

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”)

(Lecturers Grievance)

ARBITRATOR:	Robert Pekeles
COUNSEL:	Delayne Sartison, Q.C. and Meaghan McWhinnie, Counsel for the University
	Jessica Burke and Elisabeth Giffin, Counsel for the Faculty Association
DATE OF DECISION:	May 23, 2022

## INTRODUCTION

The central issue in the present grievance concerns a dispute between the parties regarding Part 4, Article 2.02(a) of the parties' 2016-2019 Collective Agreement (the "Collective Agreement"). In this decision, unless otherwise stated, when I refer to articles of the Collective Agreement those will be articles in Part 4 of the Collective Agreement. Article 2.02(a) provides as follows:

### 2.02 Term Appointments without Review

a) Appointments without review are full-time or part-time appointments for a specified limited term. With the exception of Lecturers, there is no implication that the appointee will be considered for any other appointment of this or any other kind on the expiration of the specified term. Lecturer appointments are expected to be renewed for successive terms of up to three (3) years each upon demonstration of excellence in teaching as defined in Article 4.02 in Part 4: *Conditions of Appointment for Faculty*.

The Faculty Association's position is that the Lecturer may be subjected to the demonstration of excellence in teaching only once, prior to their second appointment. The University's position, by contrast, is that the Lecturer's expectation of renewal is conditional on demonstration of excellence in teaching each time that they are up for renewal.

## FACTS

The evidence was presented by both statutory declarations and oral evidence.

Broadly speaking there are two types of appointments under the Collective Agreement: 1) appointments with review, which are either tenured faculty or those working towards tenure and 2) appointments without review, which are not tenured or on the tenure track.

Appointments without review consist of two types of faculty: Lecturers and Sessional Lecturers. In this decision, I will refer to Sessional Lecturers as "Sessionals". Part 4 of the Collective Agreement is entitled "Conditions of Appointment for Faculty". Like tenured and tenure track faculty, the conditions of appointment for Lecturers are addressed in Part 4. Part

7 of the Collective Agreement is entitled “Conditions of Appointment for Sessional Lecturers”. The conditions of appointment for Sessionals are addressed in Part 7.

In the second to last year of a tenure track faculty member’s second appointment, the University must assess whether they meet the requirements for tenure. If tenure is not granted, that faculty member will be given a terminal year, after which they have no rights to severance or continuation in any other position.

Faculty members may obtain tenure after a detailed and rigorous process of review that is set out in Part 4 of the Collective Agreement, and in particular Articles 4 and 5 read together. Those provisions alone take up close to 14 pages of the Collective Agreement. Article 5 alone takes up some 10 pages of the Collective Agreement. Article 5 sets out very detailed provisions regarding the procedures for appointment, reappointment, tenure and promotion. (It does not apply to Lecturers: see Article 5.01 (b).) Those detailed provisions involve the recommendation of a Departmental standing committee, the Department Head’s recommendation to the Dean, the Dean’s advisory committee, a recommendation by the Dean to the President, review by the Senior Appointments Committee, and a recommendation by the President to the Board of Governors.

There are two tenure streams, one that involves scholarly activity and a second that involves educational leadership. Candidates in the former tenure stream are judged principally on performance in scholarly activity and teaching. The candidates in the latter tenure stream are judged principally on performance in educational leadership and teaching: Article 4.01(a). Once a faculty member has obtained tenure, the University may only dismiss that person for financial exigency, redundancy, or just cause as set out in Article 10.01: Article 2.04.

Article 1.01 defines Lecturer in the following terms:

“Lecturer” means a person holding an appointment without review for a term of one, two or three years (the first year of an initial appointment shall be probationary), with responsibilities limited to teaching and related duties which may include administrative responsibilities normally undertaken by faculty

members, and service as defined by Article 4.05 in Part 4, conditions of Appointment for Faculty.

Lecturers are salaried appointments. I note parenthetically, that under the 2019-22 collective agreement between the parties, the maximum term for Lecturers has increased to 4 or 5 years. Like other faculty, Lecturers are assigned courses that they have the requisite knowledge base to teach and are not assigned courses that they do not have the requisite knowledge base to teach.

Article 2.02 further provides, in part, as follows:

- d) The Head shall consult with eligible members of the department and lecturers in order to ascertain their views and to obtain their recommendation concerning the appointment of all Lecturers.
- e) Lecturer appointments may not be renewed or may be revoked during the term for reasons such as lack of funding, falling enrolment, or other operational reasons.
- f) Lecturers shall participate fully in affairs and activities of the department except where prohibited by this agreement or University policy.
- g) Lecturers will have priority of course assignment over Sessional faculty.

Article 4.02 provides as follows:

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual students' work, or other means by which students, whether in degree or non-degree programs sponsored by the University, derive educational benefit. An individual's entire teaching contribution 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 colleagues of performance in university lectures, outside references concerning teaching at other institutions, course material and examinations, the calibre of supervised essays and theses, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Consideration shall be given to the

ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

When a Lecturer's appointment is not renewed, they are entitled to notice or pay in lieu, as well as reappointment as a Sessional if they previously held such an appointment. However, the latter entitlement only applies if the Lecturer was not reappointed for reasons other than failure to demonstrate "excellence in teaching".

As noted earlier, unlike Lecturers, provisions regarding Sessionals are set out in Part 7 of the Collective Agreement. Sessionals are assigned to teach a particular course (or courses) and are paid on a per-course basis, rather than on a salary like tenure-track faculty, tenured faculty and Lecturers, under Part 4 of the Collective Agreement. Article 3 of Part 7 provides as follows:

**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.

Under Part 7, Article 10.01, the reasons for non-renewal of appointment of a Sessional are teaching performance, lack of funding, discontinuance or non-scheduling of a course or section, or for just cause.

Part 7, Articles 8.01 and 8.02 provide as follows:

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.

Sessionals who are not reappointed may be entitled to notice, right of recall and/or severance depending on whether they have continuing status and the reason for termination.

To better understand the background to the present dispute, it is useful to refer to the 2014-2016 collective agreement between the parties (the “Previous Collective Agreement”). Under the Previous Collective Agreement, the definition of Lecturer set out in Part 4, Article 1.01 read as follows:

“Lecturer” means a person holding an appointment without review for a term of twelve (12) months or less with responsibilities limited to teaching and related duties which may include administrative responsibilities normally undertaken by faculty members.

Article 2.02(a) of the Previous Collective Agreement provided as follows:

2.02 Term Appointments without Review

a) Appointments without review are full-time or part-time appointments for a specified limited term. There is no implication that the appointee will be considered for any further appointment of this or any other kind on the expiration of the specified term.

As noted, a Lecturer was appointed for a term of no more than 12 months, with no right of reappointment. Under those provisions, some Lecturers had taught at the University for decades, but without any right of reappointment.

A good deal of evidence was advanced by both parties regarding collective bargaining that led to the Collective Agreement. Allison Matacheskie was the Managing Director of Faculty Relations at the University. She was the lead negotiator for the University in bargaining for the Collective Agreement. In that round of bargaining, both parties made proposals to enable

longer and more secure appointments for Lecturers that would include expectation of reappointment.

On January 27, 2017, the University tabled a proposal that included the exact same language in the last sentence of Article 2.02(a), that is now in the Collective Agreement and that is at issue in the present case.

As declared by Deena Rubuliak, the Executive Director of the Faculty Association, the parties agreed to the shared objective of increasing job security for Lecturers, and to create a right of reappointment for Lecturers to further that purpose. On January 27, 2017 the University stated that Lecturers are “expected to be here for the[ir] career as excellent teachers.” In support of the shared objective to make Lecturers more like faculty, the parties agreed to include mandatory service assignments in their job description. “Service” is defined in Article 4.05 of the Collective Agreement and can include departmental committees or serving on Senate and Senate committees.

The University referred to Article 4.02 in Article 2.02(a) because the Lecturer’s primary function at the University is teaching. The University considered that Lecturers should meet the same standard of excellence in teaching as do those in the educational leadership stream towards tenure.

Achieving tenure in the educational leadership stream requires more than demonstrating excellence in teaching. It also includes service and educational leadership as defined in Article 4.04(a) of the Collective Agreement as follows:

#### 4.04 Educational Leadership

- a) Educational leadership is activity taken at UBC and elsewhere to advance innovation in teaching and learning with impact beyond one's classroom. Educational leadership includes but is not limited to such things as:
- Application of and/or active engagement in the scholarship of teaching and learning;
  - significant contributions to curriculum development, curriculum renewal, course design, new assessment models, pedagogical innovation and other initiatives that extend beyond the member's classroom and advance the University's ability to excel in its teaching and learning mandates;
  - teaching, mentorship and inspiration of colleagues;
  - formal educational leadership responsibility within Department/Program/Faculty;
  - organization of and contributions to conferences, programs, symposia, workshops and other educational events on teaching and learning locally, nationally and internationally;
  - contributions to the theory and practice of teaching and learning, including publications such as textbooks, print and electronic publications, book chapters, articles in peer-reviewed and professional journals, conference proceedings, software, training guidelines, instructional manuals or other resources; and
  - other activities that support evidence-based educational excellence, leadership and impact within and beyond the University.
- b) Judgment of educational leadership is based mainly on the quality and significance of the individual's contributions.

The Faculty Association tabled a counter proposal concerning Lecturers on April 6, 2017 which was discussed on April 6-7, 2017. Its proposal included a new provision titled "Lecturers". That proposal provided, in part, as follows:

#### X.01 Appointment

a) The Departmental Head shall consult formally at meetings convened for that purpose with eligible members of the Department in order to ascertain their views and to obtain their recommendation concerning the appointment of all Lecturers and the reappointment of Lecturers.

....

#### X.02 Reappointment

a) As a general principle, lecturer appointments are expected to be renewed for successive terms of one, two or three years each upon demonstration of excellence in teaching as defined in Article 4.02 in part 4, Conditions of Appointment for Faculty.



### X.03 Non-renewal of appointment

a) With the exception of X.03(b) the only reason for non-renewal of appointment of a Lecturer shall be teaching performance.

b) The parties recognize that, due to lack of funding, falling enrolment, or other legitimate reasons, and subject to paragraph 22 of the Germaine Agreement, a department may need to reduce the number of lecturer appointments. Such a reduction in the number of lecturer positions may be a reason for non-renewal of a lecturer appointment.

I pause to note that under a mediated agreement between the parties reached in 2012 (the “Germaine Agreement”), Lecturers have the right to be assigned courses prior to any Sessional: paragraph 22 of the Germaine Agreement. Paragraph 7 of the Germaine Agreement provided that Sessional “reappointment is a right ‘as a general principle’ in the sense that it is subject to courses being available.” It is also subject to the Sessional holding the necessary qualifications to teach the course and the Sessional applying to teach the course.

In the course of presenting the Faculty Association’s proposal, Jim Johnson, the Faculty Association’s chief spokesperson, commented that “we want people to be permanent ongoing members.”

According to Matacheskie, in light of the balance of his presentation on Article X and the language of the proposal itself, she did not understand Johnson’s remark quoted above to mean that the Faculty Association was proposing language that would literally render Lecturers permanent ongoing faculty members. Rather, she understood his comment to be consistent with the University’s objective of having Lecturers who continue to demonstrate teaching excellence, continue to be reappointed and have lengthy careers at the University.

I note from the bargaining notes, that Johnson immediately after his comment quoted above, went on to indicate that:

A, basically yours, but we moved it. We retained “demonstration of excellence”. You had nothing about non-renewal, we added some stuff. A & B together determine rounds of non-renewals. A is for teaching performance your language. B is redundancy.

In the course of bargaining on May 19, 2017, Matacheskie stated that “we both agree that intention of 3 or up to 3 year appnt is automatic unless there’s performance or operational issue.”

Matacheskie went on to say that:

...they’re only not reappointed only in teaching performance. Again, it’s not a tenure review. And then also the operational requirement... I see it more as there’s strict reasons why you don’t renew, it’s almost like administrative review. ...

I note that Matacheskie’s comments were made in the context of her discussing whether the parties wanted a consulting process for both appointment and reappointment.

An exchange between Johnson and Matacheskie took place on June 15, 2017 as follows:

JJ: part of reason we’re struggling, sessionals are contract staff. Lecturers are also contract staff. Both parties are trying to move to more regular faculty. The language we’re looking at is more identical to instructor before they were turned into educational leadership. Both are contract, and it creates a little bit of awkwardness. From our point of view, we have classification that has a foot in both camps. That lecturers could be treated as senior instructors on rolling contracts, or they want to be treated as sessionals.

AM: which one do you want?

JJ: the first one.

AM: me too

According to Matacheskie, that June 15, 2017 exchange did not occur in the context of discussions concerning Lecturer employment stability or contract renewals, but rather during a discussion on the terminology to describe Sessionals.

What Matacheskie understood that she was agreeing to in that June 15, 2017 exchange, was that the parties wished to treat Lecturers more akin to faculty, i.e. Senior Instructors, as compared to casual staff, i.e. Sessionals. She did not understand Johnson to be suggesting that the parties treat Lecturers exactly like Senior Instructors, given that under both the University’s and Faculty Association’s bargaining proposals Lecturers remained fixed term

contract employees, subject to a prescribed expectation of renewal. The June 15, 2017 exchange occurred late in bargaining and did not result in any material changes to the Lecturer language concerning appointment/reappointment.

The grievance in the present case was filed in November 2018 after the present disagreement came to light.

According to Rubuliak, tenure cannot be achieved at the rank of Instructor. It can be achieved at the rank of Senior Instructor. For an Instructor to be awarded tenure and promotion to Senior Instructor under the Collective Agreement, there must be evidence of “excellence in teaching” which is the same standard required for Lecturers. If unsuccessful, an Instructor faces automatic dismissal and is granted a terminal year. Under the Collective Agreement, a Lecturer is subject to the same standard for teaching, and faces dismissal if unsuccessful, but does not get a terminal year.

On this basis, the Faculty Association was of the understanding that Lecturers would only have to demonstrate excellence in teaching once, in the same manner as an Instructor who is promoted to the rank of Senior Instructor and obtains tenure.

According to Rubuliak, due to the harsh result of failure, the Faculty Association would not have agreed to the language in issue, if it had understood the University’s intention to be to subject the Lecturer to demonstrate excellence in teaching in perpetuity.

I note that similar to Rubuliak’s declaration, Matacheskie declared that the University’s bargaining team and she would not have agreed to language that gave contract Lecturers successive renewal appointments after only a single demonstration of teaching excellence. Matacheskie asserts, among other things, that if the University had intended a one-time review to establish an ongoing employment relationship for the Lecturers, it would have incorporated many of the provisions for review for tenured faculty. Instead, the agreed upon terms for Lecturers do not require peer review or consultation for reappointment.

Rubuliak further stated in her statutory declaration:

The understanding of the Faculty Association was that both Parties wished to give Lecturers a right of reappointment, but that before doing so, the University wanted to ensure that Lecturers would be required to demonstrate a tenure-level standard of teaching. The Faculty Association agreed to this, but on the understanding that like tenured members, the review would be a *one-time* occurrence. I understood the agreement to be such, because otherwise, Lecturers would in fact be held to a higher standard than tenured members, without the gain of the protections that tenure affords.

Rubuliak further declared that prior to 2017, most Lecturers worked on numerous successive contracts of 12 months or less. However, they had no job security beyond each term appointment.

The parties further agreed to include “service” as part of the definition of Lecturer under Article 1.01. Service was already a part of the duties of tenure track and tenured faculty. It was the understanding of the Faculty Association that the agreement to include service in the duties of Lecturers reflected the parties’ agreement that Lecturers were to be less like Sessionals, and more like faculty who have ongoing employment and a long-term interest in participating in the decision-making processes of the University.

The Faculty Association understood that like Instructors who gain promotion and tenure as Senior Instructors after being successfully evaluated in terms of excellence in teaching once, Lecturers would be tested according to the same standard once, and thereafter gain a right of reappointment. The Faculty Association understood the parties’ agreement to be that Lecturers would be treated like Senior Instructors, however, with a right of reappointment rather than tenure. It was on the basis of this understanding that the Faculty Association agreed to the demonstration of excellence in teaching standard.

To this point, I have summarized the evidence given by Matacheskie and Rubuliak in their respective declarations. I now turn to key points in their respective cross examinations.

Rubuliak agreed that Lecturers continue to be non-tenured and non-tenure track. They are contract employees; term employees.

In terms of the Faculty Association's April 6, 2017 proposal, Rubuliak agreed that under the proposed Article X.03(a), teaching performance could be a reason for non-renewal. However, she testified that the Faculty Association thought that the excellence standard was a one-time test. She noted that a Lecturer could subsequently not be renewed for teaching performance under the just cause standard. Rubuliak agreed that when Johnson said "A is for teaching performance your language" on April 6, 2017, what he meant by "your language" was the excellence in teaching test. She subsequently said that she could not say for sure. In the Faculty Association's view, once the Lecturers passed the excellence test once, they would have a presumptive right to work subject to operational issues.

In cross examination, Matacheskie agreed that before collective bargaining for the Collective Agreement, there were some Lecturers who had worked for the University for over 20 years. She further agreed that the Faculty Association wanted to address job security for Lecturers in that round of collective bargaining.

In terms of the bargaining on January 26, 2017, Matacheskie agreed that for the Faculty Association the fundamental principle was that the Lecturer would have the right of reappointment although not tenure, but a right to keep their job. Matacheskie stated "we want to give longer, stable contracts for Lecturers". She agreed that job security for Lecturers was a shared objective.

When Johnson stated on April 6, 2017 that "we want people to be permanent ongoing members", Matacheskie did not ask him to clarify that.

Matacheskie agreed that the demonstration of excellence in teaching was not automatic.

Matacheskie agreed that Lecturers would be more like faculty; less like Part 7 of the Collective Agreement and more like Part 4. Prior to the Collective Agreement, service was not part of the duties of the Lecturers under the Previous Collective Agreement. That changed in the Collective Agreement. Faculty have certain roles in department decision

making. The University wanted Lecturers to be involved in things such as new courses or elimination of courses.

In terms of Article 4.02, Matacheskie agreed that “An individual’s entire teaching contribution shall be assessed.” She did not know, however, how the University applies that language. In terms of the evaluation of teaching, Matacheskie agreed that the member has the right to be assessed on the various indicia set out. In terms of the language “The methods of teaching evaluation may vary”, Matacheskie stated that they may vary between Departments and between Faculties. Matacheskie did not disagree that Article 4.02 provides fairness and objectivity in the assessment of teaching.

Matacheskie was asked if Article 4.02 was not a rigorous assessment. Matacheskie answered that the foundation of Article 4.02 is teaching. In terms of tenure, however, there is a lot more to it than Article 4.02.

Matacheskie asserted that the Head of the Department could do the Article 4.02 method of assessing teaching. She stated the Faculty Association had proposed collegial consultation for reappointment. The University thought that it would be more informal. She asserted that Article 4.02 does not have to include Department colleagues, the Dean or the President.

She did agree that the consequences for the Lecturers were significant. If they were not excellent, they could be “out the door”.

In Matacheskie’s view, there would not be a full-blown Article 4.02 process each time. The process is that the Head consults on appointment, but not on reappointment: see Article 2.02(d).

Matacheskie was asked whether the University needs to do the excellence test each time. She asserted that it did. She agreed that the excellence test is a high standard. It was put to her that a Senior Instructor has to meet that test, but only once. Matacheskie replied that there is only one tenure review. It was put to her that there was no certainty that a person

who passed the excellence test would always maintain it. Matacheskie replied that she expected that they would be able to maintain it.

Matacheskie stated that it was not a tenure-like University-wide process. In terms of the excellence test on review of the Lecturers, the University trusts the Department Head. It was put to her that the excellence test was a high bar, but once passed then it is an administrative review. Matacheskie replied that that is what was in her head. She further stated that the process would be fair. For example, if a 20 year Lecturer failed the excellence test, the Faculty Association would grieve. She did agree that there would be no right to stay unless the Lecturer was proven excellent. She further agreed that for a 20 year Lecturer, that is a very harsh consequence.

She said that in the educational leadership tenure stream, the maximum number of years to attain it is 6 years.

Matacheskie went on to say that it was practically impossible to lay off a tenured professor. It was put to her that there was more flexibility in letting a Lecturer go, than a tenured professor. She replied that it was “night and day”.

It was put to Matacheskie that she did not say in bargaining that there would be an excellence test in perpetuity. Matacheskie replied that the Faculty Association did not say that it would be a one time only test.

#### FACULTY ASSOCIATION’S ARGUMENT

In view of my conclusion in this matter, I will summarize the Faculty Association’s argument. I have read and re-read its legal argument multiple times. The mere fact that particular points in its legal argument are not set out here, does not mean that I have not carefully considered them. I have. As I set out in my Analysis below, I have reached my conclusion on the basis of the disputed Collective Agreement language when interpreted in the context of the rest of the Collective Agreement, and in particular in the context of the

rest of Part 4 of which it is a part. I have also compared the language of the Collective Agreement regarding the definition of Lecturer and Article 2.02(a) with the corresponding language in the Previous Collective Agreement.

As noted in the Introduction above, the Faculty Association's position is that the Lecturer may be subjected to the demonstration of excellence in teaching only once, prior to their second appointment.

The Faculty Association submits that this interpretation accords with the plain and ordinary meaning of the language. Should there be any doubt about this, however, then the Faculty Association submits that the bargaining history provides further support that this was the intended meaning.

The Faculty Association argues that read in its ordinary grammatical sense, the placement of "each" clarifies the length of the terms and not the frequency of demonstrating excellence. It notes that "Lecturer appointments" and "successive terms" are plural, while "demonstration of excellence" is singular. Read together, it argues, the language indicates multiple appointments and terms, but a single "demonstration of excellence".

The Faculty Association emphasizes that "Lecturer appointments are expected to be renewed for successive terms ...". It argues that the University's position depletes the word "expected" of any meaning.

In the alternative, to the extent that there is ambiguity in the language that cannot be resolved by other rules of construction, the Faculty Association argues that the rule of *contra proferentem* should apply, i.e. that where there is some doubt as to the meaning of a term, it should be construed against the party who wrote it, in the present case, the University. It relies on *Calona Wines*, [2002] BCCAAA No. 327 (McPhillips).

The Faculty Association further argues that its interpretation is most consistent with the parties' shared objective during bargaining to improve job security for Lecturers. It argues



that under the University's interpretation, a Lecturer who has already proven to be an excellent teacher, is permanently vulnerable to dismissal for a single failure to demonstrate excellence in teaching. It repeats that the University proposed the same teaching assessment for Lecturers that is applied only once to Instructors being assessed for promotion and tenure as a Senior Instructor, both in the old teaching stream and in the current educational leadership stream.

The Faculty Association further argues that its interpretation is more reasonable and that during bargaining the parties discussed their intention to make Lecturers more faculty like, but without making them tenured.

According to the University's interpretation, Lecturers would be forced to undergo the excellence test on a repeated basis, despite the extremely harsh result of failure. No other Faculty member is held to this standard repeatedly. The Faculty Association notes that a Lecturer who failed to demonstrate excellence in teaching and who had previously held an appointment as a Sessional is entitled to no notice upon dismissal. A Lecturer who had not previously held an appointment as a Sessional, would be given notice or pay in lieu of notice of one month per year of service to a maximum of 6 months.

The Faculty Association argues that the University's interpretation would place Lecturers in a position that is less stable than Sessionals, who while reviewed regularly, are never required to demonstrate excellence in teaching.

The Faculty Association argues that the most reasonable interpretation of Article 2.02(a) is that once a Lecturer has successfully passed the excellence test, they are no longer simply temporary employees, nor are they tenured. Rather, they are a hybrid type of faculty who have proven themselves to be excellent teachers and have therefore gained an ongoing expectation of renewal as a result.

The Faculty Association notes the University's argument that the Faculty Association's interpretation would essentially provide tenure to a Lecturer who has demonstrated excellence in teaching the one time. The Faculty Association argues that is plainly inaccurate. The defining characteristic of tenure is that a tenured faculty member can only be dismissed for extremely limited reasons. Under Article 2.04, tenured faculty members may only be terminated for financial exigency, redundancy or just cause.

The Faculty Association argues that those restricted grounds for dismissal for tenured faculty members are a far cry from the reasons that the University may dismiss a Lecturer. Such reasons include lack of funding, falling enrollment, or the broad term "other operational reasons". In cross examination, Matacheskie was asked if the University has more flexibility to dismiss a Lecturer than a tenured faculty member, to which she replied that it was "night and day".

In sum, the Faculty Association argues that its interpretation is most consistent with the parties' intention in bargaining to make Lecturers more like faculty, albeit not tenured. The Lecturers must demonstrate that they are excellent teachers once. Thereafter, they are entitled to enjoy the job security which comes with an ongoing expectation of reappointment.

At the same time, the University retains latitude to manage Lecturers, and to dismiss them for a host of operational reasons, any time before or after the successful demonstration of excellence in teaching. In contrast, the University's interpretation would subject Lecturers to a repeated review of their excellence in teaching, without any proportionate gain in job security and with the consequence of failure being dismissal, with little or no severance.

The Faculty Association notes the University's argument that because Lecturers remain term employees, there necessarily arises an implication that they must demonstrate excellence in teaching prior to every renewal. The Faculty Association argues that the language in Article 2.02(a) is that "Lecturer appointments are expected to be renewed for successive terms".

The Faculty Association further notes that the only teaching staff not on term appointments are tenured professors. All other members of the University's teaching staff are on term appointments.

In the alternative, the Faculty Association argues that the University does not have the right to choose whether to apply the methods of evaluation under Article 4.02. That Article is expressly referenced in Article 2.02(a).

It notes that Matacheskie testified that the University is required to administer the excellence test prior to every reappointment of a Lecturer. The Faculty Association submits that it is not open to the University to apply Article 4.02 fully in some instances and not in others.

Matacheskie agreed in her oral evidence that Article 4.02 confers fairness and objectivity rights on the faculty member being assessed. As stated in Article 4.02 "An individual's entire teaching contribution shall be assessed" and then goes on to list what that entails. Although Article 4.02 states that "The methods of teaching evaluation may vary", whether to employ those methods at all is not optional.

The Faculty Association submits that the University cannot argue that the "demonstration of excellence in teaching as defined in Article 4.02" is for every renewal, while on the other hand assert that this "demonstration of excellence" can in some cases be conducted in accordance with the requirements of Article 4.02, and in others be conducted by way of a Department Head's cursory impressions. This position is inconsistent with the language in issue.

### ANALYSIS AND DECISION

For the following reasons, I have concluded that the University is correct that the Lecturer's expectation of renewal is conditional on demonstration of excellence in teaching each time that they are up for renewal.

I begin with a few general principles of interpretation. There is no dispute that the object of collective agreement interpretation is to discover the mutual intention of the parties. The primary resource for that interpretation is the language of the collective agreement itself. I have emphasized the mutual intention of the parties. That is because the unilateral “understanding” or intention of one party or the other does not determine the mutual intention of the parties. Extrinsic evidence may be used to assist in the interpretation in accordance with the principles set out by the BC Labour Relations Board in *Nanaimo Times*, BCLRB No. B40/96:

If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See *Pacific Press Ltd.*, BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: “I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading.”

On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: *Finlay Forest Industries Ltd.*, BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: *U.B.C.* ... (paras. 29-30)

Having carefully considered the Collective Agreement language and the extrinsic evidence, I conclude that there is no doubt about the proper meaning of the Collective Agreement in terms of the issue before me. I am therefore able to reach an interpretive judgment without regard to the extrinsic evidence of bargaining history referred to by the parties. I should add that even had I not reached that conclusion, I would have found that the collective bargaining

history evidence was a mixed bag – some of it supporting the University’s interpretation and some of it supporting the Faculty Association’s interpretation – such that I would have had to discover the mutual intention of the parties through the Collective Agreement language. It bears noting that in collective bargaining, neither party expressly set out its position on the precise issue before me. I conclude on the evidence that each side reached its own “understanding” about the precise issue before me, without expressly disclosing that “understanding” about the precise issue before me to the other side. Reliance on the bargaining history evidence in those particular circumstances is, in my view, not particularly helpful in terms of deciphering the mutual intention of the parties on the precise issue before me.

I turn then to the language of the Collective Agreement. For ease of reference, Article 2.02(a) provides as follows:

2.02 Term Appointments without Review

a) Appointments without review are full-time or part-time appointments for a specified limited term. With the exception of Lecturers, there is no implication that the appointee will be considered for any further appointment of this or any other kind on the expiration of the specified term. Lecturer appointments are expected to be renewed for successive terms of up to three (3) years each upon demonstration of excellence in teaching as defined in Article 4.02 in Part 4 Conditions of Appointment for Faculty.

Each side argues that Article 2.02(a) is clear. I disagree. The Faculty Association reads the material sentence as follows:

Lecturer appointments are expected to be renewed for successive terms of up to 3 years each, upon demonstration of excellence in teaching ...

The University reads that same sentence as follows:

Lecturer appointments are expected to be renewed for successive terms of up to 3 years, each upon demonstration of excellence in teaching ...

Of course, there is no comma in the sentence set out in the Collective Agreement. Read in isolation then, that sentence can be read either way.

However, the language of Article 2.02(a) should not be read in isolation. Rather, the disputed Collective Agreement language should be interpreted in the context of the rest of the Collective Agreement, and in particular in the context of the rest of Part 4 of which it is a part. Part 4 specifically addresses the conditions of appointment for faculty including those on the tenure track, tenured faculty, and Lecturers. I note that the conditions of appointment for Sessionals are addressed in a different part of the Collective Agreement altogether namely, Part 7.

Part 4 of the Collective Agreement's provisions for tenure are extensively detailed and generally involve a number of pre-tenure years. For present purposes, I will focus on the Senior Instructor, as that was the example used by the Faculty Association in argument.

Article 2.03 (j)(i) provides:

j) In the case of an Instructor

i) if at any time an Instructor is promoted to the rank of Senior Instructor, a tenured appointment will also be granted;

Article 3.03 of the Collective Agreement provides:

### 3.03 Senior Instructor

Appointment at or promotion to this rank requires evidence of excellence in teaching and, demonstrated educational leadership, involvement in curriculum development and innovation, and other teaching and learning initiatives. It is expected that Senior Instructors will keep abreast of current developments in their respective disciplines, and in the field of teaching and learning. A Senior Instructor may be promoted to the rank of Professor of Teaching in the fifth or subsequent years in rank.

Similar to the Lecturer, it too requires evidence of "excellence in teaching". However, it requires much more than just that. It also requires "demonstrated educational leadership, involvement in curriculum development and innovation, and other teaching and learning initiatives."

For ease of reference, Article 4.04(a) defines educational leadership as follows:

#### 4.04 Educational Leadership

- a) Educational leadership is activity taken at UBC and elsewhere to advance innovation in teaching and learning with impact beyond one's classroom. Educational leadership includes but is not limited to such things as:
- Application of and/or active engagement in the scholarship of teaching and learning;
  - significant contributions to curriculum development, curriculum renewal, course design, new assessment models, pedagogical innovation and other initiatives that extend beyond the member's classroom and advance the University's ability to excel in its teaching and learning mandates;
  - teaching, mentorship and inspiration of colleagues;
  - formal educational leadership responsibility within Department/Program/Faculty;
  - organization of and contributions to conferences, programs, symposia, workshops and other educational events on teaching and learning locally, nationally and internationally;
  - contributions to the theory and practice of teaching and learning, including publications such as textbooks, print and electronic publications, book chapters, articles in peer-reviewed and professional journals, conference proceedings, software, training guidelines, instructional manuals or other resources; and
  - other activities that support evidence-based educational excellence, leadership and impact within and beyond the University.
- b) Judgment of educational leadership is based mainly on the quality and significance of the individual's contributions.

Article 5 sets out very detailed provisions regarding the procedures for, among other things, tenure and promotion. (It does not apply to Lecturers: see Article 5.01 (b).) Those detailed provisions involve the recommendation of a Departmental standing committee, the Department Head's recommendation to the Dean, the Dean's advisory committee, a recommendation by the Dean to the President, review by the Senior Appointments Committee, and a recommendation by the President to the Board of Governors. The extensively detailed procedures set out in Article 5 is the context in which the appointment of a Senior Instructor "requires evidence of excellence in teaching" only once, as emphasized by the Faculty Association. As mentioned, promotion to, and tenure at, that

rank generally involves a number of pre-tenure years and going through the extensive procedures set out in Article 5. To equate that extensively detailed procedure for the Instructor to gain tenure as a Senior Instructor, with the first or subsequent reappointment of a Lecturer, in the context of Part 4 is simply put incorrect.

The appointment of a Lecturer is a dramatically different process than that of the promotion to, and tenure of, a Senior Instructor. Article 2.02(d) provides as follows:

d) The Head shall consult with eligible members of the department and lecturers in order to ascertain their views and to obtain their recommendation concerning the appointment of all Lecturers. (emphasis added)

In terms of the first, or subsequent, reappointment of a Lecturer, the Head is not even obliged to consult with eligible members of the department and lecturers, let alone a process involving the Dean's advisory committee, the Dean, the Senior Appointments Committee, and the President.

Unlike the Senior Instructor, the Lecturer is neither tenured nor on the tenure track. Under the Previous Collective Agreement, Lecturer's terms were for 12 months or less. Under the Previous Collective Agreement, the definition of Lecturer set out in Article 1.01 read as follows:

"Lecturer" means a person holding an appointment without review for a term of twelve (12) months or less with responsibilities limited to teaching and related duties which may include administrative responsibilities normally undertaken by faculty members.

Article 2.02(a) of the Previous Collective Agreement expressly provided that:

...There is no implication that the appointee will be considered for any further appointment of this or any other kind on the expiration of the specified term.

In short, the Lecturers under the Previous Collective Agreement had absolutely no right to continued employment by the University. By contrast, Article 2.02(a) of the Collective Agreement provides that "Lecturer appointments are expected to be renewed for successive terms of up to three (3) years each upon demonstration of excellence in teaching ...".



The new Article 2.02(a) provided for important changes. First, the Lecturer's term was no longer confined to 12 months or less. Under the Collective Agreement, it can be for up to 3 years. Second, and critically, unlike the Previous Collective Agreement language, the "Lecturer appointments are expected to be renewed for successive terms...each upon demonstration of excellence in teaching". Those changes were very important in terms of both the possibility of longer terms, and expectation of renewal, as opposed to the old language which stated that there was "no implication that the appointee will be considered for any further appointment...on the expiration of the specified term."

However, when contrasted with the single requirement of evidence of excellence in teaching for the Senior Instructor under the extensively detailed procedures for tenure set out in Article 5, I note the absence of such extensively detailed procedures with respect to the reappointment of a Lecturer. I will address Article 4.02 later on.

I reach the conclusion that the language mutually agreed to by the parties in Article 2.02(a) when read in the context of the rest of Part 4, and in particular with the extensively detailed procedures to achieve tenure, lead me to the conclusion that there must be a demonstration of excellence in teaching each time that the Lecturer is up for renewal and not just once, as argued by the Faculty Association.

This interpretation gives meaning to the fact that Lecturers are, and always remain, term-based employees, unlike tenured Senior Instructors who are not term-based employees.

That Lecturers are term-based employees is made explicit in both Article 1.01 which sets out that Lecturers hold an appointment for a "term of one, two or three years" and in Article 2.02(a) which expressly states that: "Appointments without review are full-time or part-time appointments for a specified limited term." If the Faculty Association's interpretation were correct, then after the Lecturers' first and only demonstration of excellence in teaching, Lecturers would no longer in substance be term-based employees, contrary to the express provisions of the definition of "Lecturer" in Article 1.01, and Article 2.02(a). Rather, they

would be permanent employees, subject only to layoff for operational reasons as set out in Article 2.02(e) or dismissal for just cause.

In my view, to have gained the right to successive terms based upon a single demonstration of excellence in teaching, without the extensively detailed procedures leading to tenure set out in Part 4, would require explicit language, which does not appear in Article 2.02(a). That might be done, for example, by expressly stating that: “Only a single demonstration of excellence in teaching for each Lecturer is required”. Put another way, to achieve the single requirement of evidence of excellence in teaching required for an Instructor to become a tenured Senior Instructor, explicit language would be required for the Lecturer. That is because the Lecturer does not have to go through the extensively detailed process that a tenure-track Instructor has to undergo in order to become a tenured Senior Instructor. Moreover, it would require that type of express language to overcome the language in Articles 1.01 and 2.02(a) making the Lecturer a term-based employee. Put another way, it would take that type of express language to overcome the language in Articles 1.01 and 2.02(a) which makes the Lecturer a term-based employee, and transform the Lecturer into a hybrid type of faculty, as argued by the Faculty Association.

The Faculty Association argues that the University’s interpretation depletes the language “Lecturer appointments are expected to be renewed for successive terms” of any meaning. I disagree. That sentence, as noted earlier, was a revision of the previous language under which there was “no implication that the appointee will be considered for any further appointment...on the expiration of the specified term.” The new language of Article 2.02(a) importantly changed that. Now, Lecturer appointments are “expected to be renewed for successive terms” but “each upon demonstration of excellence in teaching”. That language, compared to the previous language, has real meaning. This interpretation also recognizes that the Lecturer continues in substance, and not just in name - which in my view is the result of the Faculty Association’s interpretation - to be a term-based employee as expressly set out in Articles 1.01 and 2.02(a).

The Faculty Association compares the grounds for dismissal of tenured faculty with those of Lecturers. It emphasizes that the difference is like night and day. In my view, that difference reflects the difference between the extensively detailed process by which faculty become tenured, as compared to the much more limited process by which Lecturers are reappointed. In my view, that difference is also like night and day. Again, I address Article 4.02 below.

As a complete aside (because I am determining the present dispute on the Collective Agreement language without regard to the extrinsic evidence of collective bargaining history), I note that the Faculty Association argues that the University's interpretation puts the Lecturers in a position that is less stable than Sessionals, who while reviewed regularly, do not have to demonstrate excellence in teaching. While it is true that Sessionals do not have to demonstrate excellence in teaching, it is also true that "Lecturers will have priority of course assignment over Sessional faculty.": Article 2.02 (g). That provision explicitly gives Lecturers a degree of job security beyond that held by Sessionals. Moreover, a Lecturer's term may be "one, two or three years". By contrast, a Sessional's appointment is "for a period of less than twelve (12) months", as set out in Part 7, Article 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. (emphasis added)

The Faculty Association relies on the *contra proferentem* rule namely, that where there is some doubt as to the meaning of a term, it should be construed against the party who wrote it: *Calona Wines*. However, in a more recent decision, *Lakeland Mills Ltd.*, [2012] BCCA No. 19 (Lanyon), Arbitrator Lanyon quoted from *Canadian Contractual Interpretation Law*, Geoff R. Hall, Lexis Nexis, 2007, in part as follows:

95. The second major restriction on use of the *contra proferentem* rule is the notion that it is a rule of last resort, to be used only when all other interpretive rules have been exhausted.

The Supreme Court of Canada has held on a number of occasions that *contra proferentem* is a rule of last resort, such that resort to the rule is to be had "only when all other rules of construction fail to enable the Court

of construction to ascertain the meaning of a document”. It is only where all the rules of construction have failed in assisting in the discovery of the true intention of the parties, that the court is entitled to resort to the *contra proferentem* rule in which case the contract is interpreted against the stipulator. As a consequence of its rule-of-last-resort status, a judge of the Alberta Court of Appeal has recently described the *contra proferentem* rule to be “a very weak canon of construction, to be applied last (if at all), and only when all other rules have failed”.

96. There is nothing on the facts before me that compels me to employ such a rule.

In the present case, I have been able to interpret Article 2.02(a) using more traditional means of Collective Agreement interpretation. Accordingly I need not, and do not, rely on the *contra proferentem* rule.

I turn to the Faculty Association’s alternate argument regarding Article 4.02. For ease of reference, Article 4.02 provides as follows:

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual students’ work, or other means by which students, whether in degree or non-degree programs sponsored by the University, derive educational benefit. An individual’s entire teaching contribution 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 colleagues of performance in university lectures, outside references concerning teaching at other institutions, course material and examinations, the calibre of supervised essays and theses, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

I begin by noting that Article 4.02 does not refer to or define what “excellence in teaching” means. What it does do is set out a description of what teaching includes, that an individual’s entire teaching contribution shall be assessed, and how teaching should be

evaluated. It goes on to note that the methods of teaching evaluation may vary, what they may include and how the opinions of students or of colleagues are to be done. Also, consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

Unlike the tenure process set out in Article 5, Article 4.02 does not specify who shall do the assessment and evaluation. As noted above, while Article 2.02(d) requires the Head to consult with eligible members of the Department concerning the appointment of all Lecturers, it does not impose that obligation on the Head concerning the reappointment of all Lecturers.

All of the above must be borne in mind. Subject to all of that, I agree with the Faculty Association that every review of the “demonstration of excellence in teaching” of the Lecturers must comply with Article 4.02.

In conclusion, I do not agree with the Faculty Association that the “demonstration of excellence in teaching” referred to in Article 2.02(a) is a once only demonstration. My conclusion regarding Article 4.02 is set out above.

Dated at the City of Vancouver in the Province of British Columbia, this 23rd day of May 2022.



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Robert Pekeles  
Arbitrator