IN THE MATTER OF THE ONTARIO LABOUR RELATIONS ACT, 1995
AND AN ARBITRATION

BETWEEN:

Carleton University Academic Staff Association

("the Association")

- and -

Carleton University

("the University")

RE: Instructor Workload Grievance – Dept. of Computer Science

BEFORE: **M.G. Mitchnick - Sole Arbitrator**

Appearances for the Association:

Christal Cote, CUASA Legal Services Representative

Chinnaiah Jangam, Chair, CUASA Grievance Policy and Administration Committee

Alex Aucoin, CUASA Grievance Support Services Assistant

Hanan Mankal, CUASA Grievance Support Services Assistant

Appearances for the University:

Michael Kennedy, Counsel

Chuck Macdonald, Dean, Faculty of Science

Michel Barbeau, Director, School of Computer Science

Amy Wyse, Director, Labour Relations

Joshua Hruschka, Senior Labour Relations Officer

Hearing held by videoconference July 21st, 2021

PRELIMINARY RULING

The Association is here challenging the University's calculation of the allowable teaching load for Instructors in the Faculty of Science's Computer Science Department. More specifically the Association grieves that the University is incorrectly applying the terms of Article 13.4(b)(i) of the collective agreement by using the figure 2.0, rather than 1.5, as the relevant Faculty teaching-load number in determining the allowable teaching load for Instructors. The Article provides:

> **(b) Instructor Positions Without Individual Job Descriptions**
>
> (i) . . . . Instructor employees shall not teach more than three and one half (3.5) credits or the equivalent of one-and-one half (1.5) times the **normal full teaching load** of faculty employees in the same unit or sub-unit, whichever is less, averaged over each consecutive twenty-four (24) month period, and shall not teach more than the equivalent of one-half credit course in excess of 1.5 times the normal faculty employees teaching workload in any academic year ending August 31. (emphasis added)

The University's Reply to the grievance highlights the issue:

> The total teaching load for regular faculty members in the Department of Computer Science is 2.0. This is composed of a 1.5 teaching course load for in class courses. However, faculty members are expected to carry out a 0.5 equivalent for the supervision of graduate students. Therefore, the teaching load for faculty members is 2.0 and the Instructor teaching load is 3.0 (2.0 x 1.5).

The difference between the parties, in other words, is whether the .5 value assigned to the "Faculty" members of the department for the supervision of grad students is properly included in the equation; i.e., in the proper meaning to be attributed to the words "normal full teaching load" in Article 13.4(b)(i). The

University submits that that very issue has already been determined in a June 11th, 2015 Award of Arbitrator Paula Knopf, and that there is nothing more to litigate here. The Association responds that the finding in Arbitrator Knopf's award rested on the "practice" in the Faculty of Arts and Social Sciences (FASS), and that the practice in the Faculty of Science, including the Department of Computer Science, has been different. In particular, the Association asserts that the practice here is that the credit to Faculty for such activities as the supervision of grad students has historically *not* been included in the Instructor workload calculation.

The Association is of course correct that the Award of Arbitrator Knopf involved a dispute over the calculation of workload for Instructors in the Faculty of Arts and Social Sciences. Notwithstanding that the dispute was over the workload of the Instructors, Arbitrator Knopf noted at the top of page 5 that "[much] of the evidence and argument focused on the Faculty members' "normal teaching load" because the formula for Instructors' workload is determined by an equation that factors in the number of credits attributed to Faculty employees".

New language was added to the collective agreement in the 2014 bargaining round limiting the "teaching workload" of each faculty member to "less than 2.5 credits". Notwithstanding that language, the Association attempted to make a case that some of the history plus the verbal exchanges between the parties in that bargaining led it to conclude that the faculty members would never be assigned more than 2.0 in teaching credits, and that the limit for Instructors, consequently, would be 3.0. On the evidence, Arbitrator Knopf rejected that submission, and found instead that the matter fell to be determined simply on the basis of the language of the collective agreement. She thus set that language out in summary form, commencing at page 28, as follows:

Faculty:

- “normal workload” includes teaching, research/scholarly/creative activities, and service to the University; Article 13.1

- “normal workload” is defined for each Faculty by past practice; Article 13.2(a)

- “the Dean assign teaching duties . . . consistent with the normal teaching load of the faculty and department in question”; Article 13.2(b)

- “normal teaching load” within a Faculty is defined by past practice in relation to the number of full-course equivalents per faculty member; Article 13.2(a)

- factors affecting the “teaching workload” include, but are not limited to, the items listed in Article 13.2(f)

- “teaching duties“ include, but are not limited to, advising students and prospective students, and conducting scheduled classes; Article 13.2(b)

- a faculty member will be assigned a “teaching workload of less than 2.5 credits”; Article 13.2(a)

<u>Instructors</u>

- “general workload” includes teaching responsibilities, professional development, assigned administrative tasks and the duties in the assigned job description; Article 13.4

- the provisions of Article 13.2(f) apply to Instructors; Article 13.4(vi)

- Instructor employees shall not teach

    - more than 3.5 credits

OR

- 1.5 x the "normal full teaching load of faculty employees in the same unit" whichever is less, averaged over each consecutive 24-month period

AND shall not teach

- more than 1 half-credit course in excess of 1.5 x the normal faculty employees' " teaching workload" in any academic year; Article 13.4(b)

Synthesizing all of that, Arbitrator Knopf concluded, at the bottom of page 29:

> This exercise illustrates that the Collective Agreement use of the term "teaching workload" includes the scheduled classes, **as well as the duties listed in 13.2(f)**, many of which relate to classroom instruction, but others that can be fairly characterized as "less formal teaching" or non-classroom teaching duties. Further, the Deans, Chairs/Directors "assign teaching duties" [13.20(b)] and must give consideration to the factors in 13.2(f) "affecting teaching workload". Teaching duties include scheduled classes and other non-scheduled responsibilities. **Therefore, it must be accepted that in calculating the number that is to be attributed to the "normal full teaching load of faculty employees", both the scheduled classes and non-classroom duties can and should be factored into the final number.** That is important for the operation of Article 13.4(b)(i). It means that the "full teaching load" becomes the multiplier used in the equation.
>
> (emphasis added)

That is the determination that the University here submits provides a total and binding answer to the claim sought to be asserted in the current grievance.

Whether referred to as *res judicata,* abuse of process, or issue estoppel, (or as more commonly characterized in the extra-judicial arbitration sphere, "arbitral deference"), the requirements for such are not in dispute. As set out in the decision of Arbitrator Steinberg, for example, in *The Society of Professional Engineers and OPG,* 2016 CanLii 16041:

> [67] The Supreme Court of Canada has described issue estoppel as precluding …the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44 (CanLII), at para. 25, per Binnie J.).

The question that arises in the present matter is whether in all material respects the issue before me here is in fact the same issue as that decided under this collective agreement by Arbitrator Knopf.

Based on what is being asserted at this point, I have to find that it is not. To conclude that the present matter raises the same issue that has effectively been disposed of by Arbitrator Knopf requires a virtual symmetry in the facts. This collective agreement is replete with reference to "past practice", and as Arbitrator Knopf observed, at page 5 of her Award:

> This language allowed for a great deal of variation across the Faculties and Departments at the University.

As a general matter, it must also be noted however, the dispute was centred around the parties' exchanges in bargaining, and the learned Arbitrator found, on the evidence before her, at page 29:

> … if there was any shared intention revealed by the evidence, it must be said that **the language cannot be interpreted to mean that teaching load**

> **does not include non-classroom duties** or that the parties had agreed that Instructors' teaching loads would be capped at 3 credits.
>
> (emphasis again added)

Notwithstanding all of that, however, the added wrinkle before me here is the Association's assertion that the practice of computing Instructor workloads under Article 13.4(b)(i) in the Faculty of Science, and Computer Science in particular, has been exactly the opposite; i.e., that in doing the calculation for Instructors under the Article, the *non*-scheduled activities such as supervising grad students have *not* been factored in. The Association asserts that "the first time we heard that suggestion was in the Reply to this grievance", and that "this inclusion of the non-scheduled work [such as grad supervision] never existed; never formed part of the calculation". I am not, at this preliminary stage therefore, in a position to say that there is no case to be heard here. The Association is entitled to an opportunity to have their assertion tested, by way of the evidence, and if proven correct, to mount whatever argument they believe, in the face of Arbitrator Knopf's award, lies open to them.

The matter can accordingly be scheduled to hear the parties' evidence and ultimate submissions.

Dated at Toronto this 29th day of July, 2021