

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

UNIVERSITY OF BRITISH COLUMBIA

(the “University”)

-and-

UNIVERSITY OF BRITISH COLUMBIA FACULTY ASSOCIATION

(the “Faculty Association”)

(Steven Galloway Arbitration)

ARBITRATOR: John B. Hall

APPEARANCES: Eric J. Harris, Q.C., for the University
Jessica L. Burke and Allan E. Black, Q.C.,
for the Faculty Association
Brent Olthuis, for Steven Galloway

DATES OF WRITTEN SUBMISSIONS: July 20, and
August 7, 17, 21, 24 & 27, 2018

DATE OF ORAL SUBMISSIONS: September 17, 2018

DATE OF SUPPLEMENTAL AWARD: September 25, 2018

SUPPLEMENTAL AWARD

I. INTRODUCTION

I issued a summary award on June 8, 2018 (the “Award”) which addressed certain issues flowing from two grievances filed by the Faculty Association on behalf of Steven Galloway (the “Grievor”). My primary determinations were that “certain communications by the University [had] contravened the Grievor’s privacy rights and caused harm to his reputation” and that he should receive \$167,000.00 in damages (p. 4). The next paragraph of the Award dealt with confidentiality, and read:

Finally, in accordance with the Consent Order dated March 23, 2017, the entirety of the proceeding before me continues to be strictly confidential and will not be disclosed unless required by law, except for matters recorded in this award. Consistent with that Order, no party will comment on the proceeding or the reasons for the Grievor’s dismissal. Should any party intend to make a public disclosure which might be contrary to the confidentiality terms, it will provide reasonable advance notice to the other parties and any disagreement will be referred to me for a binding determination before the disclosure is made public.

The Faculty Association and the Grievor¹ allege that public statements made by the University since publication of the Award have contravened the confidentiality terms and continued to violate the Grievor’s privacy rights. By way of remedy, they seek “a substantial monetary amount of additional damages”; a formal public apology to both the Faculty Association and the Grievor; the retraction of certain comments; removal of a statement posted on the University’s website; and, a permanent injunction governing any future statements by the University concerning the Grievor.

The University denies any contravention of the confidentiality terms. It maintains its representative was only responding to public statements made by the Grievor, and says it had been considered “unfair” that the Grievor would be allowed to “not only attempt to

¹ It is common ground that the Grievor is a “party” for purposes of the confidentiality provision.

demonstrate his complete innocence but to do so by criticizing the faculty, staff and the complainants who were involved in the complaints which were made against him”. The University also takes issue with the Grievor’s failure to give advance notice of his intention to make those communications. In short, the University submits the confidentiality terms did not preclude it from responding to the Grievor’s communications and commenting on an investigation conducted prior to the arbitration by a former B.C. Supreme Court Justice (which resulted in what has become known as the “Boyd Report”), as well as on matters “which did not relate to the [arbitration] proceedings or the Arbitration Award”.

II. THE CONFIDENTIALITY PROVISIONS

The Consent Order dated March 23, 2017 was issued at the joint request of the University and the Faculty Association before the hearing began. It provided in part:

- (c) The hearing will be “in camera” and no one who attends will convey at any time, to the general public and/or the media, including any form of self-publication or social media, or anyone else, anything that transpires during the hearing.

The subject of confidentiality was revisited in February of this year when the parties agreed to a revised process to determine the outstanding issues raised by the grievances. That process was very much the product of mediated discussions, and was confirmed in a letter dated February 23, 2018. Paragraphs 6, 7 and 10 of the letter read:

In accordance with the Consent Order dated March 23, 2017, the entirety of the proceeding before me (including this letter) continues to be strictly confidential and will not be disclosed unless required by law, except for matters which may be recorded in the summary award. *Consistent with that Order, no party will comment on the proceeding or the reasons for the Grievor’s dismissal.*

Should any party intend to make a public disclosure which might be contrary to the confidentiality terms, it will provide reasonable advance

notice to the other parties and any disagreement will be referred to me for a binding determination before the disclosure is made public. The immediately preceding notice requirement will be included in the summary award.

* * *

In addition to my current jurisdiction, I will have authority to conclusively determine any difference which may arise in relation to the above. This includes ... any alleged breach or apprehended breach of the confidentiality provisions. (*italics added*)

As part of the February understanding, and as recorded in the Award by agreement, the Faculty Association withdrew its claim on behalf of the Grievor for reinstatement, as well as its claims for compensation for lost income and benefits. Consequently, the issue of whether the University had cause for dismissal was no longer contested as part of the arbitration.

Shortly before the Award was published, I provided written directions regarding the scope of the confidentiality terms in light of submissions made by the University and the Faculty Association over intended public statements. The ruling read in part:

It is my view that the “confidentiality terms” captured by the February 23 letter are broader than those in the Confidentiality Order. The latter was focused more narrowly on “the hearing”. The broader “confidentiality terms” stipulate that no party may comment on “the proceeding” (or the reasons for the Grievor’s dismissal) except for matters recorded in the Award. (letter of June 5, 2018 at p. 2)

Additional guidance was given in an email sent to counsel for the primary parties on the same date:

I have been exceedingly careful throughout to not comment on what [the Grievor] may or may not say in respect of anything outside of the arbitration proceeding, including the Boyd Report, as the latter in particular is not within my jurisdiction. What I have said, and repeat now, is my view that the confidentiality terms in the February 23 letter (to be confirmed in the pending Award) do not impact on those other matters in

any way, *provided there is no public comment on the reasons for the Grievor's dismissal.* (italics added)

Finally, counsel for the Grievor sought clarification of the confidentiality terms in advance of the Award, and a conference call with all counsel was held on June 6. My email to counsel the next day confirmed the common understanding that the Grievor was precluded from commenting publicly on the pending Award, but was “*not* restricted from commenting on the effect of this process on his life and career, so long as those comments do not touch on what happened during the proceeding” (emphasis in original).

III. PUBLIC DISCLOSURE SINCE THE AWARD

Following publication of the Award, the Grievor made a number of statements which were reported in the news media, both in print and online. He also gave “an exclusive account of how allegations of sexual assault had devastated his career and his life” which was published in mid-July by the *National Post*. The public disclosures by the University which allegedly breached the confidentiality terms followed this account. The first is a report in the *Vancouver Sun* (the “*Sun* article”) on or about July 13 which quoted the University’s Vice-President of External Relations, Philip Steenkamp. The second is a “Statement on media coverage of Steven Galloway case” (the “Statement”) posted on the UBC News website on the same date.

I will examine some of these communications more extensively in my analysis below. At this stage, I note a number of the comments attributable to the Grievor which the University says prompted its public response. Some of them are found in an article by Kerry Gold of Rogers Media dated June 8 which reported on the Award. The article quotes the Grievor:

The 42-year-old married father of four says he hopes the decision brings some closure to the long months he has endured without a job and going deep into debt. At one point, he says, he came close to suicide. The award states that he is not allowed to discuss details of the arbitration.

"You come out of it having received a judgement that you didn't do these things, and that is still not good enough," he says, referring to the Boyd decision. "You think, well then there is nothing that will ever be good enough. There is no possibility of innocence. To realize that, after having put so much faith in a system to arrive at the truth, and for the truth to matter to anyone, yeah, it's a hard feeling to describe, but hopelessness is the only word I can think of.

"That, combined with just how painful it was to have the majority of my former colleagues at work go from being quasi-family members to people who absolutely loathed me, without ever speaking to them about it. It was a painful, wrenching shock, and something I never thought could happen. At the very least, I thought I would be given an opportunity to, I don't know what, tell my side — even if they wanted to take a neutral position. I don't know what I expected, but I expected people who'd known me for 20 years not to immediately go to the worst possible conclusions."

The article proceeded to summarize the complaints made against the Grievor which were considered in the Boyd Report, and noted the finding that there was no evidence of sexual assault.

A second article referenced by the University was written by Gary Mason and published in the *Globe and Mail* on June 8. The article records the outcome of the Award, but focuses mainly on the allegations which led to the Boyd Report and the associated impact on the Grievor. These passages in particular are highlighted (emphasis by the University):

While he takes responsibility for certain actions that preceded his firing as the chair of the University of British Columbia's creative writing department, the acclaimed author also believes that *what happened to him is unconscionable - not just the abysmal, ham-fisted way in which he believes the university handled the allegations leveled against him, but also the fact that charges he's insisted all along were groundless have left his reputation in ruins.*

* * *

... He insists that the allegations of sexual misconduct made by a student he had a *two-year affair* with were always untrue and that many of the other complaints against him were frivolous.

Another article by Mr. Mason was published in the *Globe and Mail* on June 12. As the University acknowledges in its August 7 submission, "... the journalist records the discussion with [the Grievor] and with particular emphasis on the report of Mary Ellen Boyd" (para. 3.6). There is no comment attributed to the Grievor regarding the arbitration proceeding or the Award.

A further publication referenced by the University is a lengthy article by Brad Cran published in the *Quillette* on June 21. It is titled: "A Literary Inquisition: How Novelist Steven Galloway Was Smeared as a Rapist, Even as the Case Against Him Collapsed". The content of the publication reflects the title; that is, it is a detailed examination of the process which culminated in the Boyd Report. Consistent with that scope, the University notes the article "deeply criticizes the procedures followed by the University in conducting the investigation" (August 7 submission at para. 3.8).

Another article quoted by the University in its submission was authored by Marsha Lederman and published in the *Globe and Mail* on July 3. It followed a request from the main complainant in the investigation (known as MC) for the Grievor to release an unredacted copy of the Boyd Report. The University points to the following extracts:

But Mr. Galloway says that, after enduring nearly three years of the repercussions from the allegations against him, he has no intention of waiving any rights the law provides him - and says at no point did he "stand as an obstacle" to MC's "exercising the access rights provided her at law, nor did he stand as an obstacle to her receiving and reading the Report," according to a statement from his lawyer, Brent Olthuis.

* * *

According to Mr. Galloway, Ms. Boyd substantiated only one allegation, on a balance of probabilities - and it was not sexual assault, but involved an affair. MC has said her complaint was not about a consensual affair.

* * *

As for Mr. Galloway, he is trying to move on with his life and will not be complying with MC's request, according to the statement from his lawyer.

"It is approaching three years since MC made her allegations of sexual assault against Mr. Galloway, Mr. Galloway has always categorically denied those allegations, and the Boyd Report dismissed them on a balance of probabilities, which is the civil, not criminal, standard," Mr. Olthuis wrote. "Having gone through the process of the investigation and Boyd Report, and having now endured years of damaging repercussions for allegations he rejects as untrue and that have been proven untrue, only to become the subject of further accusations from MC about process, Mr. Galloway has no intention of waiving any rights that the law provides him."

There is a significant amount of text between the second and third of the above extracts which deals with privacy law, release of the Boyd Report and statements by MC's legal counsel. Once again, there is no comment attributed the Grievor regarding the arbitration proceeding or the Award; the focus is manifestly the Boyd Report.

The "exclusive account" written in the first person by the Grievor was published by the *National Post*. The University points to passages which are critical of faculty and staff, and to statements by the Grievor that "I did not commit the crime I was accused of". The account concludes with this paragraph:

... Though I have no wish to quarrel with anyone, I will no longer be silent. I won't accept further shame or bullying, or the lies that have been told about me. I was investigated and I was exonerated. An arbitrator ruled that UBC violated my privacy rights and caused damage to my reputation. I won't let others define me in ways that ignore these central facts.

The only other express reference in the account to the arbitration proceeding is this statement: "I am now not permitted to speak about the arbitration process (as ordered by the arbitrator)". The remainder of the text deals extensively with the allegations addressed by the Boyd investigation, together with the impact of those allegations on the Grievor's life and career.

The University asserts the Grievor's public disclosures were "artfully" crafted to leave the impression that he was fully exonerated from all matters other than an ethical issue with a former student. The Grievor's counsel maintains that his client has been "careful" in his statements; he has consistently focused on the accusations of sexual assault which were the subject of the Boyd investigation, and has avoided discussion of his termination, the arbitration proceeding and the Award.

Putting that debate aside for the moment, there is no dispute the statements now in issue were a direct consequence of the Grievor's public remarks. Although the Faculty Association did not respond to an interview request from the *National Post*, the University did:

In an interview, Steenkamp said he was confident UBC followed the proper process *and made the correct decision when it fired Galloway. The allegations of sexual misconduct were not the only issues the university examined during its review of his employment.*

Steenkamp could not say what other issues were considered.

"It was everything taken together," he said. (italics added)

At the time of Galloway's termination, UBC cited "a record of misconduct that resulted in an irreparable breach of the trust placed in faculty members."

* * *

In his statement, Steenkamp said called the situation "difficult, sensitive and complex."

"At every turn, the university was challenged with finding the right balance between the privacy rights of the individuals involved and demands for ever-greater transparency. The faculty and staff charged with management of this matter were professional and principled in all of their dealings and were guided throughout by the relevant policies and prescribed processes. Characterizations that these faculty and staff engaged in a flawed process, or insinuations that they had ulterior motives, are simply false."

The last-quoted paragraph appears to have been drawn from the Statement posted on the University's website. The latter concludes with the following:

The University respects the arbitrator's decision and has committed to maintain confidentiality over the investigation. It is for this reason that we cannot, without Mr. Galloway's consent, disclose the reasons for our decision to terminate him, or the details of the processes that led us to this decision. In light of our legal obligation of confidentiality, all we can say is that we are confident that the investigation of the complaints against Mr. Galloway was fair and principled, *and that the decision to terminate him was fully justified*. Further, the University wants to make clear that the faculty and staff members who were responsible for managing this issue did so in a principled and professional manner. (italics added)

The Statement also records that "[i]n February 2018 *during the arbitration proceedings*, the Faculty Association withdrew its claim on behalf of Steven Galloway for reinstatement, as well as the claims for compensation for lost income and benefits" (italics added).

IV. SUMMARY OF POSITIONS

The remedies sought by the Faculty Association and the Grievor (hereafter "the applicants") were summarized in Part I above. They submit the following statements by the University were in breach of the confidentiality terms:

1. From the UBC News Release "Statement of media coverage of Steven Galloway Case".
 - (i) "Characterizations that these faculty and staff [charged with management of this matter] engaged in a flawed process ... are simply false."
 - (ii) "In February 2018 during the arbitration proceedings ..."
 - (iii) "[W]e cannot, without Mr. Galloway's consent, disclose the reasons for our decision to terminate him, or the details of the processes that led to this decision."

- (iv) "... all we can say is that we are confident that the investigation of the complaints against Mr Galloway was fair and principled, and that the decision to terminate him was fully justified."
- 2. From the Vancouver Sun article "UBC responds to Steven Galloway's first-person account of the sexual allegations that derailed his career".
 - (i) "In an interview, Steenkamp said he was confident UBC followed the proper process and made the correct decision when it fired Galloway. The allegations of sexual misconduct were not the only issues the university examined during its review of his employment."
 - (ii) "'It was everything taken together', [Steenkamp] said."

The University acknowledges that its communications were deliberate, and were a consequence of the public disclosures by the Grievor. Given his criticisms of faculty, staff and others, it wanted to support their fairness and professionalism. It submits as well that the confidentiality terms did not restrict comments about the Boyd Report or matters which did not relate to the arbitration proceeding. The University faults the Grievor for not invoking the "advance notice" provisions in the February 23 letter (as confirmed in the Award) and asserts that, if the Grievor is "blameless", then the University cannot be criticized for supporting its faculty and staff. It notes as well the prior ruling that the Boyd Report is beyond my jurisdiction. This leaves only the statement by Dr. Steenkamp that there were "other issues" examined when the decision was made to dismiss the Grievor. The University submits those comments did not contravene the Award because Dr. Steenkamp did not identify the issues or give reasons for the termination.

V. ANALYSIS

Several decisions have highlighted the value which our labour relations system places on the voluntary settlement of disputes and, more specifically, on the vital role

which confidentiality restrictions often serve in achieving that objective. There is no controversy over the relevant legal principles, and the briefs submitted by counsel contain several authorities in common. That said, all but one of the cases referred to in argument involved an alleged breach of confidentiality by an individual employee and not, as here, by the employer.

One frequently cited award regarding the importance of confidentiality clauses and the relevant remedial factors is *OPSEU and Ontario (Ministry of the Attorney General)* (2004), 124 LAC (4th) 382 (Abramsky), where a declaration was issued and the grievor who had contravened a confidentiality provision was ordered to return the payment received under the settlement. The adjudicator had earlier reasoned:

Confidentiality clauses, like all other terms of a settlement agreement, should have real meaning. Parties rely on such clauses in deciding whether or not to settle. ...

The breach of a confidentiality provision also causes harm to the grievance settlement process, which is critical to the proper functioning of labour relations and grievance administration. For settlements to work, parties must be sure that all of the terms will be honoured *and enforced*. This is equally true for employers, unions and grievors. A remedy must ensure that confidentiality clauses will be adhered to without being punitive. Deterrence is also a consideration. Each case, naturally, will vary in terms of the appropriate remedy. (paras 86-87; italics in original)

Similar comments are found in *Barrie Police Services Board and Barrie Police Assn. (McRae)* (2013), 232 LAC (4th) 1 (Marcotte), where the arbitrator wrote:

In *Toronto District School Board v. E.T.F.O.*, [(2007), 151 LAC (4th) 145 (Newman)], the employer was found to have breached the confidentiality provision of the Memorandum of Settlement of the grievance. On the matter of the importance of a confidentiality clause, arbitrator Newman states, at para. 21:

The ability to enter into such agreements, with the confidence that the terms of settlement will remain confidential to the parties, is a vital tool in labour relations. Confidentiality provisions must be capable of being used with confidence and vitality, in the essential business of

resolving individual rights disputes that characterize the administration of a collective agreement. They must be enforceable. They must be iron clad. They must be worthy of the parties' continued confidence. (*Barrie Police*, at para. 30)

A more recent pronouncement in this jurisdiction is *Vanderpol's Eggs Ltd. and Teamsters Local Union No. 213*, [2015] BCWLD 6178, 124 CLAS 27 (Foley), where one finds the following discussion at the outset of the analysis:

Confidentiality provisions in settlement documents, such as the June 16, 2015 Settlement Agreement, must have real meaning, be enforceable and worthy of the continued confidence of the persons who enter into those settlement agreements. If the settlement process is to work successfully, the parties to the settlement must be sure that all of the settlement terms will be honored and enforced, including any confidentiality provisions [See *Toronto District School Board v. C.U.P.E., Local 4400* (2007), 161 L.A.C. (4th) 374 (Ont. Arb.); *Globe and Mail (The) and CEP, Local 87-M, Re* (2013), 233 L.A.C. (4th) 265 (Ont. Arb.)].

If confidentiality provisions in settlement documents are routinely ignored by the parties who enter into those settlements documents, there would be a disincentive to even consider settling particular issues. Furthermore, by agreeing that the terms of a settlement will be kept confidential by the parties involved ensures that the parties' agreement to resolve a particular issue in a particular manner will not be misconstrued/misunderstood by others.

The arbitration cases are clear that, if it is concluded that a confidentiality breach of a settlement document has occurred, any remedy to be imposed beyond just a breach declaration will depend on all the circumstances involved in the breach.

Some of the considerations to be made in such circumstances are: what was said or written that constituted the confidentiality breach, in what forum, and the degree to which specific financial and other key settlement details were disclosed; whether the confidentiality breach was intended, premeditated and deliberate as opposed to being inadvertent; whether the confidentiality breach was a one time only occurrence by a party or whether there was a pattern of confidentiality breaches by that party.

In some cases, a declaration alone that a confidentiality breach had occurred would be considered appropriate. In other cases, particularly where deterrence is a proper factor to be considered because of the nature of the confidentiality breach and the circumstances relating to it, a remedy of damages may also be considered appropriate in addition to the breach declaration [See *Green Grove Foods Corp. v. U.F.C.W, Local 175* (2012), 218 L.A.C. (4th) 267 (Ont. Arb.)]. (paras. 20-24)

A final quotation from *Globe and Mail (The) and CEP, Local 87-M*, [2013] OLA No. 273, 115 CLAS 210 (Davie), explains why parties may be motivated to settle discharge grievances in particular:

As in the case of other types of litigation "nondisclosure" and "no admission of liability clauses" are also a recognition of the fact that parties settle grievances for a variety of reasons which may be unrelated to liability or wrongdoing. Employees may settle discharge grievances not because they accept that they have engaged in culpable misconduct warranting dismissal, but because they need money as they are now unemployed and can't afford to wait the weeks, months or years for their grievance to be decided. Employers may settle discharge grievances not because they agree that they acted unjustly, but because it is less costly than proposed litigation, or simply more expedient to deal with circumstances immediately rather than await the outcome of lengthy litigation. Parties may settle matters because each fears that potentially acrimonious litigation will negatively impact ongoing relations. There are as many reasons why parties settle grievances as there are interests and objectives at stake in the grievance. The common thread in all settlements however is certainty of result. By entering into minutes of settlement the parties achieve both finality and certainty of result on terms which they have concluded are acceptable to them. By agreeing that the terms of a settlement will not be disclosed the parties ensure that their agreement to settle matters will not be misconstrued by others. (para. 26)

There is merit to the applicants' procedural fairness arguments that this proceeding should not be converted into an examination of whether the Grievor breached the confidentiality terms. The University chose not to pursue that avenue and, instead, pursued a course of "self-help". Nonetheless, in considering all of the attendant circumstances, I have read (and re-read) the various public statements attributed to the Grievor. A full and objective review of those disclosures confirms the applicants' contention that the Grievor's statements throughout were addressing the allegations

brought by MC and others against him, along with the resulting investigation and the Boyd Report. By way of illustration, I repeat one of the extracts highlighted by the University:

"You come out of it having received a judgement that you didn't do these things, and that is still not good enough," he says, *referring to the Boyd decision*. "You think, well then there is nothing that will ever be good enough. There is no possibility of innocence. To realize that, after having put so much faith in a system to arrive at the truth, and for the truth to matter to anyone, yeah, it's a hard feeling to describe, but hopelessness is the only word I can think of.

"That, combined with just how painful it was to have the majority of my former colleagues at work go from being quasi-family members to people who absolutely loathed me, without ever speaking to them about it. It was a painful, wrenching shock, and something I never thought could happen. At the very least, I thought I would be given an opportunity to, I don't know what, tell my side — even if they wanted to take a neutral position. I don't know what I expected, but I expected people who'd known me for 20 years not to immediately go to the worst possible conclusions." (italics added)

As his counsel submits, these statements refer directly to the Grievor's friends and former colleagues who never gave him an opportunity to speak before deciding he was guilty of sexual assault; contrary to the University's contention, the passage does not refer to the arbitration proceeding. Further, it was preceded in the article by the facts that: (a) the Faculty Association had withdrawn the reinstatement/compensation claims part way through the arbitration process; and (b) the Grievor was not allowed to discuss the details of the arbitration.

I similarly find the University's complaint about the Grievor saying in the final paragraph of his exclusive account that he was "exonerated" mischaracterizes what was written. When read in context, it is apparent the Grievor was giving his description of the findings in the Boyd Report, and was not referring to the arbitration. This becomes evident when one reads what he wrote four paragraphs earlier:

... UBC is an institution whose primary motivator is self-protection. If you doubt this, ask yourself why the university has gone to such great lengths to hide the fact *that one of their professors was cleared of sexual assault charges. In the current climate, exoneration is a PR nightmare.* (italics added)

The assertion that the Grievor claimed to have been exonerated by the arbitration is additionally dispelled by one of Mr. Mason's reports in the *Globe and Mail* stating that "[the Grievor] takes responsibility for certain actions that preceded his [dismissal]".

Moreover, it should not be overlooked that the Grievor's counsel sought and received clarification of what his client could disclose publicly after the Award was issued. It was understood by all counsel participating in the June 6 conference call that the Grievor was *not* restricted from commenting publicly on the effect the process had on his life and career, provided his comments did not touch on what happened during the arbitration "proceeding" (as defined in an earlier ruling). This was consistent with the guidance provided on June 5 that the confidentiality terms do not impact on what may be said by any of the parties on matters outside the arbitration proceeding, such as the Boyd investigation, provided there is no public comment on the reasons for the Grievor's dismissal.

This leads to a fundamental flaw in the University's position. It maintains the confidentiality terms were "limited" and did not restrict comments about the Boyd Report or "matters which did not relate to the proceedings on the Arbitration Award" (August 7 submission at para. 4.8). It likewise asserts it was free to comment on matters that took place prior to the arbitration and were within its knowledge prior to that time (August 24 submission at p. 1). These contentions do not capture the full scope of the confidentiality terms. There was an additional prohibition contained in both the February 23 letter and the Award, which was reiterated in two pre-Award rulings; namely, that "no party will comment on the proceeding *or the reasons for the Grievor's dismissal*" (italics added).

The critical nature of the phrase in italics cannot be overstated. Regardless of whether it was a *quid pro quo* for withdrawal of the reinstatement/compensation claims

as the Faculty Association contends, it was a vital aspect of the agreed process, and it was pivotal in reaching a consensus during the February discussions. Earlier proposals, which were rejected by the applicants, would have permitted public discourse on the reasons for dismissal. Had the University responded to the Grievor's numerous criticisms without mentioning that subject, there would likely have been little or no basis for complaint.

The University's attempt to deflect a finding that it has contravened this aspect of the confidentiality terms because Dr. Steenkamp did not specifically disclose the reasons for the decision to terminate the Grievor cannot be sustained. It is somewhat akin to the unsuccessful plea in the *Wong* case that the grievor could disclose the fact she received a payment as long as she did not disclose the amount. As the arbitrator observed, the applicable restriction did not state that the parties agreed to not disclose "the amount of payment made in this settlement" or to not disclose "the precise terms" (para 19). The restriction here is likewise framed in broad terms and is not qualified in any fashion such as the "specific reasons".

I accordingly find that the confidentiality terms were breached when Dr. Steenkamp told the *Vancouver Sun* reporter that the allegations of sexual misconduct were not the only issues the University examined during its review of the Grievor's employment (although the passage in the article is not attributed to Dr. Steenkamp as a quote, the University has not challenged its accuracy). The confidentiality terms were additionally breached when Dr. Steenkamp said he could not say what other issues were considered, but stated: "It was everything taken together." The Grievor's counsel accurately characterizes these comments as "vague innuendo" harmful to his client.

Before considering the ramifications of these findings, I will briefly address the other breaches asserted by the applicants based on elements of the Statement on the University website.

- (i) "Characterizations that these faculty and staff [charged with management of this matter] engaged in a flawed process ... are simply false."

Although the term “flawed” was not used expressly in the Award, I determined that “certain communications by the University” [and, necessarily, by persons acting on its behalf] contravened the Grievor’s privacy rights and caused harm to his reputation”. The parties’ mutual interest in receiving a summary Award meant that the details were not recounted, but aspects of the University’s process were plainly found to have been defective.

(ii) “In February 2018 during the arbitration proceedings ...”

As the applicants note, I ruled on June 5 that this phrase required amendment prior to any public disclosure. That said, the infringement is relatively minor, and the timing and context is fairly obvious from a plain reading of the Award. Further, at least one article resulting from an interview granted by the Grievor reported that the reinstatement/compensation claims were withdrawn “part-way through the arbitration process”.

(iii) “[W]e cannot, without Mr. Galloway’s consent, disclose the reasons for our decision to terminate him, or the details of the processes that led to this decision.”

This statement by Dr. Steenkamp is not correct. The confidentiality terms in the February 23 letter recorded an agreement between the University, the Faculty Association and the Grievor, and they remain binding on all of the parties through incorporation in the Award.

(iv) “... all we can say is that we are confident that the investigation of the complaints against Mr Galloway was fair and principled, and that the decision to terminate him was fully justified.”

The question of whether the University acted in good faith in relation to the Grievor was contested vigorously by the Faculty Association at arbitration. Due to the manner in which the process unfolded, this aspect of the grievances was not adjudicated. Likewise, as a consequence of the reinstatement/compensation claims being withdrawn,

the issue of whether the University had cause to dismiss the Grievor was no longer contested and there was no arbitral determination on that front. The final part of the above quotation is also an improper comment on the basis for the Grievor's dismissal.

The authorities cited above confirm that arbitrators have exercised both express and inherent authority to fashion remedies in favour of an aggrieved party where there has been a breach of confidentiality. This entails a full consideration of the surrounding circumstances, including whether the breach was unintended or deliberate; the extent and nature of the breach, including the associated harm; and, the need for deterrence to ensure such clauses are respected.

The remedies sought by the applicants include separate amounts of damages. The Faculty Association submits it should be awarded "not less than \$30,000" for the breaches given the deleterious impact on its collective bargaining relationship with the University and, particularly, the imperative of deterrence. The Grievor seeks an award of \$334,000 (i.e., double the amount ordered under the Award) for the ongoing violations of his privacy rights and the contraventions of the confidentiality terms. The University submits the appropriate remedy in the event of a breach would be to clarify the Award for the benefit of all parties to ensure compliance in the future.

In my view, the Award was abundantly clear -- particularly given the history of the proceeding and the rulings issued prior to its publication. On the other hand, I find the magnitude of the damages sought by the applicants is excessive. There is nonetheless considerable force to their position that a "substantial monetary amount" is appropriate. A number of factors cumulatively support this conclusion.

I begin with the observation that, if the University believed the Grievor's public disclosures were "off side" (contrary to what has been determined above), it could have invoked my continuing authority under the February 23 letter to "conclusively determine any ... alleged breach or apprehended breach of the confidentiality provision" (para. 10). Next, both the process letter and the Award contained the "advance notice" mechanism

for a party intending “to make a public disclosure which *might* be contrary to the confidentiality terms” (italics added). The University eschewed this aspect of the parties’ arrangements and, instead, made the deliberate decision to speak with the news media and post the Statement on its website. In that regard, it can reasonably be inferred its Statement was intended to have broad and ongoing distribution to anyone accessing the UBC News section. This was not an inadvertent or momentary violation of the confidentiality terms.

There is then the nature of the breach. As the applicants submit, it represents a new and continuing violation of the Grievor’s privacy rights which, of course, had been the basis for the initial damages award. Further, and to adopt the arbitrator’s description in the *Wong* award, the commitment to remain silent regarding the reasons for dismissal was a “key and integral part of the bargain” (*Wong* at para. 60). The Grievor has in large measure lost the benefit of that assurance, and he is no longer able to contest whether the University had cause (at least one post-Award article on the record before me incorrectly reported that “a third party determination of remaining issues is still needed”).

There is finally the factor of deterrence. It looms large in the present circumstances because of the University’s conscious decision to bypass the “safety valve” in the parties’ arrangements. The applicants understandably do not want to be back at arbitration on a future occasion. This concern, combined with the extent of the University’s resources, leads as well to their request for injunctive and other relief. As the Faculty Association argued in its application:

The power imbalance between Mr. Galloway and the University of British Columbia is so vast that it defies description. Aside from whatever limitations you see fit to place on their conduct, and any remedy you determine just and appropriate for their contravention of your Award, Mr. Galloway is nearly powerless to defend himself against his former employer. In addition, the University has deliberately and intentionally disavowed its agreement and commitment to the Faculty Association who is the exclusive bargaining agent for all members of the bargaining unit. It has jeopardized the trust and confidence that each party must have in the other to maintain a respectful and honest collective bargaining

relationship. We are therefore asking that you issue a supplementary Award, expressly censuring UBC for continued violation of Mr. Galloway's privacy rights and continuing to harm to his reputation. We also propose that you direct UBC to issue a formal public apology to both Mr. Galloway and the Faculty Association for the deliberate and intentional breach of your Award and directions, and that you direct Dr. Steenkamp to formally retract his comments and remove his media statement from the UBC website. (July 20 at page 4)

While not retreating from what has been written to this point, I note the somewhat ameliorating consideration that much of what Dr. Steenkamp stated was already in the public domain -- albeit due to the University's prior violations of the Grievor's privacy rights. Further, having considered the entirety of the record before me, I find the post-Award violations were objectively less egregious than the privacy breaches underlying the initial damages award. They additionally present appreciably less potential harm to the Grievor's reputation.

The University's breach of the confidentiality terms must nevertheless be rectified in a manner reflecting the attendant circumstances. To repeat what has been set out already, confidentiality provisions in general are a vital tool in employment relations and must be worthy of the community's continued confidence and respect. The terms under consideration here were an extremely important consideration for the Faculty Association in agreeing to the revised process during the February discussions, and it placed significant weight on the final wording in order to obtain the Grievor's concurrence. The language was intended to avoid exactly what has happened: see *OPSEU* at para. 90. There was to be no public comment on the proceeding "except for matters recorded in [the Award]". Instead, the University deliberately by passed the agreed-upon procedure for vetting intended disclosures and committed new violations of the Grievor's privacy rights.

Taking into account all of the foregoing, I have determined that the University should be ordered to pay an additional \$75,000 in damages. This sum is to be allocated as follows: \$60,000 to the Grievor for the continued breach of his privacy rights and ongoing harm to his reputation; and \$15,000 to the Faculty Association for the failure to

honour a critical commitment in a controversial and high profile case. Beginning with the March 25, 2017 Consent Order, both parties had worked assiduously throughout to respect the parameters of the private arbitration process. The probable negative consequences for the ongoing collective bargaining relationship and the voluntary settlement of future disputes may be virtually impossible to quantify, but they cannot be ignored.

As for the remaining remedies sought by the applicants, the authorities placed before me do not support an arbitral direction for a formal public apology. See especially the various awards cited at paragraph 7 of *Surrey School District No. 36 and Surrey Teachers' Assn.* (1999), 88 LAC (4th) 445 (Kelleher); see also the reasoning at paragraphs 17 and 18 of *Canadian Corps of Commissionaires (Great Lakes Division) and PSAC, Local 802* (2006), 161 LAC (4th) 80 (Knopf), and the remarks at paragraphs 16-19 of *Thames Emergency Medical Services Inc. and OPSEU, Local 147* (2002), 149 LAC (4th) 431 (Starkman).

I foresee practical challenges in having Dr. Steenkamp formally retract his comments, including a lack of control over how that might be reported in the media and whether it might create new complications. However, the Statement must be removed immediately from the University's website. Further, if requested by the applicants, the University must post this Supplemental Award in its place (or in an equally prominent location) on the website. Any posting is to be preceded by the Summary found in Part VI below and there must be no editorial comment by the University.

Lastly, the applicants' request for a permanent injunction is denied. That form of relief was not raised until the proverbial eleventh hour after submissions had closed. It was advanced at the oral session which had been scheduled to address three questions which I identified based on the submissions. The Faculty Association had strenuously asserted that a decision should be rendered "on the basis of the parties' written submissions". In any event, I would not exercise jurisdiction to grant the request absent

proof of another violation by the University -- and, should that occur, a commensurate increase in the associated damages can reasonably be anticipated.

VI. SUMMARY

I have determined that public statements made by the University following my Award of June 8, 2018 violated the confidentiality terms previously agreed to by the parties and incorporated in the Award. They also constituted a new breach of the Grievor's privacy rights. The University is accordingly ordered to:

- (a) pay additional damages forthwith in the amounts of \$60,000 to the Grievor and \$15,000 to the Faculty Association;
- (b) remove immediately the "Statement on media coverage of the Steven Galloway case" from its website; and
- (c) if requested by the Faculty Association and the Grievor, publish this Supplemental Award on its website in accordance with the directions given above.

I reserve jurisdiction to address any difficulty over implementation, and have continued authority to fashion additional remedies should the language and intent of the confidentiality terms not be respected fully in the future.

DATED and effective at Vancouver, British Columbia on September 25, 2018.

A handwritten signature in black ink, appearing to read "John B. Hall", written over a large, circular scribble.

JOHN B. HALL

Arbitrator