

FACULTY GRIEVANCE COMMITTEE
Tribunal Decision Regarding the Grievances of
Edward R. Vrscay v. University of Waterloo
26 April 2023

Grievor: Edward R. Vrscay, Professor, Applied Mathematics, Faculty of Mathematics

Respondent: James W. E. Rush, Vice-President, Academic and Provost

Tribunal: Paul Stolee (Chair), Public Health Sciences
Roland Hall, Biology
Kirsten Morris, Applied Mathematics

Others present: Adrienne Dwyer, Tribunal Clerk
Alice Raynard, Associate University Secretary

BACKGROUND

The Grievor filed a formal grievance to the Faculty Grievance Committee (the “FGC”) consisting of two parts (hereinafter referred to as “Grievance #1” and “Grievance #2”) against the Administration of the University of Waterloo on 10 January 2022, and a third formal grievance (hereinafter referred to as “Grievance #3”) on 6 April 2022, pursuant to Art. 9.4.3 of the Memorandum of Agreement between the Faculty Association of the University of Waterloo and the University of Waterloo (the “MOA”).

Under Grievance #1, the Grievor claimed that:

- He was a victim of Workplace Harassment by the Dean of the Faculty of Mathematics (the “Dean”), alleging the Dean had “resorted to threats and empty accusations”;
- He was not provided sufficient time to respond to the Dean’s written letter of 5 January 2022;
- The “Administration’s deafening silence was responsible for a poisoned environment under Policy 33 – Ethical Behaviour on the campus” [also noted in the Grievor’s 10 December 2022 *Response to the University’s Written Decision with Reasons* and in his 2 February 2022 *Response to Written Submissions*];
- There had been a breach of due process [e.g., absence of possibility of providing names of potential witnesses, lack of time between the first letter (under Art. 8.8 MOA) and the second letter (under Art. 8.10 MOA) issued by the Dean under the disciplinary process, lack of investigation]; and
- The Dean’s investigation was deficient and thus invalid.

Under Grievance #2, the Grievor claimed:

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- A violation of his rights under Policy 33 [in relation to the removal of his teaching duties of the PMATH 370 course in Winter 2022]; and
- A secondary instance of Workplace Harassment, alleging the Dean had made a threat against the Grievor that he might not be able to teach in Winter 2022.

The Grievor filed a subsequent formal grievance (Grievance #3) against the Administration of the University of Waterloo on 6 April 2022. The Grievor claimed:

- That there were falsehoods in the disciplinary letters provided to him by the Dean;
- That he was compliant with the “University’s Vaccination Requirement” as outlined on the University’s website;
- That the disciplinary procedures proposed by the Dean were inappropriate and unwarranted.

The Respondent replied on 2 February 2022 that Grievance #1 and Grievance #2 had to proceed to arbitration.

REMEDIES

The remedies sought by the Grievor are summarized as follows:

Grievance#1 and Grievance #2:

- A letter from the Dean retracting the ‘Article 8.8’ and ‘Article 8.10’ letters addressed to the Grievor, with an acknowledgement that they represent a violation of the MOA. This letter should also include an apology for said violation.
- A letter from the Dean certifying that regardless of how the Grievor’s current tenured position as Professor of Applied Mathematics is terminated, (i.e., voluntary vs. involuntary retirement), the Grievor should be subsequently appointed as an Adjunct Professor to the Department of Applied Mathematics with the designation of “Lifetime Professor Emeritus”. The Grievor further requested that the letter should certify that the University would complete all necessary documentation which would guarantee that the Grievor can continue to hold his grant, as indicated in the NSERC e-mail letter to him dated January 6, 2022.
- A teaching credit for the PMATH 370 course that the Grievor was prepared to teach in Winter 2022.

Grievance #3:

- A public retraction of the false statement, as alleged by the Grievor, that “The University was required by statute to adopt a COVID-19 vaccination mandate” by the President of the University of Waterloo.
- A letter from the Dean retracting letters 4, 5 and 6, (i.e., his Article 8.8, 8.10 and 8.12 MOA letters addressed to the Grievor), thereby cancelling the eight-day unpaid suspension imposed on the Grievor.

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- An investigation of all similar disciplinary procedures being applied toward faculty members at the University of Waterloo, leading to a retraction of all suspensions and disciplinary procedures together with the immediate rehiring of Professor Michael Palmer (Department of Chemistry).

PROCESS

A Tribunal was formed in accordance with the process specified in the MOA.

The Tribunal issued six Orders to clarify the proceedings and the Rules, in particular:

- Order #1: Grievance #1, Grievance #2 and Grievance #3 shall be considered together by the Tribunal.
- Order #2: On 16 November 2022, the Tribunal adopted its Rules of Procedure and Evidence (the “Rules”) per Art. 9.6.3 MOA, which are the very first adopted by an FGC Tribunal, since no such Tribunal had been established since the MOA had come into force in 1998.
- Order #5: The Tribunal determined that they did not have jurisdiction over matters outside of the MOA and University Policies, per Art. 9.2.2 MOA.

In accordance with the Rules, the Tribunal held an in-camera meeting to carefully consider the information provided by the parties and determined to proceed by way of written hearing on 26 April 2023; notice of said hearing was provided to the parties on 23 March 2023.

DECISION

The decision of the Tribunal is that the Grievances be dismissed.

REASONS

The Tribunal is charged with determining whether a University policy or the MOA have been breached. The decision is based on a determination of the relevant facts, information available in the file, on the extensive information presented by the parties in view of the hearing and on the Tribunal’s reading of Policy 33 and of Policy 34 – Health, Safety and Environment. The Tribunal reviewed the latter relative to the Grievances. The Tribunal did not review the matter of the efficacy of the COVID-19 vaccines, as doing so would have fallen outside of their jurisdiction and scope of competency, per Order #5.

Alleged Infringement of Policy 34

The Tribunal noted that the Grievor did not quote Policy 34 in Grievance #1 and Grievance #2. However, the Grievor alleged in several instances (e.g., in Grievance #2, noting that the Office of the Chief Medical Officer of Health (“OCMOH”) recommended vaccination policies, not specifically mandates) that the University did not have to impose vaccination onto its employees and referred in his Grievance #3 to the fact that “University employees, students and visitors have primary responsibility for their safety and actions and for the impact of their actions on

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others”, interpreting the OCMOH’s instructions of 30 August 2021 (the “Instructions”) and quoting the Nuremberg Code in support of this argument.

In response, the Respondent stated that “the University acted in accordance with its obligations to protect the health and safety of the University community, including students and employees.”

Policy 34 states:

- “In addition to the above mentioned “Related Policies, Guidelines and Procedures”, the policy will be construed in accordance with applicable law, in particular, the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 (the “Act”) [and to other applicable law listed within the policy.]”
- “The University will take every precaution reasonable in the circumstances to protect the health and safety of its employees, students and visitors.”

The Respondent, in his 30 August 2022 response, indicated the context for the adoption of the University’s Requirement [for ease of reference, the Tribunal will refer to this as the University’s “COVID-19 Vaccination Policy” to reflect the wording used in the Instructions]:

“On August 30, 2021, the [OCMOH] issued instructions for all post-secondary institutions to adopt COVID-19 vaccination policies (the “Instructions”). The Instructions became compulsory for the University under subsection 2(2.1) of Schedule 1 and Schedule 4 of O.Reg. 364/20 of the Reopening Ontario (A Flexible Response to COVID-19) Act (the “Regulations”). Generally, the Regulations required businesses to operate in compliance with any advice, recommendations, and instructions issued by OCMOH or those issued by another medical officer after consultation with OCMOH.”

The Tribunal did not review the reasonableness of the Instructions since, per the determination made in Order #5, those were outside of the Tribunal’s jurisdiction. The Tribunal reviewed the Respondent’s arguments, more specifically the fact that the University was trying to protect the health and safety of its community and to follow the law and its Policy 34, in particular that the University had to take every reasonable precaution and that the University, like the other Ontario universities, was directed per the Instructions “to establish a mandatory COVID-19 vaccination [policy]”. The Respondent explained and evidenced how it was incumbent on the University to have a COVID-19 Vaccination Policy, how the Instructions allowed for specific options, and how it was permitted to drop the option for employees to complete an education session on vaccination.

The Grievor did not provide evidence, only arguments, that the University had violated Policy 34. While the Tribunal agrees that employees have “primary responsibility for their safety and actions and for the impact of their actions on others”, the Tribunal also recognized that the University ultimately has responsibility to ensure a safe working and studying environment to its community.

The Tribunal noted that the Grievor referred to the COVID-19 Vaccination Policy required under the Instructions using various terms, such as “policy”, “mandate”, “requirement”, “mandatory

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vaccination and testing policy”, while the University used alternatively “Requirement” (i.e., “your refusal to comply with the University of Waterloo’s Vaccination Requirement”), or “COVID-19 vaccination mandate” (e.g., in disciplinary letters). At the University of Waterloo, policies typically refer to one of the “capital P” Policies (e.g., Policy 33), which are required to follow a defined process before they can become adopted. Thus, the term ‘Policy’ was not feasible during the rapidly evolving crisis-situation of the pandemic during the summer and fall of 2021. The University likely used the term ‘mandate’ as a term to communicate a vaccination requirement drawn up in response to the instructions issued by the OCMOH, while avoiding the term ‘Policy’ which has specific meaning at the University. The Tribunal noted the lack of clarity in the wording of “policy” vs. “mandate”, however decided that this did not affect communication at the time of concern and was not significant. The Tribunal recognized that the University had to make difficult decisions in the changing environment of the pandemic. The Tribunal concluded that the University’s decision was consistent with its obligation under Policy 34 to take “take every precaution reasonable in the circumstances to protect the health and safety of its employees, students and visitors” [underlining added.]

For the reasons above, the Tribunal found that the Grievor had not discharged himself of the onus of demonstrating, on the balance of probability, per Rules 50 and 51, that the University had breached Policy 34.

Alleged Infringement of Policy 33

The Grievor alleged throughout the documents he submitted to the Tribunal that Policy 33 had been violated and that he was a victim of:

- Harassment;
- Workplace Harassment; and
- A Poisoned Environment.

Those terms have specific meaning under Policy 33 and as such are being capitalized by the Tribunal. They are, however, used interchangeably by the Grievor in his documentation.

The Tribunal noted that the Grievor knew and made it very clear on several occasions that he was not going to be vaccinated with a COVID-19 vaccine or to participate in the rapid testing program, under any circumstances.

The University communicated, well before the disciplinary process started in January 2022, that, faculty members needed to become compliant in order to be able to teach on campus, which clearly meant being vaccinated. The Tribunal recognized that there were some changes over time in the University’s messaging on possible disciplinary action; however, as noted above, the Tribunal saw this as a reflection of the University’s need to adapt to the changing circumstances of the pandemic. While this may have caused the Grievor uncertainty, stress and frustration, the Tribunal concluded that this did not in and of itself constitute Harassment, Workplace Harassment, or a Poisoned Environment. The Tribunal understands that much of the stress and frustration was likely due to the possibility of dismissal as an outcome of increasing discipline following the 8-day unpaid suspension.

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The Tribunal concluded that the caution given by the Dean to the effect that the Grievor might not be able to teach the PMATH 370 course in Winter 2022 was not a pattern of vexatious behaviour causing Harassment, Workplace Harassment, or a Poisoned Environment. The Tribunal considered the Dean's caution to have been a prudent and reasonable action to make the Grievor aware of the potential consequences of not being vaccinated; thus, the caution was not a threat, nor was it a breach of the MOA, as argued by the Grievor. The employer, the University, had to implement a COVID-19 Vaccination Policy, which meant that if someone was not vaccinated, they could not do their job. The University also may have had to find an alternate instructor. Faculty members have certain rights, however, they do not have a right to teach certain courses, whether online or in-person, or a right to choose what courses to teach. The employer needed to take action in such circumstances. What was communicated to the Grievor was consistent with what other employees were told throughout the University; this message was not directed only to him.

The Tribunal considers that the situation also became confrontational because of the Grievor's position and that the Grievor could be seen as on the verge of harassing the Dean. The Grievor himself made veiled threats to the Dean of going to the media, threatening lawsuits, for instance in emails to the Dean, and of talking to his students. The Tribunal did not find the University had created a Poisoned Environment. The Grievor provided no evidence that would have supported that allegation.

The Grievor argued further that the University was unresponsive to suggested options and concerns, such as the possibility of teaching online, and questions about the status of his NSERC grant, and saw a lack of respect in that his letters were not acknowledged. In the view of the Tribunal, the University, as an employer, could have, but was not required to, acquiesce, or respond to each of the Grievor's requests or suggestions.

The Grievor indicated the Dean, by making the observation that the Grievor's course had an in-person component which the Grievor was not in a position to provide, had been perceived as making a 'cheap shot'. For the reasons above, the Tribunal disagreed with the Grievor.

The Tribunal noted that the Grievor was never sanctioned with dismissal and he was imposed two minor suspensions.

By the time the Grievor finished his leave, the mandate had been waived. He was not dismissed, neither before he went on leave nor before the Tribunal started the proceedings.

In his last document, *Grievor's Response to the University of Waterloo's "Written Submissions of the University and Case Law"* (2 February 2023, pp. 7-8), the Grievor summarized his requests and arguments. The Tribunal reviewed these attentively and made the following findings:

- 1) On Workplace Harassment: for the above reasons, the Tribunal disagreed with the Grievor that he had been the victim of Workplace Harassment.

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- 2) On a Poisoned Environment: for the above reasons, the Tribunal disagreed with the Grievor that he had been the victim of a Poisoned Environment. The Tribunal understands the Grievor was frustrated, but the situation did not constitute a Poisoned Environment.
- 3) On the “false statement” that the “University was required by statute to adopt a COVID-19 vaccination mandate”: when the University adopted its COVID-19 Vaccination Policy, the Tribunal finds the University’s decision to be consistent with the Instructions and, as noted above, that the University did take reasonable precautions to protect its employees and students.
- 4) On the removal of a third option: the timing of when option 3 of the Vaccination Requirement (i.e., to take a course and submit to regular rapid antigen testing) was removed from the Vaccination Requirement is not a relevant factor in the present case. The Tribunal noted above that the University was not required to agree to the Grievor’s requested options, e.g., for an alternate course or working option. The possibility of dismissal for non-compliance with a workplace policy does not constitute Harassment or a Poisoned Environment. The Tribunal rejected the Grievor’s assertion that his being “non-compliant” equated to his being compliant.
- 5) On the alleged disrespectful treatment by the University: the Tribunal has addressed this point above and found in favour of the Respondent.

The Tribunal was of the opinion that the Dean, and ultimately the University, acted within their managerial authority in this matter. Managers must use some discretion or professional judgement in the exercise of their duties, and in this matter, the manager used due appropriate judgement. The Tribunal concluded that the manager’s actions adhered to University of Waterloo Policy, including Policy 33, Policy 34, and the MOA.

For the reasons above, the Tribunal found that the Grievor had not discharged himself of the onus of demonstrating, on the balance of probability, per Rules 50 and 51, that the University had breached Policy 33.

Alleged Infringement of the Memorandum of Agreement

Overall, the Grievor is grieving the two disciplinary sanctions he received in 2022.

On the first disciplinary process, the Grievor filed his first two Grievances # 1 and Grievance #2 (dated 10 January 2022).

In his Grievance #1, the Grievor queried:

- Was there Workplace Harassment? Was the workplace poisonous? The Tribunal has addressed this above and found in favour of the Respondent.
- Was there breach of due process? The Grievor has raised that the Dean had omitted informing him of all names, places, and dates of the alleged incidents. Unfortunate ‘boiler plate’ wording was included in the 8.8 MOA letter, which the Tribunal recognized as a source of possible confusion for the Grievor, but there was not much to investigate as the

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Grievor had widely broadcasted that he was not going to be compliant (letter of 27 September 2021, quoted by the Grievor in support of his Grievances #1 and #2, and where he indicated he would refuse submitting to the “UW’s vaccine mandate”). Also, the Grievor had been formally notified twice in the fall (15 October and 19 November 2021) that there could be consequences to his actions. Clearly, faculty members had to be compliant by 4 January 2022 to be able to teach during the Winter 2022 semester (whether in-person or remotely). The fact that the 8.10 MOA letter came the next day may have been poorly timed, but it was not fatal to the validity of the disciplinary process.

- Did the Dean fail to provide enough time to the Grievor to respond to the allegations letter? Again, the lapse of time between the 8.8 and 8.10 MOA letters was tight, however the 8.10 MOA letter did provide the Grievor, as required under the MOA, the opportunity to discuss. In effect, there was one month in between the 8.10 MOA letter and the meeting between the Grievor and the Dean. Thus, the Grievor was provided ample time even if the first two letters were delivered a day apart. The Dean could not technically issue the 8.8 MOA letter sooner than the start of the semester. The Dean seemingly used boiler plate language taken from the MOA, but perhaps it was thought better not to compromise the original text of the MOA. Again, the Grievor was also cautioned in the fall of 2021 about the possible consequences of his not becoming vaccinated. Fair process did play out.

The Tribunal agreed with the Respondent that there was no Poisoned Environment, that the Grievor was not compliant, and that due process and the MOA were followed.

In his Grievance #2, the Grievor queried:

- Alleged Policy 33 violation: was there Workplace Harassment? The Tribunal has addressed this above and found in favour of the Respondent.
- Was the Grievor unduly relieved from his teaching duties? The Tribunal has addressed this above and found in favour of the Respondent.

Therefore, the first disciplinary sanction is upheld.

On the second disciplinary process, the Grievor queried:

- His being compliant. This was addressed above.
- A violation of his rights under Policy 33 [in relation to the removal of his teaching duties]: the Tribunal has already addressed the matter of alleged violation of Policy 33. Was the Grievor improperly relieved from his teaching duties? The Tribunal found that it was an inevitable consequence of his decision to remain non-compliant. Again, faculty members do not have a right to choose what courses to teach. The fact that the Grievor was relieved of his teaching duties in Winter 2022 was not an infringement of Art. 8.4 MOA.
- The Grievor also went over the first disciplinary process. This was addressed above.
- The fact the disciplinary sanction was unwarranted and inappropriate. The Tribunal discussed above how the Grievor did not demonstrate that Policies 33 and 34 had been

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infringed, and thus how he was compliant, and that the disciplinary process had been appropriate. For those reasons, the second disciplinary sanction is upheld. The Tribunal noted the mild disciplinary sanctions imposed by the University onto the Grievor and the progression between the first and second sanctions to be in congruence with Art. 8.1 MOA. The Tribunal noted that the Grievor was assigned an eight-day unpaid suspension, but that the salary was paid and had not yet been returned to the University, as per Art. 8.15 MOA.

For all of the reasons above, the Tribunal found that the Respondent had discharged himself of the onus of demonstrating, on the balance of probability, per Rules 50 and 51, that the University had not breached the MOA.

CONCLUSION

At the written hearing, the Tribunal considered each of the Grievor's claims in detail and found that the Grievor had not discharged himself of the onus re: alleged policy infringements and that the Respondent had discharged himself of the onus re: alleged MOA infringements. In consequence, the Tribunal dismissed the Grievor's grievances, no remedies are granted, and the first and subsequent disciplinary sanctions are maintained.

The Tribunal's decision is final and binding upon the Parties.

Paul Stolee, Chair

Kirsten Morris

Roland Hall

Tribunal report distributed in confidence to:

Edward Vrscay, Grievor
James W. E. Rush, Vice-President, Academic & Provost
Mark Giesbrecht, Dean of Mathematics