, CAUT

On 31 May 2017, in a case where the Canadian Association of University Teachers (CAUT) intervened, Justice Marc St-Pierre of the Quebec Superior Court overturned an earlier order requiring a professor to reveal the names of subjects she had interviewed for a research project. Justice St-Pierre ruled that Professor Marie-Ève Maillé's promise of confidentiality to her research subjects met the four criteria of the "Wigmore" test for determining whether a communication is privileged.

Unlike communication between a lawyer and a client (solicitor-client privilege), there is no blanket protection in law against disclosure of information and communication related to academic research. This means that the identity of research participants and research records could be revealed through a warrant or by court order. However, the Maillé case highlights the framework for determining when research confidentiality cannot be breached by the courts or police. This determination is done on a case-by-case basis, by applying the Wigmore Test from the law on evidence.

The Wigmore Test is a legal assessment by the Court that considers the following:

1. Did the communication originate in confidence?
2. Is confidentiality essential to the full and satisfactory maintenance of the relationship between the parties?
3. Is this the kind of confidential relationship that the community wants to maintain?
4. Will the injury to the relationship by the disclosure be greater than the benefit that would be gained from using the information in the litigation, trial, or hearing?

All four parts of this test must be satisfied in order for the confidentiality to be protected by law. Courts will apply this test on a case-by-case basis, meaning that a finding of confidentiality for one researcher does not mean confidentiality for all. In order to protect research confidentiality, it is important that researchers ensure the following:

- All research documentation should state that confidentiality is integral to the project.
- The researcher should specifically address, as part of the research overview and protocol, why confidentiality is important for the quality of research.
- All recruitment literature and consent forms should specify confidentiality as a condition of participation.
- When interviewing human subjects, all interviewers should understand and explain to participants the need for confidentiality.
- All research materials should be stored in a secure place.
- Researchers should document how breaching confidentiality (or using non-confidential sources) will result in lower quality research, or the inability to recruit participants.
- Researchers should document how breaching confidentiality would affect future research in the field.
- Even if all these practices are followed, Courts might still decide that there is a greater value to the public interest in breaching research confidentiality (point four of the Wigmore Test).

Please do not hesitate to contact the CAUT office if you require further information.

CAUT can be accessed at www.caut.ca.

QUFA VOICES

Spread the Word!

QUFA welcomes you to post a copy of *QUFA Voices* in a visible place in your department or unit. Thank-you!

QUFA VOICES July 2017 (Volume 12, Number 7, Issue 69)

QUFA Voices is published by the Queen's University Faculty Association (QUFA), 9 St Lawrence Avenue, Kingston, Ontario, K7L 3N6, Canada (qufa@queensu.ca). It is distributed electronically to all QUFA Members via the QUFA-NEWSLETTER-L listserv. Past issues are archived on the QUFA Web site at http://www.qufa.ca/publications/.

QUFA Voices publishes QUFA-related news and information for QUFA Members and provides QUFA Members with a forum to express their QUFA-related ideas and opinions. We want to hear from you! Please send your QUFA-related story ideas, news items, opinion pieces, letters to the editor, photographs, and other submissions to the editor.

QUFA Voices is edited by Robert G. May. He can be reached at mayr@queensu.ca.

FYI

Has U.S. Border Patrol Searched Your Mobile Device?

If so, the American Association of University Professors wants to hear from you

By The American Association of University Professors

In conjunction with the Knight First Amendment Institute at Columbia University, the American Association of University Professors (AAUP) is seeking information from any faculty members who have had their cell phones or other electronic devices searched by U.S. border patrol officers at the nation's borders while travelling internationally.

The Knight First Amendment Institute is a recently created non-profit organization that works to defend and strengthen freedoms of speech and the press in the digital age through litigation, research, and education.

The AAUP is concerned with the chilling effect such searches may have on academic freedom and with invasion into the privacy of academic work. We are looking into legal issues related to a U.S. regulation that authorizes border patrol officers to search a traveller's mobile phones and other electronic devices at the borders without any basis for suspecting that the person has done anything wrong.

The government enforces this policy against both American citizens and non-citizens, and there has been a sharp uptick in these types of searches over the past year.

We are seeking to learn more about people who have been searched and to explore possible avenues for legal relief. We are interested in hearing from anyone who has experienced anything along the lines of the following while travelling into or out of the United States:

- A border patrol officer (or ICE officer) has asked to examine the contents of your mobile phone, tablet, laptop, or any other electronic device, including asking you to unlock your device and/or provide a password to unlock your device;
- A border patrol officer (or ICE officer) has examined the contents of your mobile phone or other electronic device, and/or has taken your device outside of your presence for a period of time;
- A border patrol officer (or ICE officer) has sought to examine your social media postings on your device, including by asking you for social media passwords and/or user names or handles;
- You have reason to believe that a border patrol officer (or ICE officer) made a copy of the contents of your mobile phone or other electronic device; or
- A border patrol officer (or ICE officer) has kept your mobile phone or other electronic device for some period of time and then returned it to you.

We are interested in hearing from both U.S. citizens and non-citizens. Please send an e-mail with a brief description of your experience and your contact information to katie.fallow@knightcolumbia.org. We will keep your information confidential.

AAUP can be accessed at www.aaup.org.

QUFA VOICES

Voice Your Views!

If you have an opinion about anything you read in *QUFA Voices*, send us a letter to the editor: **mayr@queensu.ca**

GRIEVANCE CORNER

What Does the Sun Set On with a Sunset Clause?

QUFA Members should know their rights when it comes to "sunset clauses" in disciplinary articles of the Collective Agreement

By Leslie Jermyn
Executive Director, QUFA

Many collective agreements contain what are colloquially known as "sunset clauses" on discipline proceedings. The Queen's-QUFA Collective Agreement (CA) contains such a clause (Article 20.4.4), which states:

> Any record of a written reprimand shall be removed from a Member's Official File after forty-eight (48) months from the date of the written reprimand, provided that no subsequent discipline has been imposed within that period.

Let's parse this out given the remainder of the Discipline article.

First, only records of written reprimand are subject to the sunset provision. Records of more serious discipline, such as suspension, are not removed from the file. Records of non-disciplinary coaching are not removed from the file, either. As the article states, if there is subsequent discipline within the 48-month period, the sunset provision does not apply even to letters of reprimand.

Second, Article 20.1.2 states:

> Discipline shall be progressive with the aim of being corrective; the appropriateness of any disciplinary measure rests on both the cause

and any relevant prior imposition of discipline.

This is a fairly standard labour relations principle, that discipline should be applied proportionally and in measured steps to allow employees to improve their performance or correct their behaviour. In the Queen's-QUFA CA, the steps are:

- Written Reprimand,
- Suspension with pay,
- Suspension without pay,
- Termination.

In practical terms, for non-serious disciplinary matters, the employer cannot jump to suspension or termination without having tried corrective measures such as coaching and written reprimands. However, if an employee is negligent or in breach of the rules or standards, and there is already a reprimand in the file, the employer may be justified in escalating the discipline to suspension.

Third, the requirement to take progressive steps is waived in the event of gross misconduct. Gross misconduct is wilful behaviour that, for example, disregards the safety of others, defrauds the employer, is repeatedly and deliberately insubordinate, or constitutes misrepresentation or breach of trust with the employer. Gross misconduct can be a single act or a pattern of serious misconduct.

Finally, no matter what happens to a document outlining a disciplinary action, two things are true:

1. The employer cannot rely on a prior discipline in aggravation of a current penalty if the prior event happened in the mists of time. This span of time cannot be quantified because it would depend on the circumstances. For example, if an employee were reprimanded for a pattern of lateness and then corrected their behaviour for some years (3, 5, 7), no matter whether there is or isn't a sunset provision, the employer would be hard-pressed to justify suspension with a further single incident of lateness. Progressive discipline dictates that they would be advised to return to coaching the employee. On the other hand, a serious and wilful misconduct that attracted discipline in the past may have a longer lifespan as aggravation simply because it was more serious in the first instance. An employee caught stealing who was suspended could be expected to suffer more seriously if caught again, even if it happens some years down the road. The reason is that this behaviour crosses into the territory of creating a pattern of serious misconduct.

2. The sun may set on the presence of the letter of reprimand in the file, but it never sets on history. The disciplinary events happened: there was a meeting between employer and employee to discuss a problem with the employee's comportment, it ended with a letter in the file for four years. That is always true even if in year five the letter has been destroyed. If asked in year ten, "have you ever been disciplined or coached or advised about this behaviour by your employer?", the correct answer will always be "yes," regardless of whether the employer can rely on the past discipline in aggravation of penalty, and regardless of whether evidence of the past still constitutes part of the official file record.

Given that history cannot be altered by collective agreements, employees who find themselves in subsequent disciplinary hot water will be expected to offer mitigating explanations for the emerging pattern. In other words, rather than ignore the past or assume no one knows it, the employee may be advised to raise it as part of their explanation for what is happening now.

So, the takeaway on sunset clauses is that they do not expunge one's history of discipline. They do remove from official view evidence of minor discipline so that subsequent managers are not disposed to bias against an employee who has corrected unwanted behaviours.

The other takeaway is that whether or not prior discipline matters today depends on many factors including whether or not it was for wilful misconduct, how long ago it happened, whether the current event constitutes a "pattern," and what mitigating circumstances exist.

In the unfortunate circumstance you find yourself facing disciplinary proceedings, the best advice is to be open with your QUFA representative about any past events so that we can advise you on how to deal with these in the present moment.

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