IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA,

the "University"

AND:

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA,

the "Faculty Association"

RE: Sessional Agreement Policy grievance

AWARD

Arbitrator: Rod Germaine

For the Faculty Association: Kas Pavanatharajah, Allan E. Black, Q.C.

For the University: Thomas A. Roper, Q.C.

Hearing: August 15 and 16, 2018; Vancouver, B.C.

Award: September 12, 2018
Introduction

The dispute concerns the assignment of courses to Sessional Lecturers ("Sessionals"). Like tenured and tenure track faculty, as well as contracted lecturers, Sessionals are appointed by the University's Board of Governors. Their employment terms are set out in Part 7 of the parties' collective agreement, entitled "Conditions of Appointment for Sessional Lecturers" (the "Sessional Agreement"). Article 6.01 of the Sessional Agreement provides that in making course assignments the University must consider qualifications, past performance and length of service, with the last of these factors being determinative only when the other factors are relatively equal. The issue is whether this provision applies to an applicant seeking an initial assignment.

The Faculty Association contends Article 6.01 does apply. It says an applicant must be compared with current Sessionals who have applied for the assignment, and the course must be assigned to the superior candidate in accordance with the specified criteria. The University's position is that Article 6.01 does not apply. The University says that when it has fulfilled its Sessional Agreement obligations to existing Sessionals, it is free to assign a course to a qualified applicant without regard to whether a current Sessional might be a superior candidate to teach the particular course.

To a large degree the dispute revolves around the presence of graduate students in the Sessional Faculty. The Faculty Association says the University is endeavouring to maintain a practice of inserting graduate students into the ranks of Sessional Faculty in order to provide a development component of their education. The Faculty Association asserts that it appreciates the University's interest in providing graduate students with teaching experience for this purpose and, indeed, is receptive to the concept. But the Faculty Association submits the University is precluded from eroding the rights of Sessional Faculty by unilaterally amending the Sessional Agreement in order to appoint graduate students without regard to Article 6.01.
Collective agreement

4 The parties agree that the Sessional Agreement is a comprehensive package of terms and conditions governing Sessionals. The terms have been renumbered since this matter first arose but are unchanged in substance. The relevant terms are:

Preamble

The University and the Faculty Association recognize the important contribution of Sessional Faculty Members to the University in the achievement of its purposes and, specifically, its teaching mission.

Sessional Faculty Members have a right to fair terms and conditions of employment within the many distinct administrative structures of the University community.

The University and the Faculty Association recognize that Sessional Faculty Appointments are determined by institutional realities which affect the availability of Sessional Faculty Appointments.

Article 1. Interpretation

1.01 "Sessional Lecturers" means a Faculty Member appointed by the Board of Governors to teach credit course(s), full-time or part-time, or to perform related duties such as course coordination or laboratory supervision, for a period of less than twelve (12) months.

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Article 2. Appointment Process

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2.06 Candidates for initial appointment at the rank of Sessional Lecturer are judged principally on qualifications, performance in teaching, and experience.

Article 3. Reappointment

3.01 As a general principle, Sessional Lecturers have the right to reappointment in accordance with Part 7: Conditions of Appointment for Sessional Lecturers and subject to Article 10.01.

3.02 Candidates for reappointment are judged principally on performance in teaching, based on formal evaluation of their performance in all of the
courses taught in the previous twelve (12) months. All such evaluations shall be consistent with the criteria and procedures outlined in Articles 7 and 8.

**Article 4. Assessment of Length of Service**

4.03 Sessional Lecturers whose duties fall to less than 50% of a full-time Sessional Lecturer due to lack of funding or non-scheduling or cancellation of a course or section offering (as per 10.01(b) or (c)) shall maintain member rights as if holding an appointment at or above 50%, including benefits, for a period of twenty-four (24) months commencing from the date at which the workload fell below 50%.

4.04 Subject to Article 10.07, Sessional Lecturers who are not offered a further appointment will maintain their accumulated length of service to the University for a period of twenty-four months. The twenty-four (24) month recall period will be extended only by the period of maternity leave or certified illness. During that period the University must post position(s)/course(s) that come available and provide copies to the Faculty Association. Other factors being equal, length of service shall be the determining factor in assigning the position(s)/course(s).

**Article 5. Continuing Appointments**

5.01 a) When a Sessional Lecturer’s appointments cumulatively equal three (3) years (thirty-six months) of full-time appointment over a period of six (6) or fewer consecutive academic years (July to June) he or she is a Sessional Faculty Member with a Continuing Appointment.

5.02 A Sessional Lecturer with a Continuing Appointment has a right to:

a) reappointment for a period of time equal to the same length of time and on the same basis, full or part-time, as the appointment he or she held in the winter session of the academic year (July to June) in which the Continuing Appointment becomes effective, subject to Article 10.01; and

b) assignment to a course load in any academic year at least equal to the percentage of full time equivalent upon which his/her Continuing Appointment is based, subject to Articles 6.01 and 10.01.
This Article does not preclude the University from changing course assignments or other duties, or the terms in which teaching is assigned. Any increase in workload shall be subject to Article 2.03 of this Agreement.

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**Article 6. Assignments**

6.01 In making Sessional course assignments, the University shall consider qualifications to perform the required work, quality and effectiveness of work performed and length of service. All evaluations of work performed shall be consistent with the criteria and procedures outlined in Articles 7 and 8 of this Agreement. Length of service shall be the determining factor only where the other factors are relatively equal.

6.02 Subject to Article 6.01, the University shall distribute available course assignments to Sessional Lecturers with Continuing Appointments:

a) in accordance with their individual entitlement as determined by Article 5.02 (b), and

b) in priority to other Sessional Lecturers.

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6.04 Sessional Lecturers with less than full time appointments may apply for additional course assignments as they become available and they will receive first consideration for such teaching course assignments subject to the criteria in Article 6.01.

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**Article 7. Evaluation of Initial Appointment**

7.01 a) If, during a Sessional Lecturer’s initial appointment serious concerns are raised with respect to his/her teaching performance the Department Head, or Delegate, shall within 30 days from the date the concern was raised investigate the concerns and may make recommendations for remediation and reassessment.

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**Article 8. Performance Evaluation**

8.01 The performance of a Sessional Lecturer must be evaluated on a regular basis.
8.02 An Individual's entire performance of assignment duties as per Article 2.03 shall be assessed. Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students. The methods of teaching evaluation may vary; they may include student opinion, assessment by Faculty, including other Sessional Lecturers, of performance in University lectures, course material and examinations, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Decisions not to reappoint a Sessional Lecturer cannot be based exclusively on student evaluations.

The remaining provisions of the Sessional Agreement deal with non-renewal, termination, leaves of absence, the grievance procedure, vacations, benefits and other matters irrelevant to the issue at hand.

The 2012 agreement

6 In the course of grievance procedure discussions on another matter nearly ten years ago, the parties recognized the existence of several differences over the Sessional Agreement. In early 2011, they referred these differences to arbitration in a written agreement “to proceed with a policy grievance regarding the assignment of courses to Sessional Lecturers”. Although six years have passed, this is the only arbitration to flow from the policy grievance. Following written exchanges in 2011 and “pathway to resolution discussions” in 2012, the parties resolved all of the issues save the one for determination in this Award.

7 Resolution of the other issues was achieved in principle on January 5, 2012 and the settlement terms were incorporated into a written Agreement dated February 29, 2012 (the “2012 Agreement”). This Agreement sets out the parties’ mutual understanding of the meaning of the Sessional Agreement and defines the remaining issue in paragraphs
22(v) and 24. With these two provisions italicized for emphasis and references to the Sessional Agreement updated to reflect current numbering, the relevant terms are:

3. A person who applies to work as a Sessional Lecturer (an “Applicant”) becomes a Sessional Faculty Member upon receiving an initial appointment.

4. An “appointment” or “reappointment” is an engagement to teach and must be accompanied by an assignment to teach at least one course. The right of appointment or reappointment is the right to an assignment to teach one course.

Reappointment

5. Sessional Faculty Members with a Continuing Appointment (“CSs”) are entitled to reappointment under Articles 3.01 and 5.02(a). This entitlement is accompanied by the right to an assignment to a minimum course load (“individual course load entitlement”) under Article 5.02(b).

6. Sessional Faculty Members without a Continuing Appointment (“NCSs”) are entitled to reappointment under Article 3.01. This entitlement is accompanied by the right to an assignment to teach one course each academic year (from July to June) in accordance with the Sessional Agreement.

7. Pursuant to Article 3.01, reappointment is a right “as a general principle” in the sense that it is subject to courses being available. It is also subject to:

   i) the CS or NCS holding the necessary qualifications to teach the course within the meaning of Article 6.01 (subject to paragraph 22(iv) where applicable); and

   ii) the CS or NCS applying to teach the course.

Non-Continuing Sessionals’ priority in relation to Applicants

8. NCSs shall be assigned courses to satisfy their right to reappointment before any Applicant is appointed or assigned a course in any academic year.

Course load

9. Pursuant to Article 6.02(b), CSs shall be assigned courses in priority over NCSs to the extent necessary to provide CSs with their individual course load entitlement.
Rights in the winter and summer sessions

15. The right of a NCS to reappointment is unchanged throughout the academic year. Whether the course assignment is in the winter session or the summer session, it is a right to teach one course per academic year.

Externals

16. The University has the right to appoint non-bargaining unit faculty ("Externals") to teach courses. There is no contractual obligation on the part of the University to assign all work that could be performed by Sessional Faculty Members to bargaining unit members.

17. The University decides, in its sole discretion, what work will be allocated to the "Sessional Courses Pool", as this term is defined in paragraph 22(iii) below.

18. In determining the work to be allocated to Externals and to Sessional Faculty Members, the University must apply its policies fairly, and not in an unreasonable, discriminatory or arbitrary manner.

19. The Sessional Agreement pertains to work assigned to Sessional Faculty Members and the work allocated to the Sessional Courses Pool (see paragraph 22(iii) below) for distribution to Sessional Faculty Members.

20. If no Sessional Faculty Member in the Department and no Applicant is qualified to teach a course in the Sessional Courses Pool, the course may be assigned to an External.

Distribution of courses to Sessional Faculty Members

22. Pursuant to Article 6.05, the Department Head includes CSs "in existing departmental processes used to determine course loads and course assignments for the upcoming academic year in the same way and at the same time as tenured and tenure-track faculty are included in those processes". Pursuant to the Sessional Agreement and this Agreement, the process by which courses are distributed to Sessional Faculty Members is:

i) First, the Department Head assigns courses to the teaching and professoriate streams including 12 month lecturers.
ii) Second, the Department Head assigns courses to CSs to meet their individual course load entitlements.

iii) Third, the Department allocates the remaining courses to either:

a) a pool of courses designated by the Department for assignment to Sessional Faculty Members (the “Sessional Courses Pool”), or

b) a pool of courses designated by the Department for assignment to Externals.

iv) Fourth, each NCS is reappointed with an assignment to teach at least one course in the Sessional Courses Pool. The courses are assigned to the NCSs in accordance with Article 6.01 as far as possible; the prescribed criteria for assignment are subject to modification only to the extent necessary to ensure the reappointment of every NCS in the department.

v) Fifth, courses which remain to be assigned (the “Leftover Courses”) are assigned to Sessionals with less than a full-time course load and to Applicants. The one unresolved issue for determination by arbitration arises here. It is whether Applicants must compete with Sessional Faculty Members for an initial course assignment.

On the University’s interpretation, it is entitled under Article 2.06 to appoint an Applicant to teach one course without regard to Article 6.01, although beyond this single course the University recognizes the new NCS must compete for course assignments under Article 6.01.

The Association’s interpretation is that Article 6.01 applies to all course assignments at this stage, with each course being assigned to either a Sessional Faculty Member or an Applicant according to the criteria in Article 6.01.

Courses which subsequently become available / Article 6.04

23. In the event that courses become available after the initial course assignments within a Department have been made, for reasons such as previously unscheduled leaves of absence, the addition of course sections, rearrangement of schedules or teaching assignments within a Department, Sessional Faculty Members with less than full-time appointments within the Department will be notified of these course offerings and have first priority to such courses, subject to the criteria in Article 6.01.
Issue for arbitration

24. The remaining unresolved issue, then, concerns the assignment of the Leftover Courses. Having regard to paragraph 22(v) above, it is whether the University may grant an Applicant an initial appointment with an assignment to teach a course, without applying Article 6.01.

Facts

8 Sessional Faculty members number 600 to 750 annually. A relatively small number have attained Continuing Appointment status ("Continuing Sessionals") which provides course load assurances under Article 5. In 2017, there were 94 Continuing Sessionals. In the same year, the number of Sessionals who were graduate students was 126. In the six years from 2013 to 2018, the number of graduate student Sessionals fluctuated between 84 and 255.

9 The University asserts that graduate students have been appointed as part-time or Sessional Lecturers since the 1980s. The practice has been governed by a series of University policies, the current form of which is Policy 75. The teaching experience gives graduate students a vital qualification for employment in the competitive market for faculty positions in post-secondary institutions. The consensus is, however, that if required to compete with existing Sessionals in accordance with Article 6.01, graduate students would receive very few course assignments.

10 The extrinsic evidence will be described in more detail below in conjunction with an assessment of its value as an interpretive aid. It is sufficient here to identify its components. One is the resolution of a grievance in 2007, referred to by the parties as the "Weatherby Settlement". Another is the parties' 1999 Memorandum of Agreement which brought Sessionals with less than a 50 per cent appointment into the Faculty Association's bargaining unit. The third consists of bargaining proposals made by the University in renewal collective bargaining in 2006, 2012, 2014 and 2017. The fourth component of the extrinsic evidence is a succession of University policies in relation to
the appointment of graduate students as part-time or Sessional lecturers, together with the University’s consultation process which preceded the adoption of the current Policy 75.

**Parties’ positions**

The Faculty Association says the early history of graduate students being assigned to teach courses as part-time or Sessional lecturers is not material for two reasons. First, prior to 1999 the appointment of graduate students as Sessionals was not on the Faculty Association’s radar because it did not represent Sessional Faculty members with less than a 50 per cent workload. Second, the practice was less extensive because teaching experience was not as essential to employment in academic positions at post-secondary institutions.

The Faculty Association relies on “the clear language of the Sessional Agreement, read as a whole, including Articles 3, 5 and 6”, as well as the 2012 Agreement and extrinsic evidence to argue that Article 6.01 applies to all course assignments, including any assignment made to an applicant for initial appointment. The Sessional Agreement, the Faculty Association submits, contains no language excluding applicants from the scope of Article 6.01 and the provision cannot be “read down” to achieve that effect.

The Faculty Association argues that, having in mind the measure of job security it has achieved for Sessionals, it would make no sense for it to allow these benefits to be diluted by the assignment of courses without regard to Article 6.01. The Faculty Association urges an interpretation which avoids such an absurdity.

The University submits that Articles 2.06 and 3.02 of the Sessional Agreement contemplate a course assignment as a function of appointment and reappointment respectively, and this is confirmed by paragraph 4 of the 2012 Agreement. The University argues that these and other terms of both the Sessional Agreement and the 2012 Agreement, including the language of Article 6.01 itself, indicate the course given
to a new appointee (and the one course to be taught by a reappointed Sessional) are distinct from course assignments under Article 6.01. Properly interpreted, the Sessional Agreement, in the submission of the University, does not require applicants to compete with existing Sessional Faculty members.

15 The University argues the Weatherby Settlement and the University’s bargaining proposals over the years concern graduate students, not the specific interpretive issue for determination in this arbitration. Finally, the University submits Policy 75 is consistent with the Sessional Agreement and invites a harmonious interpretation of the two instruments.

Reasons

16 The University agrees it appoints graduate students as Sessionals and allows that, “from a factual perspective”, the issue is related primarily to the ability of the University to provide graduate students with teaching experience to assist them to gain employment in institutions of higher education. But I take the University’s point about the precise nature of the issue for determination; it is not confined to graduate students. To quote paragraph 24 of the 2012 Agreement, it is “whether the University may grant an Applicant an initial appointment with an assignment to teach a course, without applying Article 6.01”. Most applicants will be graduate students and they are the focus of the agreed facts, but the issue bears on any applicant.

17 The dispute turns on the meaning of Article 6.01 of the Sessional Agreement. The principles which must guide the interpretive process are discussed in several authorities cited by the parties and succinctly summarized in the one authority cited by both: Pacific Press, A Division of Southam Inc. and GCIU, Local 25-C, [1995] BCCAAA No. 637 (Bird), at paragraph 27. It is worth repeating this oft-quoted point-form summary:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

The Faculty Association places emphasis on 5, 7 and 9, while the University relies in particular on 2, 5 and 7.

In my view these rules, as Arbitrator Bird called them, are principles or canons of interpretation distilled from a host of awards. These principles have been adopted and elaborated by more recent authorities and I accept the direction provided by the authorities on which the parties rely. Thus, the point of any interpretative exercise is to fathom and implement the mutual intent of the parties to the collective agreement, with the language of their agreement providing the most cogent assistance: *Victoria Times Colonist, A Division of Canwest Publications Ltd. and Victoria-Vancouver Island Newspaper Guild Local 30223*, [2010] BCCA No. 182. The words of a collective agreement must given a purposive, contextual reading: *University of Northern British Columbia and UNBC Faculty Association (Fellers Grievance)*, [2017] BCCA No. 65 (Nordlinger). The words and clauses of the agreement are to be read “in a harmonious fashion, with the workplace realities and purpose in mind”: *United Parcel Service Canada Ltd. and Teamsters, Local 31*, [2017] CLAD No. 133 (Nichols), at paragraph 83. The relevant context is thus both textual and factual.
The University also cites two venerable authorities for the proposition that it "is a fundamental right of an employer to organize and reorganize work": Algoma Steel Corp. and United Steelworkers (1968), 19 LAC 236 (P. C. Weiler); and, Windsor Public Utilities Commission and IBEW, Local 911 (1974), 7 LAC (2d) 380 (Adams). I take no issue with this proposition as a broad and general principle. But those cases concerned disputed changes to job content in the face of job classifications, which is rather removed from the issue here. Moreover, the proposition is qualified. In addition to the necessity for good faith and genuine change, it is fundamental that any organizational structure or reorganization must not be contrary to the express language of the collective agreement. In this case, there is express language on which the Faculty Association relies: Article 6.01. If it applies to the initial appointment of an applicant, the conventional view of the management right to organize and reorganize the workplace is not relevant.

Another authority cited by the University is equally unhelpful. The University relies on Wire Rope Industries Ltd. and United Steelworkers, Local 3910 (1982), 4 LAC (3d) 323 (Chertkow), for the time-worn employer argument that a trade union must rely on precise contract language in order to satisfy an arbitrator that a collective agreement has "taken away a fundamental management right to organize and reorganize its workforce for bona fide business reasons" (paragraph 19). Again, the argument begs the question; Article 6.01 constitutes precise contract language if it applies. Put another way, I decline to infer the parties' pertinent intention simply because of the absence of an explicit statement in the provision such as, for example, "This Article 6.01 applies to all course assignments, including any assignment to an applicant seeking an initial appointment as a Sessional Lecturer".

It is not only Article 6.01 which is silent on the matter of whether it applies to applicants. There is nothing in the entire Sessional Agreement which expressly applies the provision to applicants and, equally, nothing which expressly excludes applicants from its application. This silence impacts the usefulness of one of the principles of
interpretation relied on by both parties; it effectively eliminates the possibility of any assistance from the principle that a very important promise is likely to be unequivocally expressed. If either the exclusion or the application of Article 6.01 to applicants would amount to a very important promise, then the likelihood of express articulation of such a promise is defied by the Sessional Agreement.

22 Turning now to language of Article 6.01, I quote it again for convenience of reference:

In making Sessional course assignments, the University shall consider qualifications to perform the required work, quality and effectiveness of work performed and length of service. All evaluations of work performed shall be consistent with the criteria and procedures outlined in Articles 7 and 8 of this Agreement. Length of service shall be the determining factor only where the other factors are relatively equal.

The provision cannot be interpreted in isolation from Articles 2.06 and 3, which I also quote again:

2.06 Candidates for initial appointment at the rank of Sessional Lecturer are judged principally on qualifications, performance in teaching, and experience.

3.01 As a general principle, Sessional Lecturers have the right to reappointment in accordance with Part 7...

3.02 Candidates for reappointment are judged principally on performance in teaching, based on formal evaluation of their performance in all of the courses taught in the previous twelve (12) months. All such evaluations shall be consistent with the criteria and procedures outlined in Articles 7 and 8.

23 A thorough textual analysis of these and related provisions of the Sessional Agreement turns up a number of problems with the Faculty Association’s interpretation. The most obvious difficulty is that the application of Article 6.01 to applicants entails some duplication of Article 2.06. The Faculty Association characterizes Article 2.06 as
merely a “general statement on how a candidate is judged” for appointment, which the Faculty Association contends must occur before the assignment of a course. But Article 2.06 is clearly about applicants, and it demonstrates the parties understood how to formulate language unique to applicants. The words indicate their appreciation of the necessity to assess applicants rather generally, based on teaching experience elsewhere. Necessitating a second assessment under Article 6.01 based on considerations which are described in different terms is at least awkward.

The difficulty is compounded when the Article 6.01 criteria are scrutinized. It requires that all evaluations of work performed are to be “consistent with the criteria and procedures outlined in Articles 7 and 8”. In the absence of any control over an applicant’s previous performance evaluations, it is difficult to understand how the University can ensure that all such evaluations are consistent with Articles 7 and 8 of the Sessional Agreement. The processes set out in Articles 7 and 8 relate to the University; they mirror the evaluation requirements for tenured and tenure track faculty prescribed elsewhere in the parties’ collective agreement. It is doubtful that an applicant can be assessed under Article 6.01.

Nor do the words “consistent with” signal flexibility with respect to the precise methodology of previous evaluations. The same words appear in Article 3.02 dealing with reappointment and, of course, evaluations of Sessionals seeking reappointment will have been carried out under Articles 7 and 8. It is safe to infer the phrase “consistent with” was not used in Article 2.06 because the parties apprehended the impossibility of applicant evaluations under Articles 7 and 8. The presence of the words in Article 6.01, then, is consistent with an intention to exclude applicants from the operation of the provision.

Departing from the words of the present Sessional Agreement briefly, the language of Articles 2.06 and 6.01 reflects terms contained in the 1999 MOA which
brought part-time Sessionals with less than a 50 per cent course load into the Faculty Association’s bargaining unit. To the extent this piece of extrinsic evidence is of any assistance, it is worth noting that the terms in question governed the separate matters of appointment and reappointment.

To return to the text of the Sessional Agreement, the interplay between Articles 2.06 and 6.01 is central to the parties’ respective interpretations. The Faculty Association says that the appointment process and course assignment process are “inextricably linked” but separate, and the plain and ordinary meaning of the language of the Sessional Agreement requires both processes to be completed, with all course assignments subject to Article 6.01. The argument invokes the Preamble to the Sessional Agreement and Articles 3, 5 and 6 as indicating the parties’ intention to provide current Sessionals with a fair opportunity to participate in the distribution of courses. In terms similar to its contention that the University’s interpretation leads to an absurdity - an argument to which I will return below - the Faculty Association says the Sessional Agreement contemplates a system of competition for courses that values excellence and merit. Reference is made to the right to reappointment under Article 3, the opportunity to earn a minimum course load entitlement as a Continuing Sessional pursuant to Article 5, and the priority accorded Sessionals who apply for “additional courses” in Article 6.04. The Faculty Association submits the University’s interpretation would produce the most unusual result of giving applicants a better opportunity for some work than existing Sessionals. In the submission of the Faculty Association, it is most unlikely that it would ever agree to terms which prevent some Sessionals from accessing the opportunity afforded by Article 5 to achieve Continuing Sessional status.

In the University’s construction of the Sessional Agreement there is no interplay between the two provisions. On this interpretation, Article 2.06 concerns applicants and appointment entails a course assignment. Article 6.01 concerns Sessionals and the assignment of courses to Sessionals. In other words, the University contends assessments
for appointment, reappointment and course assignment are three different processes, each
governed by its own language in Articles 2.06, 3.02 and 6.01 respectively. The
University recognizes it must meet its obligations to reappoint Sessionals and assign
course load entitlements to Continuing Sessionals: Articles 3.01, 5.02, and 6.02, and
paragraphs 4, 5, 6, 7 and 8 of the 2012 Agreement. When those obligations have been
met, the University says an applicant may be appointed to teach a course without regard
to Article 6.01.

The Faculty Association’s spirited case for the application of Article 6.01 to the
distribution of all courses is based more on the interests of existing Sessionals than the
words of the Sessional Agreement. Given the awkward duplication of Articles 2.06 and
6.01 in the Faculty Association’s interpretation, as well as the other textual support for the
University’s interpretation, I conclude the University’s interpretation more effectively
meets the interpretive principles, including in particular the principle that all words in a
collective agreement should be given meaning. In each of Articles 2.06, 3.02 and 6.01,
the evaluation language serves a distinct purpose with no overlap or duplication.

The University’s interpretation also finds support in the 2012 Agreement. To
buttress its interpretation, the Faculty Association emphasizes that paragraph 4 of that
agreement provides that an appointment is separately “accompanied by” a course
assignment. But, as the University correctly emphasizes, paragraph 4 goes on to conflate
appointment and course assignment by providing that, “The right of appointment or
reappointment is the right to an assignment to teach one course” (emphasis added).

The University’s interpretation finds additional support in the clarification of the
role of Externals in paragraphs 16, 17, 18 and 20 of the 2012 Agreement. Paragraph 16
in particular tends to undermine the Faculty Association’s argument that it would not
agree to terms which might prevent its members from pursuing the opportunities for
enhanced job security. Two elements of paragraph 16 indicate just the opposite. First,
the Faculty Association agreed the University has the right to appoint “non-bargaining unit faculty” to teach courses. Second, the Faculty Association agreed the University is under no obligation to assign to Sessional Faculty all of the work they could perform.

Before leaving the 2012 Agreement, it is necessary to deal with paragraph 7 which prescribes the conditions of reappointment. Having in mind that the University equates appointment with reappointment as far as Article 6.01 is concerned, the mention of Article 6.01 in the first of the itemized conditions seems contradictory. But the reference does not apply the entire provision to reappointments; it is limited to the qualifications criterion. Specifically, paragraph 7(i) provides that reappointment is subject to having the qualifications “within the meaning of Article 6.01”. Thus, in the words of Article 6.01, reappointment is subject to the Sessional having the “qualifications to perform the work required”.

Paragraph 7(i), however, goes further; it provides the condition is also “subject to paragraph 22(iv) where applicable”. And paragraph 22(iv) expressly provides that the one course to be assigned upon reappointment shall be distributed “in accordance with Article 6.01 as far as possible”, the criteria of Article 6.01 being “subject to modification only to the extent necessary to ensure the reappointment of every… [non-continuing Sessional] in the department”. It is difficult to reconcile this language with the University’s equation of appointment and reappointment in relation to Article 6.01. This contention was never about courses assigned in order to meet the Article 5 individual course load entitlements of Continuing Sessionals. Article 6.02 (and paragraph 9 of the 2012 Agreement) apply to the distribution of these courses and are expressly subject to Article 6.01. But paragraph 22(iv) expressly pertains to the one course assignment which, in accordance with paragraph 4 of the 2012 Agreement, is the definition of reappointment. This is perhaps the explanation for the University’s characterization of the 2012 Agreement as a modification of the Sessional Agreement as well as clarification. But, if the University’s interpretation is not sustainable in relation to reappointments, the
flaw is by definition restricted to existing Sessionals. It does not relate to applicants and, therefore, has no bearing on the precise issue for determination in this Award.

34 The University’s interpretation, then, finds more support than does the Faculty Association’s in the plain and ordinary meaning of the words of the Sessional Agreement, having regard to the Sessional Agreement as a whole. Moreover, it is reinforced by the parties’ clarification of the Sessional Agreement in the 2012 Agreement. The Faculty Association’s submission that there is nothing in the Sessional Agreement to suggest Article 6.01 does not apply to applicants therefore fails. Equally, there is no merit to the Faculty Association’s argument that the University is endeavouring to “read down” Article 6.01. In contrast with Ottawa Hospital and CUPE, Local 400, [1999] OLAA No. 1019 (Kates), the University is not endeavouring to restrict the meaning of “a precise and specific clause” (paragraph 12) which manifestly encumbers management rights. On the contrary, far from a restriction on management rights in relation to Article 6.01, the more plausible interpretation of the provision is that it does not apply to applicants. Based on a textual analysis of the Sessional Agreement, Article 6.01 is at worst ambiguous with regard to whether it applies to applicants as well as existing Sessionals.

35 However, before I come to any conclusion as to whether there is a bona fide doubt about the meaning of the relevant contract language, I am obliged to consider the extrinsic evidence in accordance with Nanaimo Times Ltd. and GCIU, Local 525-M, [1996] BCLRB Decision No. B40.

36 The Faculty Association gives prominence to the Weatherby Settlement in 2007 and relies as well on the 1999 MOA and several bargaining proposals to argue the University has demonstrated that it understands it must negotiate the right it now asserts by its interpretation. The submission is something of a reliance on the cumulative effect of this evidence, to which I now turn.
The Weatherby Settlement dealt with the role of Teaching Assistants in the Department of Education. Teaching Assistants are in a separate bargaining unit, and represented by another trade union which was party to the settlement agreement. The Weatherby Settlement benefited the Faculty Association in several respects. First, it terminated the Department’s use of the Instructor of Record structure under which Teaching Assistants had assumed disputed teaching responsibilities. Second, it confirmed that Sessionals are solely responsible for teaching courses assigned to them, while Teaching Assistants provide assistance to a Faculty Member who retains responsibility for the course. Third, it provided that course assignments “will be posted and awarded in a fair, transparent and equitable manner”, while opportunities for Teaching Assistants would be “distinguished and posted separately”. None of these terms, however, relate to the specific issue of when and how the University gives a course to an applicant for an initial appointment. Nor does any other term of the settlement. Reliance on the settlement is, in any event, precluded by other terms. The Weatherby Settlement applied expressly to the Faculty of Education only and was “without prejudice to the rights of either party in any future case”.

The thrust of the 1999 MOA was to identify the terms of the then Sessional Agreement which would be applicable to the newly-included faculty members. As I have said, two of its provisions anticipated Articles 2.06 and 6.01. Specifically, clause 2.4 of the MOA dealt with initial appointments and is now Article 2.06, while clause 3.3 spoke to reappointment in terms very similar to the language by which Article 6.01 now addresses course assignments. But the Faculty Association places most emphasis on clause 11.5 of the MOA:

The parties acknowledge that some staffing assignments will already have been made prior to the implementation of this Agreement and therefore agree that no such staffing assignments shall constitute a breach of this agreement...

The Faculty Association asserts these “staffing assignments” would have included the appointment of graduate students as Sessionals.
I am unable to draw any material inference from the amnesty for earlier “staffing assignments”. It is possible, if not probable, that graduate students were among those staffing assignments. But there is no agreement between the parties on the relevant facts, including in particular the specific breach or breaches the parties had in mind when they negotiated clause 11.5. As a result, there is no basis on which I can find the parties intended the amnesty to cover staffing assignments to graduate students. It was a general amnesty from which I gather no assistance with respect to whether Article 6.01 applies to the assignment of a course to an applicant seeking an initial appointment.

As far as the bargaining history is concerned, the University cites several authorities for the proposition that bargaining proposals that have been withdrawn are not reliable evidence of a particular interpretation: Pacific Northern Gas Ltd. and IBEW, Local 213, [1993] BCCAAA No. 77 (Kelleher); White Rock (City) and CUPE, Local 402-01, [2016] BCCAAA No. 72 (Young); Community Social Services Employers’ Association and Community Social Services Bargaining Association of Unions, [2017] BCCAAA No. 70 (Pekeles); and, Parmalat Dairy and Bakery Inc. and Retail, Wholesale Canada, CAW Division, Local 462, [2002] OLAA No. 895 (Rayner). I accept the thrust of these awards. Arbitrator Kelleher, as he then was, put it most succinctly: “A proposal may be withdrawn for many reasons” (Pacific Northern Gas, paragraph 56). Indeed, a proposal may be made, as well as withdrawn, for many reasons.

None of the specific bargaining proposals in evidence was agreed to by the Faculty Association. The 2006 proposal was that graduate students “may be appointed as a Graduate Student Lecturer as part of their learning opportunity”; it would have limited these appointments to a specified term and removed the opportunity for reappointment. The University proposal in 2012, which came on the heels of the 2012 Agreement and the adoption of the current version of Policy 75, was aimed at essentially the same result as the 2006 proposal except that it included the more ambitious objective of excluding
graduate student Sessionals from the bargaining unit. The University reiterated this position in 2014 in the context of a proposed realignment of Lecturer and Sessional Lecturer positions intended to enhance the reappointment opportunities for the former, and create more long-term Lecturer positions. A corollary of this restructuring was to return “the position of Sessional Lecturer to a true temporary appointment”. In 2017, the University again proposed to limit the teaching load and reappointment rights of graduate students but no longer sought to exclude them from the Faculty Association’s bargaining unit. This round of bargaining improved the reappointment prospects and job security of Lecturers, but made no relevant change to the Sessional Agreement.

42 It is evident from the content of the proposals that the University sought to obtain the Faculty Association’s agreement to limiting the reappointment rights of graduate student Sessionals. The purpose was doubtless to ensure the students’ studies were not adversely affected. But neither tabling nor withdrawing such proposals affords any insight into the University’s understanding of its rights to appoint graduate students as Sessionals. To the extent the proposals appear to establish that graduate students may be appointed as Sessionals, the authorities cited by the University caution against treating them as reliable evidence in relation to the specific issue in dispute. It is entirely plausible that the University sought nothing more than recognition of its practice, or perhaps an express clarification that it was not contrary to the Sessional Agreement. This seems probable in light of the continued practice of appointing graduate student Sessionals without regard to Article 6.01. It would be reckless and wrong to infer from the proposals that the University appreciated it was required to apply Article 6.01 when considering the appointment of a graduate student or other applicant.

43 The only remaining extrinsic evidence is Policy 75, the earliest form of which dates back to 1980. The policy and its subsequent revisions in 1986 and 1992 provided that in the winter session a “doctoral student who has been admitted to candidacy may be granted an appointment as a part-time lecturer...”. Later in 1992, that policy was
replaced by Policy 75, Appointment of Graduate Students to Teach a Course in which a Board of Governors Appointment is Required. The new policy retained the gist of the previous policy and added this clause 3.1:

A credit course is given and students examined under the supervision of a faculty member of the department or unit in which the course is given. This faculty member is in charge of all aspects of the course.

A 2005 reiteration of the policy retained clause 3.1, on which the Faculty Association relies to argue the University was aware that graduate students were confined to working under the supervision of a faculty member.

Clause 3.1 did not survive the 2012 revision of Policy 75. The consultation process in relation to this revision commenced in September 2011 with an “Information” document in which the University stated the purpose of the proposed amendments was “to simplify and articulate more clearly the conditions and approvals that would apply to all teaching appointments of graduate students...”. The executive summary of this document explained that, “[t]he conditions that a graduate student must meet before being appointed to teach have been revised to allow for more flexibility where it is appropriate”. An aspect of this flexibility was related to clause 3.1. It was, to quote the document, “…deleted entirely, as the information should not be in the Policy”.

The Faculty Association responded to the invitation for input. In its written submission dated November 16, 2011, the Faculty Association expressed concern that “many of the proposed amendments undermine the [Faculty] Association’s representational rights under the Collective Agreement”. In a preview of its position in this case, the Faculty Association stated, “the proposed policy opens up teaching to Graduate Students without clearly articulating the priority and ongoing rights of Sessional Lecturers… [and] will lead to violations of the priority rights of existing Sessional Faculty to available work”. The Faculty Association expressly reserved its right to challenge the new Policy.
46 On February 2, 2012, the Board of Governors adopted the current version of Policy 75. Changes had been made to clarify that the appointment of graduate students under the policy would be made in accordance with the Sessional Agreement. But there was no change in response to the Faculty Association’s concerns about the assignment of courses which Sessionals could teach. The Board’s “rationale” in this regard was:

The proposed Policy is not intended to alter the way teaching appointments are made to graduate students...
...a teaching appointment under the proposed Policy is one avenue for graduate students to gain teaching experience. Such an appointment is only appropriate, and, as the proposed Policy confirms, will only be utilized, for those graduate students who are qualified to teach university level courses without supervision. In situations where supervision is either required or more appropriate, Departments and Faculties can place graduate students in roles as teaching assistants under the supervision of a faculty member.

47 The revised Policy 75 came into effect on February 3, 2012 and remains in force. It contemplates the appointment of graduate students - principally doctoral students admitted to candidacy but others as well on an exceptional basis - as part-time Sessionals with specified limits on the amount of teaching permitted. Clause 2.1 of the Policy prescribes that the student “must have suitable academic credentials or experience to teach any course that he or she is assigned”.

48 Except for the presence of clause 3.1 in the policy until 2012, every iteration of Policy 75, like its predecessors, is entirely consistent with the University’s interpretation of Article 6.01. Each speaks to the appointment of graduate students as part-time lecturers and, later, as Sessionals. No reference is made to Article 6.01 and this did not change in 2012 despite the Faculty Association’s expressed concerns about the position of existing Sessionals.

49 What about clause 3.1 then? The Faculty Association’s reliance on the language of this clause is not persuasive for at least two reasons.
First, it is impossible to infer the University perceived any relationship between clause 3.1 and the Sessional Agreement. In fact, the Sessional Agreement was not a consideration in 1992 when the clause was introduced into Policy 75. The Sessional Agreement had no bearing on graduate students appointed as part-time lecturers until seven years later when the parties entered into the 1999 MOA.

Second, while clause 3.1 was in Policy 75, it co-existed with language that expressly contemplated the appointment of doctoral students admitted into candidacy, as well as other students on an exceptional basis, as part-time lecturers. There is no evidence to suggest that, upon appointment as part-time lecturers, graduate students were not regarded as faculty members for purposes of clause 3.1.

This, in all probability, is the factual history of the dispute. The University’s assertion that graduate students have been appointed as part-time faculty for many years is corroborated by its rationale for the 2012 revision of Policy 75. To repeat, “The proposed Policy is not intended to alter the way appointments are made to graduate students”. The statement then affirmed that such appointments are only for graduate students qualified to teach university courses and distinguished those students from others who require supervision. The plain implication is that the University did not consider either the earlier versions of Policy 75, including clause 3.1, or the Sessional Agreement to be an impediment to the appointment of graduate students as part-time lecturers and then, after 1999, as Sessionals. A graduate student Sessional was simply a “faculty member” under clause 3.1. And it is safe to surmise that the practice of making these appointments continued despite the 1999 MOA and long after the era when teaching experience was less important to future employment in academia. In short, there is no basis on which I can safely draw any inference regarding the issue at hand from the history of Policy 75.
Nothing turns on the failure of the Faculty Association to act on the notice it gave during the 2011 consultation that it would formally challenge Policy 75. By 2012, the issue in this dispute had been defined and the Faculty Association presumably anticipated the outcome of this matter would solve its concerns about Policy 75.

Despite the Faculty Association’s objections to Policy 75, it no longer seeks any remedy in that respect and the University invites a harmonious interpretation of the Policy and the Sessional Agreement. But if Policy 75 restricts the reinstatement rights of Sessionals who are graduate students, it must be inconsistent to that extent because there is no such restriction in the Sessional Agreement. But this departs from the issue at hand. The resolution of any such inconsistency is not a matter for determination in this proceeding.

In sum, it is not possible to conclude that the University at any point in time understood it was required to apply Article 6.01 when it assigned a course to an applicant seeking an initial appointment. In other words, the extrinsic evidence does not establish any relevant mutual intent of the parties. Having determined there is nothing in the extrinsic evidence on which I can rely on to interpret Article 6.01, the Nanaimo Times decision directs me to return to the only evidence which is probative: the meaning of the language of the Sessional Agreement when read in its textual and practical context. For the reasons I have canvassed above, there is no real ambiguity in the language. I find the words of the Sessional Agreement favour the University’s interpretation.

There remains the Faculty Association’s contention that the University’s interpretation amounts to an absurdity. The essential premise of this argument is that this dispute is a matter of the integrity of its bargaining unit. To paraphrase Deena Rubuliak, the Faculty Association’s Executive Director, the Sessional Agreement reflects the reality that the parties have turned their minds to how Sessionals attain greater job security. She referenced Articles 3 and 5, as well as the protection of “member rights” and
“accumulated length of service” in Article 4. As Ms. Rubuliak put it, having negotiated these terms, it makes no sense to conclude the Faculty Association would “leave the back door open” to applicants being appointed to teach a course for which an existing Sessional Lecturer is better qualified. In reply to the University’s argument that the Faculty Association’s interpretation would block the appointment of graduate students, Ms. Rubuliak cited examples of applicants who are appointed because of the need for special qualifications not possessed by existing Sessionals.

This attempt to elevate the Faculty Association’s case ignores important facets of the practical or workplace context. In particular, it ignores the reality of the University’s commitment to graduate student programs, the practice of appointing graduate students as Sessionals and the value of this teaching experience to the development of graduate students. Policy 75 provides that a graduate student must be capable of teaching any course she or he is assigned; however, graduate students are unlikely to have special qualifications, which is precisely the University’s interest in maintaining the practice of appointing graduate students without regard to Article 6.01. Another contextual factor is the University’s interest in maintaining the short-term character of Sessional appointments. Despite the improvements to Sessionals’ job security cited by he Faculty Association, it is undisputed that the University has consistently taken the position that Sessional appointments do not represent a career path.

The parties’ competing interests - the Faculty Association’s in protecting the job security of its Sessional Faculty members and the University’s in maintaining the quality of its graduate student programs - are the backdrop to the interpretation required to determine this dispute. These counterbalancing interests mean the University’s interpretation is neither anomalous nor any more absurd than the Faculty Association’s. I am not assisted, then, by the cases cited by the Faculty Association in this regard: Nova Scotia (Department of Transportation and Communications) and CUPE, Local 1867.
(1996), 58 LAC (4th) 11 (Veniot); Telus Communications and TWU, [2010] CLAD No. 71 (Brown); and, British Columbia and BCGEU (2003), 122 LAC (4th) 201 (Germaine).

As a consequence of the University’s contractual right to appoint graduate students as Sessionals with a course assignment and to do so without regard to Article 6.01, the opportunity for some Sessionals to teach additional courses and access Continuing Sessional status will be negatively affected. The Faculty Association has bargained these benefits for its members and commendably sought to protect and advance them. In the end, however, the job security provisions in the Sessional Agreement remain less than genuinely robust, circumscribed as they are by the University’s rights to assign courses to externals and to assign a course to an applicant for initial appointment as a Sessional without regard to Article 6.01.

Award

The University may appoint an applicant as a Sessional under Article 2.06 together with an assignment to teach one course without applying Article 6.01.

Dated at Vancouver, British Columbia this 12th day of September 2018.

Rod Germaine, Arbitrator