IN THE MATTER OF AN ARBITRATION

BETWEEN: UNIVERSITY OF OTTAWA

(The "Employer")

- and -

ASSOCIATION OF PART-TIME PROFESSORS OF THE UNIVERSITY OF OTTAWA

(The "Union")

RE: GRIEVANCE CONCERNING SENIORITY RIGHTS FOR TEACHING COURSE ASSIGNMENTS

BEFORE:	SYDNEY BAXTER	SOLE ARBITRATOR
AT:	OTTAWA, ONTARIO	
DATE:	FEBRUARY 6, 2020	
ON BEHALF OF THE EMPLOYER:	JULIE SICOTTE	
ON BEHALF OF THE UNION:	WASSIM GARZOUZI	

The Association of Part-Time Professors, University of Ottawa (the "Union") filed a grievance on behalf of Professor Lawrence Harris (the "Grievor") alleging that the University of Ottawa (the "Employer) violated the Grievor's seniority rights in the bidding of teaching assignments for the winter semester, 2017.

The sections of the Collective Agreement referred to by the parties in their submissions are as follows:

5.6 APPLICATIONS

5.6.1 All applicants must file their applications electronically. Applicants must specify in order of preference the course(s)/work which interest them most. They may indicate the number of courses they would like to teach during the next session in accordance with paragraph 5.9.3.

5.7 APPOINTMENT PROCEDURES

5.7.5 a) In order to assign courses/work at the end of the posting period, the chairperson shall establish a list of qualified applicants who have been classified in accordance with paragraphs 5.7.1 and 5.7.2 in the highest category; such a list shall be in decreasing order of seniority and shall contain the full names as well as the seniority points of the applicants, it being understood that where there is a candidate considered to be in category C, no ranking by seniority of category B and A applicants is necessary, and where there are only B and A applicants, only B applicants need be so ranked. All applicants who by accepting the posting will exceed the limits prescribed in paragraph 5.9.3 shall be removed from the list. The chairperson shall then proceed to offer the posting to applicants in order in which they appear on the list.

5.7.7 TIE BREAKER

5.7.7.1 If a tie in seniority points results and either or both applicants have been part-time teachers before September 1, 1981, experience acquired before that date may be considered as follows: seniority shall be calculated retroactively, one year at

a time, until the tie is broken. If the tie is not broken, the applicant with the most seniority points in the course in question shall be assigned the course.

5.7.7.2 The Employer undertakes whenever possible, in the assignment of work, to consider the course selections made by the applicant.

5.9.3* LIMITS IN COURSE ASSIGNMENTS

5.9.3.1 No member shall teach courses with more than fifteen (15) credits in two (2) consecutive sessions.

The evidence consisted of an exhibit book, a list of candidates for the three courses the Grievor applied to teach and the testimony of Professor Yazid Dissou the Economics Department Chair.

The Grievor submitted applications to teach three courses for the winter semester 2017. He had almost reached his teaching credit limit under 5.9.3.1 and could only be assigned one of the three courses. The courses and his preferences are set out below:

EC0 1102 F Choice number one
EC0 1102 E Choice number two
ECO 1102 A Choice number three

Each of the three courses was the subject of a separate posting in accordance with article 5.7.5 (a).

On November 24, 2016, the Grievor received an offer to teach course ECO 1102 E, his second choice, which he accepted believing that his first choice had gone to a professor with more seniority.

On November 28, 2016, the Grievor was informed that the assignment to teach course ECO 1102 F was given to a professor with significantly fewer seniority points. Twenty-one (21) points compared to the Grievor's two hundred and twenty-four (224) points.

When the list for course ECO 1102 F was originally established, professor Claude Théoret topped the list as he was the senior candidate with two hundred and forty-five (245) seniority points. However, for reasons that were not explained, Professor Théoret refused to accept the appointment.

The Grievor was not given an explanation, at the time that Professor Théoret was removed from the list, why it was not possible to give him his first course choice.

The Grievor raised the issue of his failure to be awarded his first choice, by email on November 28, 2016, with Professor Dissou.

TESTIMONY OF PROFESSOR DISSOU

At the time of the grievance, Professor Dissou had been Department Chair for three years. He explained that a list, in order of seniority, is set up for each course and each course is offered to the professor with the highest seniority. The Grievor applied for three courses and was offered ECO 112 E because he had the most seniority on that list. According to Professor Dissou, nothing in the Collective Agreement obliges the Employer to give anyone his choice of course. The bottom line, Professor Dissou said, is that the Grievor may have provided a list of preferences but the courses are assigned based on operational constraints. The Employer, he said, endeavours to assign the best professor for the situation while following the Collective Agreement. The Grievor was the most qualified and had the most seniority to be assigned ECO 1102 E. He added, that he found no articles [in the Collective Agreement] that constrained the Employer from assigning course ECO 1102 F to the Grievor.

Further, Professor Dissou said the reason the Grievor was not offered ECO 1102 F was that he was limited to teaching one course for the winter semester. He was the best and most qualified to give the course [ECO 1102 E], therefore, he was offered the course and that ended the matter.

Professor Dissou maintained that there would be consequences for the faculty if all three courses had to be offered to the Grievor, when he could only teach one. "It would be a nightmare", he said, " if we had to send the Grievor a list of the three courses, asking for his preference." He added that the Employer could not find any article in the Collective Agreement obliging it to do so.

Professor Dissou was asked by Employer Counsel, "When you received the email from the Grievor saying he should have been given ECO 1102 F?", He replied, "We had offered it to another professor. We didn't know if it was possible to take it back."

UNION'S ARGUMENT

The Union began its argument by stating that the Grievor, in accordance with article 5.6.1, applied online, to teach a course for the winter semester 2017. He indicated a choice of three and specified his order of interest. He wanted to work evenings.

Article 5.7.5, the Union submitted, is a seniority provision and provides that the Chair shall proceed to offer postings to applicants in the order they appear on a list.

There is no restriction with respect to operational requirements specified in 5.7.5. The issue here, the Union argued, is how I should interpret the Collective Agreement regarding the seniority provisions. Seniority has been determined by arbitrators in the past to be of utmost importance.

The Union asked me to give no weight to the argument that the Grievor could not be offered the second course as he had reached his fifteen (15) credit limit because the Grievor did not apply to teach more than one (1) course.

In support of this thrust of its argument, the Union relied on: *Tung Sol of Canada Ltd and VEW Local 512* (1964), 15 L.A.C. 161 (Reville); *Re Sault College of Applied Arts and Technology and Ontario Public Service Employees Union* (Levesque), 202 LAC (4th) 403 (Bendell).

The Union, in anticipation that the Employer would rely on article 5.7.7.2 to support its position that there is no obligation to assign preferred courses to professors, argued that article 5.7.7.2 has no bearing on the outcome as it merely comes into play when there is a tie in the seniority of one or more professors. The Union drew my attention to its placement in the Collective Agreement, after the heading Tie Breaker.

In the alternative, the Union argued, were I to find that article 5.7.7.2 does apply, its provision is mandatory and not discretionary. In support of this argument the Union relied on the decision of Arbitrator Haefling in *Re Natrel Ontario Inc. and Milk and Bread Drivers, Dairy Employees, Caterers and Alllied Employees, Local 647*, 1998 CarswellOnt 7222, 54, C.L.A.S. 69.

Further, the Union submitted that in the event the Employer will argue that giving professors their course choice would be a nightmare to manage, I should take note that arbitrators have ruled that they are not in the public policy arena.

In support of this part of its argument the Union relied on *CUPE Local 400 v. Ottawa Hospital 1999* CarswellOnt 7166 [1999] O.L.A.A. No. 1019 (Kates) and *Trillium Health Centre v. CUPE 2012*, CarswellONT 1897, [2012] O.L.A.A. No. 72, 109 C.L.A.S. 217 (Kaplan).

Finally, turning to the issue of remedy the Union argued that the Grievor should receive payment for the course he was denied. He was inconvenienced by having to work days and should be paid for the full course he was refused as compensation and to deter the Employer from taking the same position in similar situations going forward.

In addition, the Union seeks a declaration that the Collective Agreement was violated.

EMPLOYER'S ARGUMENT

The Employer began its argument by stating that anything not indicated in the Collective Agreement would fall under management rights. On the issue of preference, nowhere in article 5.7.5 does it talk about preferences.

The only places in the Collective Agreement where preferences are mentioned are in article 5.6.1 which imposes an obligation on the employee only and not on the Employer, and in article 5.7.7.2. Although the parties addressed preferences in the Collective Agreement, they chose not to impose them on the Employer under article 5.7.5.

It was the Employer's further submission that the plain meaning of article 5.7.5 imposes nothing more than an obligation on the Employer to offer a course once the posting period has ended, to the professor with the highest seniority points. This process is done in silo for each course.

In summary, it was the Employer's position that there are no specific provisions in section 5 of the Collective Agreement or in any other section which obliges the Employer to offer courses to a part-time professor based on their preference.

What is being suggested by the Union, the obligation to offer every course to every professor who has applied based on seniority points and preference, is not contained in article 5.7.5. Surely, Counsel for the Employer argued, it was not the intention of the

Employer and the Union when article 5.7.5 was negotiated that the Employer would be obliged to offer each course to each qualified professor and wait for him or her to refuse, then start the process again. Such an interpretation of the clause, it was argued, would create havoc for both the University and the professors. It would, Counsel stated, be impossible to implement.

In any event, according to the Employer, once a course is offered to a professor, it has discharged its obligation under the Collective Agreement.

The Employer submitted that once ECO 1102 E was offered to the Grievor he had reached his limit of fifteen (15) credits and the Employer was precluded from offering him another course. Nor was there any obligation to cancel the contract awarded to the candidate who was awarded course ECO 1102 F.

Turning to the issue of damages, the Employer argued that no evidence was led with respect to damages. The Grievor taught the exact same course as ECO 1102 F on days, rather than nights, as he would have preferred. Nevertheless, he was paid in full for teaching and had the maximum number of teaching credits as allowed by the Collective Agreement.

The Employer asked me to dismiss the grievance as the Union had failed to meet the burden of proof.

DECISION

There is a long established principle as stated in the oft cited *Tung-Sol, supra* that seniority is one of the most important rights of employees covered by Collective Agreements.

Arbitrator Reville expressed this principle in the following way at page 162:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights, as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

There is no dispute that the professor who was assigned to teach course ECO 1102 F had substantially less seniority credits than the Grievor. It is also undisputed that at the time the list of professors was finalized Professor Théoret was the most senior qualified candidate on the list for course ECO 1102 F.

The Employer argued that it retains discretion in the assignment of teaching courses and noted article 5.7.7.2 as its authority.

Article 5.7.7.2 states that the Employer undertakes wherever possible... to consider the course selections of the Professors.

The Union, on the other hand, argued that article 5.7.7.2 has no bearing on the case as it applies only in the event of a seniority tie.

Alternatively, the Union argued that were I to find article 5.7.7.2 has application, the wording of the article is mandatory and not directory as the Employer asserts.

I turn then to a consideration of article 5.7.7.2.

Having regard to each of the articles referred to by the parties in their arguments, I do not agree that article 5.7.7.2 applies only in the event there is a tie in seniority.

In my view, the means for breaking a tie is entirely set out in article 5.7.7.1. A reading of article 5.7.7.2, in my opinion, has no bearing whatsoever on how a tie might be broken. Rather, it is my view that 5.7.7.2 directs the Employer to consider seniority in the application of article 5.7.5.

The award in *Natrel supra* lends weight to my conclusion in this regard.

In *Natrel,* Arbitrator Haefling dealt with an issue concerning contracting out. The article that he was asked to interpret was the following:

> Where possible, temporary vacancies will be filled by laid-off regular full-time employees. These work requirements will be assigned on a seniority basis provided the laid-off employee possesses the necessary immediate ability, qualifications and skills to do the work.

Arbitrator Haefling found that the inclusion of the above-noted article in the Collective Agreement directed the Company to fill temporary vacancies with laid off regular employees, except when it could be shown that it was not possible to do so.

In the instant case however, the Employer argued that I should distinguish *Natrel* from the case at hand because the word "will" used in that case is clearly mandatory, whereas the use of the word "undertakes" in article 5.7.7.2 connotes something different.

Accordingly, I have researched several sources for the meaning of the word "undertakes".

With respect to the definition of "undertake", the Mirriam Webster Online dictionary provides as follows:

> To take upon oneself

To put oneself under obligation to perform

The Online Cambridge English Dictionary provides:

To promise or agree that you will do something

Bind oneself to perform.

The Shorter Oxford Dictionary (5th edition) (2002), Oxford University Press provides:

Commit oneself to perform

Take on an obligation.

Having regard to the dictionary definitions cited, when the parties agreed to include the word "undertakes" in article 5.7.7.2 it is my view that the Employer was bound or obliged to consider a professor's course preferences.

I find further, that the words "wherever possible" to be analogous with the words "where possible" as used in the *Natrel* case and accordingly adopt the finding of Arbitrator Haefling.

In applying those findings to the case at hand, the Employer was obliged to consider, that is, to be influenced by the Grievor's seniority in assigning his course selection in his order of preference, unless it could be shown that it was impossible to offer him his choice.

No evidence of the existence of impossible circumstances was put before me.

Accordingly, I find that when Mr. Théoret was offered and refused course ECO 1102 F, it was incumbent on the Employer, in consideration of the Grievor's seniority, to offer that assignment to him as the Employer was aware that it was his first preference, unless of course circumstances presented themselves rendering it to be impossible. Again, no evidence on this point was presented.

In the absence of any evidence, I am unable to find any support that awarding the Grievor his preference of assignment when Professor Théoret declined would create the "nightmare" alluded to by Professor Dissou, nor the "havoc" claimed by counsel for the Employer in argument..

The awards in both *CUPE Local 400, supra* and *Trillum Health Centre, supra* support the proposition that it is an arbitrator's job to interpret the Collective Agreement not to alleviate the difficulties such an interpretation may cause an Employer. Arbitrator Kates in *CUPE Local 400,* articulated this principle in the following way:

> We, as arbitrators are not in the public policy making arena. We are not authorized to "read down" or "read out" or otherwise alleviate a party from the application of viable contract obligations assigned under the Collective Agreement where circumstances dictate their appropriateness."

To find in favour of the Employer, I would have to read down or read out article 5.7.7.2 from the Collective Agreement. In the absence of any evidence before me, that is something I am not prepared to do.

Having found then that article 5.7.7.2 obliges the Employer to consider, that is, be influenced by, the Grievor's seniority in his preference of course selection, I am not persuaded by the Employer's argument that I should distinguish *CUPE Local 400,* and *Trillum Health Centre.*

Nor am I persuaded by the Employer's argument that course ECO 1102 E could not have been offered to the Grievor, in any event, owing to the fact that when he accepted course ECO 1102 E he had reached his credit limit as set out in article 5.9.3.1.

The evidence is clear that the Grievor had no desire to teach more than one course during the 2017 winter semester. It is not disputed that he was aware he had almost exhausted

his teaching credits for the year. What he wished was to exercise his seniority by being relieved from teaching the course he was assigned, ECO 1102 E, and reassigned course ECO 1102 F.

For all of the above reasons, I find that the Employer violated the Grievor's seniority rights when he was denied the assignment of course ECO 1102 F for the winter semester 2017.

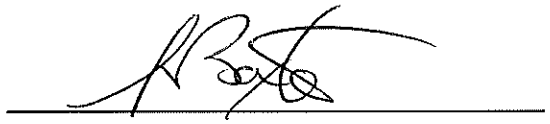
Turning now to the issue of damages, the evidence was that the Grievor taught course ECO 1102 E during the winter semester 2017 and was paid in full. I note that in one of his emails he stated that he was happy to be teaching ECO 1102 E that semester.

There being no evidence that the Grievor suffered a monetary loss as a result of the denail of his seniority rights, I am not prepared to award damages.

That being said, I may have reached a different conclusion had the Grievor adduced evidence that he was unable to take advantage of a day time assignment at another institute of learning because he was denied his preference to teach ECO 1102 F, an evening assignment.

In summary, I find that the Grievor's seniority rights were violated when he was denied his preference of teaching assignment for the winter semester 2017.

DATED AT OTTAWA THIS 25TH DAY OF FEBRUARY 2020



SYDNEY BAXTER