

LABOUR RELATIONS CODE
(Section 104 Appointment)
ARBITRATION DECISION

THE FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

FACULTY ASSOCIATION

THE UNIVERSITY OF BRITISH COLUMBIA

UNIVERSITY

(Re: Was Time Taken to Pay Retroactive Salary Increases Reasonable?)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Faculty Association:	Allan E. Black, Q.C. and Kas Pavanantharajah
Representing the University:	Thomas R. Roper, Q.C.
Dates of Hearing:	October 25 and December 8 and 9, 2016; January 6, 2017
Date of Decision:	January 20, 2017

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1. **Grievance: Time to Pay Retroactive Salary Increases Unreasonable**

[1] Did the University pay all arbitrated retroactive salary increases within a reasonable time after the March 31, 2016 interest arbitration decision? The first retroactive increase for regular Faculty and Sessional Lecturers was paid July 30th and August 15th. The last increase was paid November 30th. An annual July payment was made December 15th.

[2] The Faculty Association says the payment delay beyond August 15th was unreasonable. It claims interest payable to each bargaining unit member for the unreasonable delay. The University says, because of the complexity of implementing the retroactive salary increases and the good faith diligent effort it made to pay the awarded increases, the time it took was not unreasonable.

[3] Although the actual average annual faculty salary is \$143,000, using an average of \$150,000, the University roughly calculates the interest claimed at the *Court Order Interest Act*¹ current pre-judgment rate of 0.7% as approximately \$100,000, an average of \$32.81 per bargaining unit member. It says discretion should be exercised not to award interest because the administrative burden and cost to pay small sums of money

¹ RSBC 1996, c. 79

to each faculty member would be disproportionate to any individual's loss and more punitive than restorative.²

[4] The Faculty Association and University agree I am properly appointed as an arbitrator under section 104 of the *Labour Relations Code* to finally decide the merits of the Faculty Association's August 2nd grievance that all salary increases should have been implemented and paid no later than August 15th, which is four and one-half months after the interest arbitration award.

2. Payment in Reasonable Time is Implied Term in Collective Agreement

[5] When the University voluntarily recognized the Faculty Association in November 1999 as exclusive bargaining agent, the Faculty Association gave up the right to strike and the University gave up the right to lockout. They agreed to binding interest arbitration. When arbitration is invoked, it is not necessary nor the practice to have the final and binding award ratified. Its terms are to be implemented effective the dates agreed or awarded.

[6] There is no express term in the collective agreement on the time within which negotiated or arbitrated retroactive salary increases are to be paid.³ There is an arbitral consensus that in the absence of an express term there is an implied, enforceable term that retroactive salary increases will be paid within a reasonable time in all of the circumstances from when the increase was agreed or awarded. The arbitration decisions referred to by counsel provide the basis for this consensus and a framework for assessing the reasonableness of the time for payment.

[7] The common workplace premise is that employees are to be paid promptly for the correct amount of wages they have earned. It is common experience in payroll administration that:

² The discretionary arbitral authority in BC, to award interest was confirmed by the Labour Relations Board in *British Columbia Hydro and Power Authority* [1982] B.C.L.R.B.D. No. 31. There is a presumption the discretion will be exercised in favour of awarding interest, but interest is not to be awarded automatically. "The facts of each case will determine whether the presumption in favour of granting interest has been rebutted."

³ The collective agreement in *City of Greater Sudbury, Pioneer Manor Long Term Care Facility* [2011] O.L.A.A. No. 471 (Harris) is an example one that has an express term – "within three pay periods." Another is *Nurses Bargaining Association of British Columbia* [2001] B.C.L.R.B.D. No. 400, ¶ 22 - "Retroactive pay shall be received by employees no later than ninety (90) calendar days after the signing of this agreement."

Payroll errors generate intense employee dissatisfaction that challenges the confidence employees and members of their household and circle of friends have in managerial competence. The distraction and unnecessary discontent they generate can cause a decrease in employee morale, adversely impact productivity and consume time and resources to correct.⁴

[8] The arbitral consensus begins with an interest arbitration decision in Ontario on September 28, 1979 setting a retroactive wage rate for hospital employees. The union and employer signed an interim agreement on implementation on November 12th. The union believed the retroactive payment should have been made by December 13th, the date the employer had set as its goal.

However, the changes required for retroactive payments were numerous and, as experience revealed, more complex. The difficulties were due in part to the fact that the membership consists of hourly paid workers. In order to determine the amount of retro-activity to be paid to each hourly worker an accumulation of hours for each employee had to be totaled. The hours were not the same for each employee as some had been absent from work, while others had not, or, of those who had been absent from work, the absent hours were not the same for everyone. Moreover, some of the hourly rates had changed during the retroactive period which added to the complexity of the problem facing the employer.

In any event, the employer carried out what it called "a dummy run" on the computer prior to December 13th, which indicated that the system would function properly. However, when attempts were made at issuing the cheques on December 13th, it was discovered that so many errors were occurring that the cheques could not be issued.⁵

The employer made over 27,000 manual calculations and issued 1,622 cheques on January 24th.

[9] The union grieved claiming damages in the form of interest payable to each employee. Because the employer had a problem implementing a retroactive increase in 1978, the union argued it should have begun preparations to make payment immediately after release of the award and not waited until the interim agreement in mid-November.

[10] The grievance was dismissed. Arbitrator Simmons decided it was appropriate for the employer to wait until concluding the interim agreement before beginning preparations; the employer acted in good faith; the employer did all it could to rectify the unexpected computer problem as quickly as possible; and the delay from December

⁴ *British Columbia Emergency Health Services (Scheduling and Payroll Software Grievance)* [2013] B.C.C.A.A.A. No. 106 (Dorsey), ¶ 10

⁵ *Hamilton Civic Hospitals* [1980] O.L.A.A. No. 33 (Simmons), ¶ 30-31

13th to January 24th was not unreasonably long. “An additional month's delay cannot be said to be so unreasonable that the employer must pay interest on the money. In my view, it would require specific language in the interim agreement requiring such payments by the employer before so holding.”⁶ He assigned shared responsibility to the union and employer for not anticipating what had happened in 1978 might recur in 1979.

[11] Arbitrator O`Shea determined in another dispute 1982 that:

... there is nothing in the collective agreement which specifies when such payments must be made. Although it may be inferred that the parties intended that such payments should be made within a reasonable period of time, I find, in view of the technical problems encountered by the employer and indeed the nature and extent of the mathematical computations which are required to determine the retroactive payments owing to each individual employee, the time that transpired between October 6th and November 27th was not, in all the circumstances, so unreasonable that it could be construed as a violation of the purpose and intent of the collective agreement in this matter. It would be completely unreasonable to expect that such retroactive payments would be available to the employees immediately following the employer's ratification of the memorandum of settlement.⁷

[12] In British Columbia in 1983, a grievance claiming interest was allowed on delayed retroactive wage increases following protracted negotiations. The employers, four of eleven publicly funded long term care facilities, were bound by an agreement signed December 8, 1982. It was determined the retroactive payments could and should have been made by February 10, 1983. Payment beyond that date was unreasonable and interest at the current rate of 12% was awarded.⁸

[13] A collective agreement was ratified June 15, 1992. In 1993, the majority of an arbitration board held it was inferred that the union and employer “intended payments to be made within a reasonable period of time.”⁹ While legislated labour standards for payment of wages was a useful guide, it was not the only measure for payment of more complex retroactive wages. There was no unique or unusual circumstance and the retroactive payment to 450 employees on October 2nd was an unreasonable delay. The payment could have been made seven weeks earlier on July 24th. The presumption in favour of awarding interest was not rebutted.

⁶ *Hamilton Civic Hospitals* [1980] O.L.A.A. No. 33 (Simmons), ¶ 48

⁷ *Regional Municipality of Hamilton-Wentworth* [1982] O.L.A.A. No. 75 (O`Shae), ¶ 16

⁸ *Health Labour Relations Association* [1983] B.C.L.R.B.D. No. 139

⁹ *Health Labour Relations Association (British Columbia Cancer Agency)* [1993] B.C.C.A.A.A. No. 218 (Jackson), ¶ 50; See also *Health Labour Relations Association* [1994] B.C.C.A.A.A. No. 36 (Kelleher)

[14] In December 1993, retroactive pay adjustments to April 1, 1993 in British Columbia public hospitals were awarded on a pay equity claim. The retroactive payments were made March 4, 1994. Arbitrator Munroe determined:

Given the employer's existing staffing, vacation calculations and payouts of calculations and payouts of retroactivity arising from the pay equity award were done as promptly as reasonably possible. That is to say, short of "staffing up" for a peak demand which was unpredictable as to timing, I doubt there was much the employer could reasonably have done to speed up the process.

I do not understand the union to take issue with the observations made in the paragraph immediately preceding this one. Fundamentally, the case for the union is that the employer ought to have had more trained payroll staff (regular or casual) so that the retroactive implementation of the pay equity award could have been accomplished earlier than was the case.

I am not able to agree that the test of "reasonableness" requires the kind of "staffing up" demanded by the union in the prosecution of these grievances.¹⁰

[15] The facts of each situation will determine the reasonableness of the employer's actions. Lack of funds does not justify delay, as it does not justify failure to pay wages.¹¹ In 2007, Arbitrator Burke accepted employer diligence, calculation complexity and demands on the time of the person responsible to implement the payment were relevant considerations. She agreed with Arbitrator Munroe there was no employer obligation to hire additional staff.¹²

2. Faculty Salary Components

[16] The University's annual faculty salary increase process for bargaining unit members with its various inputs is intended to be completed by mid-July each year. Faculty members are paid twice a month. Annual July increases, with their many components, are based on an individual's salary from July 1st of the previous year to June 30th of the current year.

[17] The first three components of an annual salary increase – Career Progress Increments (including carry forward and length of service), Merit Awards and Performance Salary Adjustments – are collectively referred to as Progress Through the Ranks (PTR). PTR increases have been characterized as “the primary means of advancing the compensation levels of faculty under the collective agreement.”¹³

¹⁰ *Juan De Fuca Hospital Society* [1995] B.C.C.A.A.A. No. 486 (Munroe), ¶ 10-12

¹¹ *Health Labour Relations Association (Cartier House Care Centre Ltd.)* [2004] B.C.C.A.A.A. No. 326 (Larson)

¹² *Overwaitea Food Group* [2007] B.C.C.A.A.A. No. 104 (Burke), ¶ 28-29

¹³ *The University of British Columbia* [1997] B.C.C.A.A.A. No. 426 or 793 (Larson, Burke and Taylor), ¶ 58

Sessional Lecturers are not entitled to PTR increases, which do not advance salary ranges or address inflation or salaries at other universities or elsewhere.¹⁴

[18] PTR increases, requiring consultation with and input from Faculties, are made annually regardless whether collective bargaining is ongoing. The review process and accompanying administrative processes begin in February.

2.01 Career Progress Increments (CPI)

[19] Eligible continuing bargaining unit members, which do not include Sessional Lecturers, receive Career Progress Increments effective July 1st.¹⁵ The amount is based on a negotiated unit formula from a pool of money determined by a negotiated percentage of annual salaries of all continuing members. The CPI unit value in any year is: (academic dollars) x (agreed %) plus (unused professional development \$) divided by (total CP units) = value. In 2014, the unit value was \$1,854.

[20] A CPI may be withheld if in the period a continuing member is demonstrating unsatisfactory career progress.¹⁶

[21] The annual increment is higher in earlier career years and stops after various numbers of years among the ranks. "Every faculty member is either a Lecturer or holds one of the following ranks, in either the teaching stream (Instructor I, Senior Instructor, Professor of Teaching) or the professoriate stream (Instructor II, Assistant Professor, Associate Professor, Professor)."¹⁷ After 15 and 13 years for Professors and Senior Instructors, respectively, the CPI is discretionary.¹⁸

[22] There are CPIs for length of service at the 20th and 25th year of initial appointment in an eligible rank.¹⁹

[23] The collaborative process between the Faculty Relations Office and Faculties to identify individual member eligibility for CPI, check the correct unit entitlement for career

¹⁴ *The University of British Columbia*, unreported, July 24, 2013 (Taylor), ¶ 111 (available at www.facultyassociation.ubc.ca/assets/media/bargaining2012_arbitratoraward.pdf)

¹⁵ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 1.01 "Continuing member of the bargaining unit"

¹⁶ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 2.02(d)

¹⁷ Collective Agreement, Part 4 – Conditions of Appointment for Faculty, Article 3.01

¹⁸ Collective Agreement, Part 2 – Salaries and Economic Benefits Appendix A

¹⁹ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 2.03

progress, make decisions to withhold or grant discretionary increments and complete reports for implementation in payroll extends from February to June.

2.02 Merit Awards

[24] A similar negotiated unit formula from a pool of money determined by a negotiated percentage of annual salaries of all continuing members is applied for annual merit awards.²⁰ The number of merit units in any year is: (academic dollars) x (agreed %) divided by (total the CPI value) = # of merit units.

[25] Because of its nature, the process of determining merit awards is less formulaistic and more individualistic, but each continuing member must be considered with accompanying consultation before recommendations are made.

2.03 Performance Salary Adjustments (PSA)

[26] Again, a pool of money determined by a negotiated percentage of annual salaries of all continuing members is allocated with career progress carry forwards having a first charge on the allocation. Unexhausted CPI eligibility can be carried forward when a faculty member is promoted and awarded in addition to eligibility for CPI in the new rank. Each continuing member's salary is considered with accompanying consultation to recommend PSA each year. The calculation of PSA allocation is: (academic dollars) x (agreed %) = (PSA \$) minus (CP carry forward and length of service retroactive) = PSA allocation.

[27] After CPI, Merit and PSA increases have been determined and confirmed within Faculties, the salary increases are entered into the payroll system and each member is informed of increases, which are paid effective July 1st in the mid-July paycheques.

2.04 Lump-Sum Payment (1%)

[28] Each bargaining unit member is paid 1% of salary each July 1st "as a development (fundraising) productivity lump sum payment."²¹ This is an embedded part of compensation and separate from any general salary increase. The amount is calculated on "salary", not honorarium or other payments.²²

²⁰ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 2.04

²¹ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 5

²² Collective Agreement, Part 1 – Framework for Collective Bargaining, Article 1 "Salary"

2.05 Retention Increase

[29] A negotiated amount of money is available to retain continuing members by granting salary increases that “reflect market considerations where market is disciplinary and/or merit based.”²³ These increases can be made at any time of the year.

2.07 General Salary Increase

[30] Any percentage-based general salary increase in a year resulting from collective bargaining or interest arbitration is effective July 1st.²⁴ If there is prolonged collective bargaining or a delay in completing interest arbitration, the increase can be retroactive.

[31] The general salary percentage increases of 2.45% and 2.4% effective July 1st in 2012 and 2013 were determined in an interest arbitration decision issued July 24, 2013. The 2014 and 2015 increases of 2% and 2% were determined in the March 31, 2016 interest arbitration decision. Although the language of the collective agreement is “General Salary Increase”, it is commonly referred to as a general wage increase (GWI).

3. Human Resources Management System

[32] The University’s Human Resources Management System (HRMS) combining processes and systems with information technology encompasses 40,000 jobs performed by 35,000 faculty, staff, student employees and clinical adjuncts.

[33] Robert Boudreau, Director, Human Resources Management Systems, testified ongoing employee turnover is high. Some positions, like sessional faculty members, can have several distinct periods of employment in a year. There is continuous churn in position management, recruitment, salary and benefit administration and payroll. Leaves of absence, benefit and work rules in multiple collective agreements and multiple components of faculty salary, some of which are sourced and taxed in different ways (E.g., research grants providing funds paid to 12% of faculty) and some of which are not included for general wage increases, add complexity to the system. All contribute to greater complexity in software programming.

²³ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 6

²⁴ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 2.01

[34] The payroll component of HRMS services four paydays a month. In addition, there are smaller run, off-cycle pay schedules throughout the year. The peak demand on payroll services is in September when there is the highest volume of hiring. Because there are four regular and eight off-cycle paydays in September, payroll staff work overtime. Consequently, implementation of salary increases, which always requires some manual corrections, is not scheduled between mid-August and early October.

[35] When programming a salary increase in the HRMS, no existing information is overwritten. Historical information is retained unaltered. Consequently, each sequential increase requires programming to establish and maintain each step in a multi-component increase. The records prior to the increase are retained. For example, the records with a PTR increase for each faculty member are retained. The sequential records for a general wage increase are established and retained. Each layer of records contains funding distribution, earnings subject to benefits, earnings subject to taxes and earnings to be increased.

[36] In 2016, the programming team dedicated to HRMS consisted of a manager and four programmer positions. One programmer had left in November 2015. The vacancy was partially filled as a 0.6 FTE by a more expensive consultant. Department management waited until May to see if funding for the position was extended to the next fiscal year. A vacancy was posted and the team achieved 4.0 programmer FTEs in November 2016. Mr. Boudreau testified it can take two years for a new programmer to learn the technology, system peculiarities and business rules.

[37] During the relevant time in 2016, two programmers were dedicated to programming to implement faculty salary increases. They did have to respond to other urgent demands, especially those requiring their unique knowledge. While the other 1.6 FTE programmers managed critical matters, a backlog of work accumulated.

[38] From March 1 to November 1, 2016, while faculty salary increases were being implemented, fifteen less complex salary increases for employee groups covered by collective agreements and some not covered by a collective agreement were implemented. These were negotiated or decreed general wage and calculated Economic Stability Dividend increases. Several were implemented July 1st and September 1st. A salary increase for Research Associates was also implemented in

September because the follow-up manual cleanup for this small group was manageable.

4. Experience Implementing Arbitrated Salary Increases in 2013

[39] Before 2013, PTR and any general wage increase had been implemented together in the same pay period. Collective bargaining for the 2012-13 collective agreement extended into 2013 taking longer than it had in many years. The first interest arbitration since 1997²⁵ was scheduled for June 2013 with a decision anticipated by August. There had been no general wage increase payment in July 2012 and there would be none in July 2013.

[40] While PTR increases happen each year, the University's obligation to pay them each year is rooted in specific collective agreement language.²⁶ In the absence of agreement, there is no collective agreement language after the expiration of the term of a collective agreement that obliges the University to pay PTR increases at specific times, if at all. The obligation to continue to pay PTR increases arises with the renewal of the collective agreement.

[41] Both the Faculty Association and University were proposing the same PTR increase effective July 1, 2012. If the arbitration decision was received by August, that retroactive increase was unlikely to be paid until November. It was agreed a "17-month delay is not in the best interests of faculty members." On March 5, 2013, the Faculty Association and University agreed to pay the July 1, 2012 PTR increase as soon as possible.

[42] This agreement was a University initiative. Nicole Hyatt, Manager Faculty Relations, had been given notice February 25th that the 2012 PTR increase might proceed before receipt of the interest arbitration decision. In 2004, it took 5 months (mid-May to mid-October) from the date of decision to payment of the PTR. In 2006, it took 4.5 months (May to September 15th) to pay both the PTR and a general wage increases. There was a four-year collective agreement from 2006 to 2010 with three PTR increases paid in July at the same time as a general wage increase in 2007, 2008

²⁵ *The University of British Columbia* [1997] B.C.C.A.A. No. 426 or 793 (Larson, Burke and Taylor)

²⁶ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 2

and 2009. The 2010 PTR increase was paid in 3.5 months (November 2010 to March 2011). In 2011, the increases were paid in July.

[43] How soon after the mid-February 2013 notice to Ms Hyatt could the 2012 PTR increase be paid? Ms Hyatt had supervised, shepherded and managed the faculty salary increase process at the macro and granular level since 2003. She had overseen the process several times when there was a PTR increase without an accompanying general wage increase. The process posted on the University website²⁷ involves preparation, completion, collection and checking 70 spreadsheets for distinct groups of faculty members distributed to Deans' offices. The retuned spreadsheets have to be checked for anomalies and used in test runs. Occasionally, as happened with one spreadsheet in 2016, the data is corrupted and the spreadsheet has to be recreated. The actors in the process are Faculty Relations, Planning and Institutional Resources, Faculties, Departments, Faculty Members, Payroll in Financial Services, the Vice-President Academic (UBC Vancouver) and Deputy Vice Chancellor (UBC Okanagan). A University sample timeline overview document includes the following:

The following timeline is based on a year when the increase will be processed in time for the July 15th paycheque. In the case of years when the Collective Agreement is bargained the increase will be processed after July 1st, but will be retroactive July 1st. The delay in the increase due to negotiations will typically be 4 months.²⁸

[44] The July 1, 2012 retroactive increase was paid on the May 31, 2013 payroll (3.5 months from mid-February to May).

[45] The July 24, 2013 arbitration decision renewing the collective agreement for the two years July 1, 2012 to June 30, 2014, awarded annual general wage increases of 2.5% and 2.5%, which were higher than the provincial Public Sector Employers Council mandate at the time.²⁹

[46] In the past, any general wage increase had been coupled with PTR increases. For the May 31, 2013 payroll, it had been relatively easy to "turn off" any general wage

²⁷ www.hr.ubc.ca/faculty-relations/compensation/faculty-salary-increases/ and www.hr.ubc.ca/faculty-relations/files/Faculty-Salary-Increase-Process-2016-October.pdf. The April 2015 document for the 2014 increase was entered as an exhibit.

²⁸ www.hr.ubc.ca/faculty-relations/files/Increases_Sample_Timeline.doc. The footer dates this document April 2009.

²⁹ *The University of British Columbia*, unreported, July 24, 2013, (Taylor) ¶ 6; 124 and 142 (available at www.facultyassociation.ubc.ca/assets/media/bargaining2012_arbitratoraward.pdf)

increase and pay only the 2012 PTR increase. It was not as easy to pay a general wage increase separate from a PTR increase. The programming for a general wage increase did not easily accommodate the fact the PTR increase had already been layered in.

[47] Mr. Boudreau testified it was a significant programming challenge to have the general wage increase for July 1, 2012 look at prior year records and ignore the PTR increase for July 1, 2012. A new program had to be created and extensive overtime was required to implement a general wage increase with the PRT already in the system. Rather than one or two test runs to achieve a measure of confidence in outcome reliability, it was necessary to conduct seven test runs.

[48] Perfection is not attainable. In the past, there had been a range of 40 to 200 and an average of 111 errors in faculty pay requiring manual correction after implementation of a general wage increase. For the GWI effective July 1, 2012, the retroactive period was long; the population was larger than in previous retroactive increases; and there were more appointment changes. There were 671 on the October 15, 2013 payday. A former employee was hired and worked full-time for five months to correct the errors. Seventy to eighty of the errors were overpayments to individuals who had retired or resigned. Programming fixes addressed 252 of the errors.

[49] The programming team proposed to senior management payment of the July 1, 2013 increase for both the PTR and GWI be made in mid-February 2016 (6.5 months after the July 24th award). Senior management directed the team to do it faster. The increases were paid December 13, 2013 (4.5 months after the July 24th award).

[50] The implementation in 2013 required full time attention from Programmer Peggy Pan with assistance from two other programmers and Ms Hyatt working extended hours from mid-August to mid-December. Ms Hyatt often worked over 50 hours a week and as many as 70 hours in one week. Ms Pan worked 30 days overtime and two other programmers worked overtime.

[51] This happened at a time when it was planned with senior management approval to upgrade HRMS from PeopleSoft 8.9 to 9.2. The upgrade was to be operational in 2014 and planning was receiving extensive time and attention. In November 2014, the upgrade was postponed. It was cancelled in April 2015.

[52] During this time, program development slowed because it was believed it would not integrate with the upgraded version. No resources were allocated to make program changes for faculty salary increases or to create a new program to avoid the error incident if the same scenario of uncoupled PTR and general wage increases for the same academic year were to be implemented in the future.

[53] Ms Hyatt understood the experience had convinced the University it would not repeat implementation of uncoupled PRT and general wage increases. She did not think it necessary or wise to advocate for allocation of programming resources to create a program for the unlikely event it would happen again.

[54] It happened again in the next round of collective bargaining for the 2014-16 collective agreement. There was no PTR increase July 1, 2014 and no agreement it would happen automatically or while collective bargaining was ongoing.

[55] In March 2015, interest arbitration was scheduled for the third week of October 2015. The Faculty Association and University agreed on March 30, 2015 to have the July 1, 2014 PTR increase implemented as soon as possible. Ms Hyatt was given notice on February 27th of the pending agreement and voiced her reservations about the wisdom of repeating what had happened in 2013. She began working with the programmers in March before the March 30th agreement was signed.

[56] Using the established process and with no requirement for any programming changes, the July 1, 2014 PTR increase was paid on the June 30, 2015 paycheque (4 months).

[57] Although collective agreement was ongoing, the 1% of salary lump sum payment was also paid June 30, 2015. It had been paid June 30th in 2013 and 2014.

5. Retroactive Arbitrated Salary Increases Awarded in 2016

[58] There was no agreement to pay a general wage increase effective July 1, 2014 at the same time as the PTR increase. The Public Sector Employers Council mandate was 0% on July 1, 2014 and 1% on July 1, 2015. The University advocated for these percentages at interest arbitration.³⁰

³⁰ *The University of British Columbia*, unreported, March 31, 2016, (Taylor, Conlon and Osborne) ¶ 16 (available at www.facultyassociation.ubc.ca/assets/media/bargaining2014_arbitratoraward.pdf)

[59] The interest arbitration hearing was adjourned from October 2015 to February 16 to 18, 2016. In 2013, the arbitration decision was issued eight weeks after the hearing. Ms Hyatt knew the commitment required after a decision was issued and scheduled her annual vacation as early as she could. She returned April 18th, two months after the last day of hearing. During her absence, the decision was issued March 31st.

[60] While the 2013 interest arbitration award was issued 13 months after the expiry of the term of the previous collective agreement, this March 31, 2016 award was issued 21 months after the expiry of the term of the previous collective agreement and only 3 months before the expiry of the term of the collective agreement it settled.

[61] The board awarded a collective agreement for the term July 1, 2014 to June 30, 2016 with a 2% general wage increase effective July 1, 2014 and 2% effective July 1, 2015. These percentages and dates amended the language of Article 2.01 of Part 2 of the 2012-14 collective agreement.

[62] While the University advocated for a \$500,000 retention fund to be included in or deducted from the July 1, 2015 general wage increase, the board awarded \$500,000 in addition to the general wage increase at July 1, 2015.³¹

[63] The board did not decide a time by which the awarded increases were to be paid. It did decide: "Agreed items are left to the parties to implement." The general wage increases and retention fund were not agreed items. Presumably the dates for implementation of the components of the PTR increases were agreed items left for the Faculty Association and University to implement.

[64] The Faculty Association Executive Committee began inquiring when the University would make payments and instructed Executive Director Deena Rubuliak to obtain the information.

6. Faculty Association Grieves University's Proposed Payment Schedule

[65] Immediately on her return, Ms Hyatt and Ms Pan met to plan implementation. Despite the 2013 decision awarding an increase greater than the PSEC mandate, Ms

³¹ *The University of British Columbia*, unreported, March 31, 2016, (Taylor, Conlon and Osborne) ¶ 17-18; 48; 52; 81

Hyatt had not anticipated a general wage increase effective July 1, 2014. As in 2013, a general wage increase had to be retrofitted after implement a PTR increase.

[66] Ms Hyatt put an out-of-office message on her telephone on April 18th that remained there until the first day of this hearing. From April 18th to December 7th, she worked, with minor exceptions, exclusively on implementation. She worked 8 to 10 hours a day and six or seven weekend days. She and Ms Pan were in continuous email communication. She took two days of vacation leave. With an exemption to carry vacation forward, Ms Pan cancelled three weeks of vacation scheduled during the summer. Ms Hyatt had Assistant Manager Christine Pickering, who she is introducing to the faculty salary increase process, work on the implementation, including extra hours to her regular hours of work.

[67] Because of the 2013 error rate, there was no confidence the 2013 programming to implement a general wage increase after and independent of a PTR increase could be used in 2016. Rather than attempt to fix what had been done, it was decided a new program had to be written. Ms Pan and another programmer were dedicated to the assignment. It would take longer to write a new program, but there was more confidence this option. Even with a fresh approach, it took multiple runs before the new program attained acceptable reliability. Mr. Boudreau testified the programmers worked eight weeks of overtime in 2016.

[68] Ms Pan proposed a schedule she and Ms Hyatt agreed on. The schedule was constructed with the increases staged in a logical, sequential order. Although the proposed schedule in 2013 had been seven months in duration, compressed to five months at the direction of senior management, the proposed 2016 schedule was 8.5 months to avoid an unacceptable number of errors.

[69] Mr. Boudreau testified all of the team – programmers, business analysts and payroll – are risk adverse. As part of a risk-adverse approach, the schedule, unlike 2013, segregated Sessional Lecturer and regular Faculty increases to minimize risk of errors and to help enable identification of the source of errors if the new program once loaded produced errors.

[70] Payments of the 2014 general wage increase for regular Faculty and Sessional Lecturers were separated by two weeks – July 30th and August 15th. Then the 2015

general wage increase for Sessional Lecturers followed on August 30th. The annual 1% lump sum payment for Sessional Lecturers was scheduled for September 30th, which is the normal time at which the payment is made to them each year.

[71] The schedule included contingency time for the unanticipated. Mr. Boudreau testified the University has not been missed a payroll date in 40 years and it was not going to happen on his watch. Because of the payroll schedule, all of September and eight days each other month were not unavailable to them.

[72] Ms Hyatt proposed the implementation schedule to senior management, which accepted it.

[73] On May 13th, the schedule with anticipated payment dates was emailed to Ms Rubuliak.

- 1) 2014 GWI for regular Faculty – July 30th
- 2) 2014 GWI for Sessional Lecturers – August 15th
- 3) 2015 GWI for Sessional Lecturers – August 31st
- 4) 1% lump sum for Sessional Lecturers – September 30th
- 5) 2015 GWI & PTR for regular Faculty – November 30th
- 6) 1% lump sum for regular Faculty – December 15th

The least complex payments were the three payments to Sessional Lecturers. The email cautioned any problems with one payment might delay subsequent payments. Further: “The 2014 and 2015 increases for regular faculty will need to be processed prior to the annual 1% lump sum.”

[74] Despite explanation by Ms Hyatt to Ms Rubuliak about the complexity and error experience in 2013, the Faculty Association considered the proposed timeline to be too long. Tenured Associate Professor Nancy Langdon, a former Faculty Association President and current Member-at-Large on the Executive Committee testified the Committee was dismayed at the planned payment delay, especially for the 1% lump sum payment. It could proceed normally with any adjustment paid later. It was hoped the University could act more quickly.

[75] On May 27th, Faculty Association President Dr. Mark MacLean wrote the University disagreeing with the timeline. The Faculty Association did not agree to delay the annual 1% increase and considered the 8.5-month schedule unreasonable in light of the 4.5-month implementation in 2013 “for the same exercise.” Dr. MacLean wrote:

... the explanation we have been provided for the extended timeline for implementing the salary changes – 8.5 months vs. slightly over 4 months in 2013 for the same exercise – does not seem reasonable to us. We have been told the extended timeline is needed to avoid the extensive error correcting that Payroll claims it had to do in 2013. An outside error rate for this implementation should be no more than 3% of the members having their salaries incorrectly computed, and for the sessional faculty, I would expect an error rate of much less than 1%. This should mean fewer than 100 error corrections. Since the error rate in the extended time period would still not be 0%, the actual differential should be much less than 100.

The communication with Faculty Association members about this implementation timeline has been inconsistent, with some deans communicating it directly to their faculty and others not doing any communications. This, plus the extended timeline has contributed to a growing level of agitation amongst our members.

We intend to send a communication to the members to ensure they all have the timeline Payroll has communicated to us, but also to highlight our concerns with this timeline. It has been two months since the arbitration award was received by the parties, and yet the first date for the first changes to take effect will be four months after the award came down. We see no reasonable explanation for this nor for the extended time to implement the rest of the changes.

[76] After the retroactive general wage increase for 2014 was paid as scheduled on July 30th, the Faculty Association grieved on August 2nd that the University's payment of the PTR and general wage increases and 1% lump sum was contrary to Article 2.01, 5.01 and 5.2 of Part 2 (Salaries and Economic Benefits) of the collective agreement.

[77] The grievance specifically states the collective agreement requires the University to pay "each member an amount equal to 1 percent of salary on each of June 30, 2014 and June 30, 2015." The grievance states, in part:

The University's payment schedule, which extends approximately 8.5 months after the Award was issued, is both unreasonable and unacceptable. The general salary increases, and the associated retroactive salary owed, should reasonably have been paid, in full, at a maximum, 4 months following the pronouncement of the Award.

By way of remedy for the University's breaches of the Collective Agreement, the Faculty Association seeks an accelerated payment schedule. The Faculty Association also seeks the payment of interest, commencing effective July 31, 2016, on all amounts paid beyond that date.

[78] The University denied the grievance. On September 6th, Allison Matacheskie, Director, Faculty Relations, wrote, in part:

Under the current circumstances, the University is processing the increases as quickly as possible for faculty members. These circumstances include the complexities of the increase process especially when they are retroactive and PTR for 2014 has been processed before the 2014 GWI was known, and the fact they are occurring at the same time as increases for numerous other groups of employees.

[79] The Faculty Association gave notice on September 27th it was proceeding to expedited arbitration before an arbitrator appointed under section 104 of the *Labour Relations Code*. I was appointed October 13th. The hearing began by telephone conference call on October 25th.

7. University's Implementation of Payment Schedule

[80] Ms Langdon testified there are 2,937 regular Faculty members, including 82 Librarians, and approximately 600 Sessional Lecturers of whom 65 work full-time.

[81] She testified the common experience is that the PTR increase process can proceed each year regardless whether collective bargaining or interest arbitration are ongoing. If there is an extended delay in achieving a renewed collective agreement, the base salary for the July to June year might not be known until the retroactive general wage increase, if any, is known.

[82] After the March 5, 2013 agreement to pay the July 1, 2012 PTR increase separate from an general wage increase that might be awarded, Ms Langdon received an eleven-month retroactive payment on May 31st. It was based on her salary from July 1, 2011 to June 30, 2012 and established her base salary for the July 1, 2012 to June 30, 2013 year.

[83] Her retroactive general wage increase effective July 1, 2012 awarded on July 24, 2013 was paid October 25th. Her July 1, 2013 general wage increase was paid December 15th, 4.5 months after the award. With this payment, her base salary was established for the July 1, 2013 to June 30, 2014 year.

[84] In 2015, following the March 30th agreement, she was paid her PTR increase effective July 1, 2014 on June 30th. On July 30th, Ms Hyatt emailed the increase data to the Faculty Association, which she usually does a month after each increase is paid. The data includes the new monthly rate for each Faculty member that is the base for the next increase. It does not include individual eligibility for future increases.

[85] Ms Hyatt acknowledges Ms Langdon's circumstance as a continuing bargaining unit member is one where the base salary for successive increases is readily determinable. However, there are less straightforward circumstances, e.g., the recently hired or promoted member and the member who recently received a retention increase.

Correct placement of new hired members on the schedule of Career Progress Increments³² is necessary for both the individual and calculation of the CPI unit value.

[86] Development and unit testing of the new program to pay the July 1, 2014 retroactive general wage increase was done from April 28th to May 14th. User acceptance testing with Ms Hyatt as the user took from May 15th to July 2nd. Regular Faculty were paid July 31st and Sessional Lecturers were paid August 15th. There were less than 50 errors, which Mr. Boudreau characterized as likely collateral from 2013.

[87] On cross-examination, Mr. Boudreau testified it was not feasible in early 2014 to write a new program for a segregated general wage increase following payment of a PTR increase for the same effective date. There was pent up demand for projects delayed in 2013 and the team needed a respite after the volume of overtime in 2013. Even though it was not known whether the split that had been done in 2013 would have to be done again, he agreed it was possible before April 2016 to write and test a program for a hypothetical percentage general wage increase in case there was a repeat of 2013.

[88] Ms Hyatt does not consider it a sensible use of resources to separate a hypothetical increase from the actual demographic profile because of the number of changes in the member group each year and the employer's hope the award would be 0% for July 1, 2014. If it was 0%, there would be no need for the program developed as a contingency.

[89] After July 30th, a faculty member contacted payroll about an error. Investigation discovered a programming typographical error had resulted in benefit and pension contribution calculation errors for 703 faculty members on leaves or with reduced workloads. The correct benefit (TOP) and pension (TPP) contribution calculations should have based on full salary despite payment of a reduced salary. Similar errors do occur randomly in a normal year and are corrected manually. Ms Hyatt tested a program change in August and made the corrections in September. Correction of the contribution errors was a necessary prerequisite to determining the correct earnings at June 30, 2015 to give to Deans for the upcoming 2015 PTR and general wage

³² Collective Agreement, Part 2 – Salaries and Economic Benefits, Appendix A

increases. Mr. Boudreau testified it was fortunate that contingency time was built into the payment schedule and that the corrections could be made in September.

[90] The general wage increase effective July 1, 2015 for Sessional Lecturers was paid August 31st. Their 1% lump sum payment was paid September 30th. The period of user acceptance testing for each of the three payments to Sessional Lecturers decreased from three to two to one week. At the same time, a simple general wage increase effective July 1, 2015 was paid to Research Assistants on September 30th. Although several hundred employees were involved in the Sessional Lecturer and Research Assistant increases, Mr. Boudreau testified the error rate was negligible. Research Assistant economic and general wage increases for 2016 were paid in October.

[91] Ms Hyatt distributed the spreadsheets for the 2015 combined PTR and GWI increases for regular Faculty on October 18th. She had shared the base information with the Deans in September after the 2014 salary values were finalized and corrected. The PTR and general wage increases effective July 1, 2015 underwent user acceptance testing and were paid November 30th with 105 errors. This was 8 months after the board's award on March 31st.

[92] The final payment in 2016 was the 1% lump sum paid December 15th. It was delayed from July because the University had determined and communicated to the Faculty Association that: "The 2014 and 2015 increases for regular faculty will need to be processed prior to the annual 1% lump sum." The collective agreement provides:

Article 5. Lump-Sum Payments

5.01 The Parties recognize each member of the bargaining unit has been paid an amount equal to 1% of salary as a development (fundraising) productivity lump sum payment. This lump sum payment will continue to be paid to each member of the bargaining unit effective June 30 of each year, beginning July 1, 2012.

5.02 All Sessional Faculty Members who held an appointment during the period from July 1 of one year to June 30 of the next, will receive the lump sum payment described in paragraph 5.01 above.³³

[93] The ongoing nature of the language of this article is unlike the language in other articles setting specific periods and dates for general salary increases, career progress increments, merit awards and performance salary adjustments. The experience or

³³ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 5

expectation of annual payment to continuing bargaining unit members in July and Sessional Lecturers on September 30th is not specifically addressed in this language.

[94] In 2013, Arbitrator Taylor decided the 1% lump sum payment is part of “existing compensation” and not an increase.³⁴ In 2016, the University unsuccessfully renewed its argument to have the 1% payment offset any increase. The board wrote:

In the current arbitration, the University has renewed its argument that the annual 1% lump sum should be counted as an increase in compensation under Article 11.02(e). The Association maintains its position that the 1% annual lump sum is part of a member’s existing compensation, does not increase the member’s compensation from year-to-year, and is thus not an increase in compensation and should not be counted as such.

We are unpersuaded by the University’s argument. The 1% annual lump sum is part of existing compensation and, while the dollar amount of the 1% may change from year to year, it does not take the place of a general wage increase. The University argues that this “means that a COLA clause in a collective agreement that produces an annual lump sum payment would not be considered in assessing whether there was an increase in salary that offset inflation, simply because the provision exists in the agreement and has not been renegotiated”. That is not the case. The purpose and intention of a cost of living adjustment is to *increase* existing compensation. It does so in order to keep pace with things like inflation, fulfilling the same type of function as factors in Article 11.02(e). The principled distinction to be made is not between a lump sum and a percentage, but between existing compensation and an increase to existing compensation. The 1% annual lump sum is part of existing compensation. It is therefore taken into account as existing compensation. It is not an increase, and does not take the place of an increase under Article 11.02(e).

Accordingly, the general wage increase is in addition to the 1% annual lump sum.³⁵

[95] In May, 2016, the Faculty Association disagreed with the scheduled payment delay from June 30th to December 15th for regular Faculty members. Dr. MacLean wrote:

First, our Collective Agreement has a 1% lump sum payment that is to be paid on the June 30th paycheque each year. While I appreciate that Payroll would prefer to generate this payment after it has made the changes to the 2015 salaries, any variance from the Collective Agreement needs to be agreed to by the Faculty Association. To date, it has not been discussed with the Association and signed off by me and so no such agreement exists. In the absence of any such agreement, it is our expectation that members will receive a 1% lump sum payment on their June 30, 2016 paycheque with any adjustment to this amount paid out after the 2015 salary has been determined.

³⁴ *The University of British Columbia*, unreported, July 24, 2013, (Taylor) ¶ 107-108; 112. The “Faculty Salary Increase Process” refers to it as “lump sum honoraria.”

³⁵ *The University of British Columbia*, unreported, March 31, 2016, (Taylor, Conlon and Osborne) ¶ 60-62

[96] Ms Hyatt testified she does not know of anything that could have been done to accelerate the sequential payment process dependent on each stage having final and accurate amounts from the previous stage. Hiring programmers without experience with the program and process would not. There were 10,000 lines of code that had to be written and loaded in 2016. It took her three years to learn the process that normally happens once a year. Ms Pickering is learning.

8. Summary of Faculty Association and University Submissions

[97] The Faculty Association submits the awarded increases were enforceable from March 31, 2016, the date of the board's unanimous award³⁶ and the time taken to implement the payments beyond August 15th was unreasonable. There is no justifiable reason the payment schedule could not have been accelerated and all increases paid within 4.5 months after the award was issued, as the University did with almost identical increase payments in 2013. For the first time in final argument, the Faculty Association identified the interest it seeks includes interest on employer contributions to the Faculty Pension Plan.³⁷

[98] The Faculty Association emphasizes it had no role in establishing or implementing the payment schedule; the University has exclusive knowledge of the reason it adopted the payment schedule; the Faculty Association's acceptance of 4.5 months as a reasonable time for payment recognizes there is complexity in implementation of the retroactive increases; and its members lawfully entitled to timely payment lost the use and benefit of money paid after August 15th, while the University had the use of the money.

[99] The Faculty Association submits the standard period of time for payment of earned wages is the time specified in the *Employment Standards Act* which points to the first pay period following lawful entitlement to the pay.³⁸ For retroactive payments, the standard is the same period except when there are unique or unusual

³⁶ Collective Agreement, Part 1 – Framework for Collective Bargaining, Article 11; *Labour Relations Code*, s. 96; *Teamsters Union Local 155 v. Canadian Affiliates of the Alliance of Motion Picture and Television Producers* [2007] B.C.J. No. 943, ¶ 25 – 26; *Health Labour Relations Association (Cartier House Care Centre Ltd.)* [2004] B.C.C.A.A.A. No. 326 (Larson), ¶ 12 - 13

³⁷ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 7.06

³⁸ *Employment Standards Act*, RSBC 1996, c. 113, s. 17(1) – “At least semimonthly and within 8 days after the end of the pay period, an employer must pay all wages earned by the employee in the pay period.”

circumstances.³⁹ There was no issue of securing funds to pay as in some cases.⁴⁰ Calculation complexity and limited resource availability have not supported extension of the presumptive time beyond two or three months.⁴¹ In this situation, 4.5 months is a reasonable delay. The fact the University had the use and benefit of money denied to the Faculty members is an important consideration in determining what is reasonable.

[100] The Faculty Association submits the appropriate measure of a reasonable time is the time taken in 2013. If that experience taught the University it had to write a new program for future retroactive payments, then it should have started the process of writing a new program before the interest arbitration and avoided the three-month delay after the award it took to develop and test a new program. This could have been done without having the actual percentage awarded retroactively as a general wage increase effective July 1, 2014. It would have reduced the payment delay by at least three months.

[101] Instead, the University acted on the mistaken assumption the events of 2013 would not recur. It made a choice at the expense of Faculty members to delay development of a new program rather than take the preventive step of creating a new program. It made this choice despite the March 30, 2015 agreement to pay the 2014 PTR increases separate from any as yet undetermined general wage increase and cancellation of the planned HRMS upgrade in April 2015. Nothing was done for twelve months from April 2015 to March 2016. An assumption the arbitration board would accept the University's proposed 0% at July 1, 2014 is not a reasonable explanation for the failure to act. It is not one for which Faculty members should pay.

[102] The Faculty Association submits it was unreasonable for the payment schedule to include contingency time, even if it was used to correct TOP and TPP errors created by the University, which took two months before the process for the 2015 PTR increase began in October. Payment within a reasonable period of time does not include contingency delay when there was no prior contingent program development. This was for the University's sole benefit without regard to the cost to Faculty members. The

³⁹ *Health Labour Relations Association* [1983] B.C.L.R.B.D. No. 139; *Health Labour Relations Association (British Columbia Cancer Agency)* [1993] B.C.C.A.A.A. No. 218 (Jackson), ¶ 59

⁴⁰ *Health Labour Relations Association* [1983] B.C.L.R.B.D. No. 139

⁴¹ *Overwaitea Food Group* [2007] B.C.C.A.A.A. No. 104 (Burke), ¶ 29

University's explanation of its caution, errors and delay explain what happened. They do not provide a justifiable explanation of the unreasonably delayed payment schedule.

[103] While the Faculty Association acknowledges it cannot dispute the normal burden on the payroll system in September, it submits the University's decision to avoid additional stress on the system in September is irrelevant. A reasonable period of implementation would have achieved all payments by mid-August. The 2012 general wage increase was processed September 25, 2013 and paid October 15th.

[104] The Faculty Association submits the University had the capability in 2016 to pay all increases within 4.5 months, as it did in 2013. With foresight and planning, it could have made all retroactive payments within a reasonable period of time. The unreasonable delay was not because of any unique or unusual circumstance, but a choice not to take the necessary steps to ensure payment within a reasonable time.

[105] The Faculty Association submits the University should be ordered to pay interest on the increases and lump sum payments made after August 15, 2016 and the employer's accompanying pension contributions on these increases. It submits this is not an insignificant amount. Even by the University's calculation, which the Faculty Association does not accept, the interest exceeds \$100,000.

[106] The University submits the Faculty Association has failed to establish it breached the implied term that retroactive increases would be paid within a reasonable time after the interest arbitration award. It submits no retroactive increase was owed or payable until the expiration of a reasonable time after the issuance of the award, not the date of the award. There was no breach of the implied term and no reason interest should be awarded.

[107] Alternatively, the University submits discretion should be exercised not to award interest because any breach found of the term implied in the collective agreement was not due to a failure of effort by the University; the current low interest rate; and the extensive resources required to calculate and pay interest to eligible Faculty members.

[108] The University submits it had regard to its first-time experience in 2013 when the team responsible for implementation proposed a 6.5-month schedule, but was told to complete payments in 4.5 months. That reduction in time did not justify the incident of

errors or cost to correct them. It was unreasonable. In 2016, the University justifiably decided it would not replicate that accelerated timeline, excessive overtime and error experience.

[109] The University submits the key question is whether it was unreasonable for it to wait receipt of the arbitration board award before taking implementation steps beginning with the creation of a new program to pay a retroactive general wage increase separate from implemented PTR increases. The employer submits it was reasonable to wait in light of the PSEC mandate and its advocacy for 0% increase for 2014 and inclusion of the 1% lump sum payment in any increase. It was not required to divert resources to prepare for a 2014 increase it opposed and which might not be awarded.

[110] The University submits it acted in good faith and without delay on receipt of the interest arbitration award. It was not bound by the payment standard in the *Employment Standards Act* because the retroactive increases were not earned in the pay period at the time the award was issued and the existence of an implied provision of the collective agreement for payment within a reasonable time applies.⁴²

[111] The University submits it acted with due diligence by having Ms Pan cancel three weeks of scheduled vacation and having Ms Hyatt work almost exclusively on the task. Although not legally required, a significant amount of overtime was worked to complete implementation within a reasonable time. There is no evidence of any lack of effort by any member of the implementation team. The University was not required to hire additional employees. And doing so would not have accelerated the process. New programmers and human resources professionals require training and experience to learn the complexity of the faculty salary increase process. It was prudent and reasonable to include contingency time, which turned out to be necessary to address the TOP and TPP errors. In the end, there were few errors in the payment of the 2014 retroactive general wage increase.

[112] The University submits it was not possible to collapse increases that have to be done sequentially. It needed time to develop and test a new program and then move

⁴² RSBC 1996, c. 113, s. 3(4) – “If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement: section 17 [paydays];”

through the processes required to pay each increase. None of the sequential steps could be advanced. There is no evidentiary basis on which it can be concluded the entire process would have been concluded earlier or by August 15th if a program had been written prior to March 2016. It is simply hypothetical to say a hypothetical program based on a hypothetical retroactive general wage increase would have reduced the timeline by a hypothetical period.

[113] The University submits the determination of a reasonable period of time is situation-specific based on the facts of the circumstance, which in this situation include the sequential nature of the payments; the distinct complexity of each of the 2014 and 2015 payments; the available resources; the payroll limitations and restrictions; and the good faith efforts of dedicated staff working regular and overtime hours to make the correct payments. All of which explain why the time taken was necessary and reasonable.

[114] The University submits the payment schedule in 2016 to make retroactive salary increases was consistent with prior experience – 5 months for retroactive PTR increases; 5 months for retroactive PTR and GWI increases in 2016; 3.5 months for a retroactive PTR increase in 2010 and 2012; 3 months to make a retroactive GWI increase for 2012 and another 4.5 months to pay retroactive PTR and GWI increases for 2013.

9. Discussion, Analysis and Decision

[115] An implied term that an employer must pay an agreed or awarded retroactive pay increase within a reasonable time purposefully does not set a fixed or absolute measure of time, but does embody a dictate that the time the employer takes cannot be indefinite or simply at the employer's pleasure.⁴³

[116] Although the burden is on the Faculty Association to prove on a balance of probabilities a delayed payment time was unreasonable, the test of reasonableness includes the concept of proportionality and this places an onus on the employer to explain why it took the time it did.

⁴³ See *Health Labour Relations Association* [1983] B.C.L.R.B.D. No. 139

[117] The employer's explanation will enable a union to assess and an arbitrator to judge in all the circumstances whether the employer's actions respected a balance of competing workplace interests – the union and employees' interest in expeditious payment of retroactive earnings and the employer's business, operational and organizational interests. Making the judgment requires consideration of all the circumstances at the time the retroactive increase was agreed or awarded.

[118] Arbitrators have decided an employer agreement or interest arbitration award to make a retroactive payment does not include an agreement or decision the employer will incur extraordinary additional cost to implement the retroactive payment. It is one thing to agree to pay more for work performed in the past and another to agree to incur additional cost to make the retroactive payment. Similarly, it is one thing to decide an employer must pay more for work performed in the past and another to say the employer must also incur additional cost to make the retroactive payment. This is what Arbitrators Munroe and Burke decided when they said reasonableness does not include an obligation to increase staff.⁴⁴ And to be clear, the Faculty Association does not say the University should have.

[119] The University was forthcoming in explaining to the Faculty Association in May 2016 the reason for its payment schedule over 17 pay periods in 2016 rather than 9 pay periods, as in 2013. It was forthcoming after May and during the hearing in providing the explanation for the schedule it implemented. There is no period of unexplained delay between April and December.

[120] I agree with the University's following description of what it confronted in April 2016.

The already busy Payroll, Faculty Relations and IT Services departments were faced with implementing a number of complex retroactive payments as soon as possible. Processing those payments required the dedication of significant human resources and system resources in addition to the normal workloads of those individuals involved, and the normal processing demands on the HRMS and payroll systems.⁴⁵

[121] Mr. Boudreau was candid that the payment schedule was fashioned in a risk adverse culture that values accuracy over expeditious action; was opposed to

⁴⁴ *Juan De Fuca Hospital Society* [1995] B.C.C.A.A.A. No. 486 (Munroe), ¶ 10-12; *Overwaitea Food Group* [2007] B.C.C.A.A.A. No. 104 (Burke), ¶ 28

⁴⁵ University's Outline of Argument, ¶ 48

overburdening the payroll system or intruding on its peak demand period coincident with new hiring from mid-August to early October; and cautious in its commitments by including contingency time in the schedule coincided with the peak payroll period.

[122] In 2013, the timing of the July 24th award allowed the University to work around that peak period by processing the 2012 retroactive general wage increase for payment October 15th. This was not the situation in 2016 with the award issued March 31st. The effect was there were three or four pay periods not available for major implementation steps. The University used these pay periods from mid-August to September to pay the less complex 2014 and 2015 GWI retroactive increases and 2015 lump sum to Session Lecturers. There was an incidental benefit that these payments to Session Lecturers reduced the risk of errors in retroactive payments to regular Faculty.

[123] It was not unreasonable for the University to plan for unanticipated errors with the implementation of a newly created program. It was not unreasonable to schedule contingency time after the July 30th payment of the 2014 GWI retroactive increase for which the new program was created and which would be the likely source of any errors. The timing coincided with the payroll peak period and proved to have been prudent planning when the TOP and TPP errors arose.

[124] The sequential staging was rational and prudent and allowed for payment of the lump sum to Sessional Lecturers on September 30th when the payment is made each year. Even from the Faculty Association's submission, the contingency time included in the schedule did not unreasonably delay payments to Sessional Lecturers beyond one pay period.

[125] The central difference between the Faculty Association and University is whether it was unreasonable for the University to wait until the award was issued before beginning development and testing of a new program to pay the 2014 retroactive GWI increase after the 2014 PTR increase had been paid.

[126] There is no express collective agreement term or interest arbitration decision that required the University to begin the development and testing before issuance of the award on March 31, 2016. The University was not agreeing to or advocating for a retroactive increase with any implied commitment it would act before the conclusion of a renewed collective agreement to expedite what it agreed or was advocating. There was

no agreement before or after adjournment of the interest arbitration hearing dates from October 2015 to February 2016 that this delay or any other event obliged the University to take any proactive step to compensate for this or any other delay in the two-year collective bargaining process.

[127] Resolving competing interests and differences through the adversarial process of collective bargaining and interest arbitration does not impose an obligation on either party to proactively take steps in anticipation of unknown outcomes. The implied term requiring the University to pay retroactive increases within a reasonable period of time did not arise until the terms of the renewed collective agreement, including the retroactive payments, were awarded on March 31, 2016.

[128] I conclude the implied term there will be payment of retroactive increases within a reasonable period of time following conclusion of a collective agreement does not operate retrospectively to impose an obligation on the University to take steps prior to the conclusion of the collective agreement in anticipation of fulfilling the implied term if and when it might arise.⁴⁶

[129] The employer made a diligent, good faith effort to make the retroactive PTR and GWI payments in a logical sequence required under the terms of the collective agreement. The persons with knowledge and experience to make the retroactive payments were assigned to the task and worked additional days and hours at personal and operational sacrifice to achieve the goals.

[130] In determining what is a reasonable period of time for an employer to pay retroactive increases, the business, annual, operational and organizational cycles of the enterprise are relevant sources that may extend the time. In this situation, delay occasioned by not imposing an additional burden on payroll during its peak period was reasonable.

[131] With one reservation, I find the University's schedule of payments of the retroactive increases was done within a period of time that was reasonable in all the circumstances. The reservation is the payment of the 1% lump sum to regular Faculty on December 15th.

⁴⁶ This is what Arbitrator Simmons decided in *Hamilton Civic Hospitals* [1980] O.L.A.A. No. 33

Article 5. Lump-Sum Payments

5.01 The Parties recognize each member of the bargaining unit has been paid an amount equal to 1% of salary as a development (fundraising) productivity lump sum payment. This lump sum payment will continue to be paid to each member of the bargaining unit effective June 30 of each year, beginning July 1, 2012.

5.02 All Sessional Faculty Members who held an appointment during the period from July 1 of one year to June 30 of the next, will receive the lump sum payment described in paragraph 5.01 above.⁴⁷

[132] The Faculty Association's initial approach in May 2016 was that this payment was due in July. Dr. MacLean wrote:

First, our collective Agreement has a 1% lump sum payment that is to be paid on the June 30th paycheque each year. While I appreciate that Payroll would prefer to generate this payment after it has made the changes to the 2015 salaries, any variance from the Collective Agreement needs to be agreed to by the Faculty Association. To date, it has not been discussed with the Association and signed off by me and so no such agreement exists. In the absence of any such agreement, it is our expectation that members will receive a 1% lump sum payment on their June 30, 2016 paycheque with any adjustment to this amount paid out after the 2015 salary has been determined.

[133] The Faculty Association's repeated submission at this arbitration was that the University had contravened Articles 5.01 and 5.02. Both the Faculty Association and University paid only passing attention to the evidence the Sessional Lecturers are regularly paid this part of their existing compensation on September 30th, as was done in 2016. If this is the case, then there was no contravention of Article 5.02.

[134] For regular Faculty or "Continuing members of the bargaining unit", the 2016 payment of this part of their existing compensation was not a retroactive payment awarded by the interest arbitration board. Consequently, it was not covered by the implied term that retroactive payments would be made within a reasonable time. Payment is the subject of the express agreement in Article 5.01.

[135] I conclude the University did not make the 1% lump sum payment to regular Faculty in 2016 as agreed in Article 5.01 and it did not have the agreement of the Faculty Association to delay the payment until December 15th. I declare the University's payment was in contravention of Article 5.01.

[136] I award no other remedy other than this declaration. While there is a presumption arbitral discretion will be exercised to award interest, I conclude the cost to

⁴⁷ Collective Agreement, Part 2 – Salaries and Economic Benefits, Article 5

develop, test and implement a program to pay interest on the 5-month delayed payment of the 1% lump sum is too disproportionate to the loss to each regular Faculty member that awarding interest in the circumstances would be more punitive than compensatory.

[137] I reserve and retain jurisdiction over the interpretation and implementation of this decision.

JANUARY 20, 2017, NORTH VANCOUVER, BRITISH COLUMBIA

James E. Dorsey

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