7-16-1982

Dalhousie Faculty Association v Board of Governors of Dalhousie College and University

Innis Christie

IN AN ARBITRATION

BETWEEN:

DALHOUSIE FACULTY ASSOCIATION

The Association

- and –

BOARD OFGOVERNORS OF DALHOUSIE
COLLEGE AND UNIVERSITY

The University

Re: Failure to deduct monthly bargaining unit dues from the salaries of Ms. H.E. Bednarski and Dr. M.H. Ross

Hearing: June 8 and 14, 1982, at Halifax, N.S.

Before: Innis Christie, Arbitrator

Appearances:

For the Association

Howard Epstein, Esq., Counsel,
Executive Director N.S.C.U.F.A.

Dr. Marcia Ozier, Grievor on behalf
of the Dalhousie Faculty Association

Dr. R. S. Rodger, Honourary Treasurer
and Office Manager, Dalhousie
Faculty Association

For the University

Eric Durnford, Esq. , Counsel
Dr. Donald D. Betts, Dean, Arts & Science
Dr. Roseann Runte, Chairperson, French Department

Association grievance alleging that Ms. Bednarski and Dr. Ross were members of the Bargaining Unit for the academic year 1981-82, that the University breached the Collective Agreement between the parties signed February 5, 1981 and effective from that date to June 30, 1982 and thereafter in accordance with Article 33.01, by failing to deduct regular monthly·dues from their salaries in accordance with Article 7.02 and failing to provide information in accordance with Articles 7.05, 7.08(a) and 7.08(b). The Association seeks a declaration that Ms. Bednarski and Dr. Ross were members of the Bargaining Unit during the academic year 1981-82 and "immediate remittance of the dues outstanding".

AWARD

At the start of the hearing counsel agreed that I was properly seised with this matter and explicitly waived any objection to bias due to my membership in the Bargaining Unit, noting that I am a named arbitrator in Article 27.24(a) of the Collective Agreement. It is also to be noted that by letter of May 5, 1982 Mr. Epstein waived any objection by the Association to breach of the time requirement of Clauses 27.24(b) and 27.25. On behalf of the University Mr. Durnford waived any objections arising from breach of time limits.

It is important to stress at the outset that, to quote the words of the grievance form,

> This grievance concerns the failure to deduct monthly bargaining unit dues from the salaries of Ms. H. E. Bednarski and Dr. M.H. Ross of the Department of French.

and that

> the remedy sought is the immediate inclusion of Ms. Bednarski and Dr. Ross in the membership bargaining unit, and immediate remittance of dues outstanding.

I stress that this is the context of this arbitration and of this award because much of the testimony seemed to reflect the mistaken notion that the salary

entitlements of Ms. Bednarski and Dr. Ross for the academic year 1981-1982 are at issue here. In fact I am not concerned with individual grievances by or on behalf of Ms. Bednarski and Dr. Ross. Article 27.27 of the Collective Agreement directs me to "confine [my]self to the grievance submitted for arbitration" and it was not suggested at any time on behalf of the Association that Article 27.36 was relevant. That article would, in certain circumstances, allow me to award a remedy to an individual member of the Bargaining Unit although the grievance had been presented as an Association grievance . On the other hand, although Counsel for the University seemed to belabour the point, I attach no particular significance to the fact that no remedy was sought on behalf of Ms. Bednarski and Dr. Ross individually. I simply point out that none of their rights or entitlements are in issue here.

The issue, then, in this arbitration is whether Ms. Bednarski and Dr. Ross should have been treated by the University as members of the Association's Bargaining Unit during the academic year 1981-82. The relevant considerations are their arrangements with the University, what duties they performed during that period and the proper interpretation and application of the Collective Agreement. As originally filed on December 10, 1981 the grievance in this matter stressed an alleged pre-certification oral agreement between then Vice-President MacKay and the D.F.A. President Rodger that a faculty member at Dalhousie teaching one and one-half courses is by definition a member of the Bargaining Unit. Subsequently, and before me, the Association argued that, quite apart from any such agreement, Ms. Bednarski and Dr. Ross de facto met the requirements for inclusion in the Bargaining Unit in that the work each did was 50% or more of that of a regular full-time faculty member.

At the hearing before me Counsel for the Association for the first time invoked Article 12.17 of the Collective Agreement in aid of his argument. However, the Article 12.17 argument was dropped, with an assurance from Counsel for the University that the Association would be in no way prejudiced

should it raise that argument in any future proceeding. I note the existence of Article 12.17, simply to indicate that the parties have specifically provided protection against dilution of faculty strength at Dalhousie by undue hiring of less-than-half-time faculty members. The Articles of the Collective Agreement with which I am concerned here should not, therefore, have any such purpose too readily ascribed to them.

Before turning to the relevant facts, that is to the arrangements between the University and Ms. Bednarski and the University and Dr. Ross, and the duties they actually performed in 1981-82, I want to make it clear that I am not concerned here to judge the quality of their teaching or scholarly activities, nor am I concerned with their past contributions to the University except to the extent that their performances in preceding years might reasonably have guided what either of them understood to be her duties and responsibilities for 1981-82.

Throughout the hearing, and apparently in the proceedings leading to this arbitration, Ms. Bednarski and Dr. Ross were treated as being in situations which, if not identical, were so substantially similar that much of the evidence and the arguments applied to both of them. I have continued in this mode but would observe at the outset that insofar as the question of whether or not a person is in the Bargaining Unit turns on the facts of his or her particular duties it may be quite unfair to treat individuals in groups, or even in pairs.

Since 1972 Ms. Elizabeth Bednarski has been a part-time lecturer in the Department of French. Throughout that period she has offered one course in French Canadian literature and between 1975 and 1979 she taught "independent studies" to M.A. students. She has published two full-length books of French Canadian literature in translation and numerous shorter pieces, and is working on a third book.

Dr. Margaret Ross has been a part-time lecturer and assistant professor at Dalhousie since 1975 except for the academic year 1979-80 when she held a full-time appointment during the leave of a regular faculty member. Throughout that period Dr. Ross has taught a course on French Canadian Civilization and together with Ms. Bednarski has provided virtually all of the French Canadian studies component in the program of the French Department. Unlike Ms. Bednarski, Dr. Ross was not engaged in any scholarly research, as the term is normally understood, for some years preceding 1981. Dr. Roseann Runte, Department Chairperson, testified that when this matter has been raised with Dr. Ross her reaction has been to take offence and to say that she little values people who think research important. A curriculum vitae prepared by Dr. Ross sometime after 1975, which was introduced in evidence, by its statements with respect to "publications" bears out Dr. Runte' s testimony.

In the spring of 1981 Ms. Bednarski and Dr. Ross conceived of and gained approval from the Curriculum and Staffing Committee of the Department of French for a course entitled "Literature and Society of Quebec and Acadia" , within the framework of the new M.A.T. Program, for the academic term 1981-82. This was to be a graduate level course with interdisciplinary elements and team teaching. Technically the Committee's approval was for the course, not the staffing of it, but quite clearly all concerned assumed that Ms. Bednarski and Dr. Ross would teach the course. The Committee approved the course on April 28, 1981 and over the month of May Dr. Runte carried on discussions with Dean Betts of the Faculty of Arts and Science with respect to the remuneration to be paid to Ms. Bednarski and Dr. Ross for teaching one and one-half courses in the forthcoming academic year.

On June 11 Dean Betts decided that Ms. Bednarski should be paid at 35% of the full-time lecturer rate which came to $7,000.00 and that Dr. Ross was to be paid at 25% of the full-time assistant professor rate. That same day Dr. Runte called Ms. Bednarski and told her the terms of the University's offer. Dr. Runte

testified that she told Ms. Bednarski that the $7,000.00 was based on 35% of full-time, explained to her that the percentage was calculated by taking into account the four categories of duties set out in Article 15.07 of the Collective Agreement, that is, teaching, research, academic administration and professional responsibilities outside the University. Dr. Runte testified that she told Ms. Bednarski that the 35% on the basis of which her salary was calculated was greater than the percentage assigned to Dr. Ross and explained to her that this was because Ms. Bednarski had been doing, and was therefore expected to continue to do, some research.

Ms. Bednarski did not accept the University's offer until July 8, by which time she had consulted with Dr. Ross. Subsequently, under date of July 20, 1981 Ms. Bednarski received a letter over the signature of President MacKay stating, in part, as follows:

> The Board of Governors of the University, at its meeting held on July 9, authorized me to offer you an appointment as Lecturer in the Department of French on the part-time academic staff of the Faculty of Arts and Science for a further period of one year, effective July 1, 1981.
>
> If you accept this appointment, you would not be included in the Bargaining Unit of academic, research and professional librarian staff represented by the Dalhousie Faculty Association.
> …
>
> If you agree with the terms of this letter of appointment, your acceptance of those terms will be effective upon receipt in this office of the enclosed white form, signed and dated by you.
> …

Ms. Bednarski's signed acceptance, dated July 30, 1981, was duly received in the President's office.

Ms. Bednarski testified that neither on June 11, when Dr. Runte told her the University's offer, nor on July 8, when she agreed to teach the new half

course, did she understand that her total duties had been assessed at 35% of a full load by the Dean of Arts and Science. She said that because the appointment offered by the President's letter had been authorized by the meeting of the Board of Governors on July 9 she assumed that, for purposes of that approval and the President's letter, the additional half course had not been taken into account, since she had agreed to accept it only on July 8. Therefore, she said, she was unclear for some time just what her salary for the academic year 1981-82 was to be.

In relation to Dr. Ross, just as in the case of Ms. Bednarski, Dr. Runte testified that following approval of the new M.A.T. course she dealt with Dean Betts respecting the salary to be paid. On July 11, after calling Ms. Bednarski, Dr. Runte called Dr. Ross and told her that the University was offering her a part-time position teaching one and one-half courses on the basis that she was carrying 25% of a full-time assistant professor's load. In Dr. Ross' case as well Dr. Runte testified that she had explained that the percentage was calculated by taking into account the four components of a faculty member’s duties. Dr. Ross did not accept the University’s offer until July 8, the same date on which Ms. Bednarski accepted it.

On July 8 Dr. Runte wrote to the Registrar requesting that the new course jointly taught by Ms. Bednarski and Dr. Ross be added to the time table.

Dr. Ross' letter of appointment from President MacKay is dated two days later than Ms. Bednarski’s. Under date of July 22, 1981 President MacKay wrote, in part, as follows:

> The Board of Governors of the University, at its meeting held on July 9, authorized me to offer you an appointment as Assistant Professor in the Department of French on the part-time academic staff of the Faculty of Arts and Science for a further period of one year, effective July 1, 1981. This appointment would constitute less than 50% of a regular full-time appointment and the salary payment would include 4% vacation pay.

> If you accept this appointment, you would not be included in the Bargaining Unit of academic, research and professional librarian staff represented by the Dalhousie Faculty Association.
> …
>
> If you agree with the terms of this letter of appointment, your acceptance of those terms will be effective upon receipt in this office of the enclosed white form, signed and dated by you.
> …
>
> P.S. Your salary for this period will be $5,893.00.

The differences between this letter and that received by Ms. Bednarski, specifically, the last sentence of the first paragraph and the "P.S.", were never explained to me.

Dr. Ross' signed acceptance, dated August 4, 1981, was duly received in the President's office.

Like Ms. Bednarski, Dr. Ross testified that she did not understand the significance of the 25 percent figure referred to by Dr. Runte on June 11. She too was confused by the fact that the Board of Governors had approved her appointment only one day after she had agreed to teach the additional one-half course. She purported to be uncertain just what her salary was to be for the academic year 1981082. I note that Dr. Ross' proper salary was $6,000.00, not the $5,893.00 contained in the "P.S." to the President's letter of July 22. This took a while to straighter out and may have contributed to some degree to her uncertainty.

On October 26 and October 28 respectively Dr. Ross and Ms. Bednarski wrote to Dr. Runte asking for confirmation, in writing, of their teaching loads and salaries. By this time the Faculty Association was involved as indicated by the fact that copies of both letters were sent to Dr. Ozier. Dr. Runte replied by simply

confirming in each case that "you are teaching one and a half courses" and stating that Dean Betts would write in respect of salary.

On or about November 13, 1981 Dr. Ross and Ms. Bednarski each received a copy of her "Staff Employment and Change Form". They both testified that only then, seeing their fractions of employment spelled out at 35% for Ms. Bednarski and 25% for Dr. Ross, did they appreciate the significance of percentages in the calculation of their salaries.

Ms. Bednarski testified that she felt that during 1981-82 she performed duties in excess of 50% of those performed by her colleagues in the French Department and Dr. Ross testified to like effect.·Each testified that such was the case with the other and I heard similar expressions of opinion from Professors Michael Bishop, Karolyn Waterson and Patricia DeMeo. Letters to similar effect from Professors Gesner and Sandu were also taken into evidence with the understanding that they could be accorded only limited weight in the absence of opportunity to cross-examine the authors.

All of these expressions of opinion are relevant insofar as they address themselves to the issue of whether Ms. Bednarski and Dr. Ross in fact discharged 50% or more of the duties of a regular full-time member of the French Department. Opinion is relevant because both the scholarly research and the academic administration components of an academic' s duties are in some degree nebulous. Not only might it be difficult to be totally specific about the activities of Ms. Bednarski and Dr. Ross in these respects, it is also very difficult to quantify the duties of a regular member of the French Department in these respects. However, much of the opinion evidence did not go to that issue, but addressed instead the quality of Ms. Bednarski’s and Dr. Ross' teaching and academic research. As I have already suggested, important as quality is, it is not a criterion adopted by the Collective Agreement for determining inclusion in the Bargaining Unit.

Similarly irrelevant was the apparent concern on the part of Ms. Bednarski, Dr. Ross and at least one other witness that they, as part-timers, were grossly underpaid for the services they gave the University. That may well be the case but the appropriate payment of people carrying less than a 50% of full-time load is not any part of the issue before me and, not surprisingly, is not addressed by the Collective Agreement which, by its on terns, applies only to those carrying a load of 50% or greater.

Dr. Runte testified that in her opinion Ms. Bednarski and Dr. Ross were both carrying what was clearly less than 50% of a full-time load. She also testified that the Department of French was split in its views on this matter but hearsay evidence of that nature is of little value.

I turn now to the specifics of the duties actually performed by Ms. Bednarski and Dr. Ross during the academic year 1981-82. I will consider in turn the evidence relating to each of the four categories of academic duties set out in Article 15.07 of the Collective Agreement. With respect to their undergraduate and graduate teaching in the academic year 1981-82, it suffices to say that each taught the course that she had been offering for some time plus her share of responsibility for the the new course on the "Literature and Society of Quebec and Acadia". Establishing and teaching a new graduate course for the first time is undoubtedly more onerous than many other teaching responsibilities. On the other hand, teaching an undergraduate course that one has taught for several years prior is probably a less onerous teaching duty than others. Beyond that, of course, if one were to try to evaluate with real precision the actual effort put into teaching any particular course by any particular teacher the number of variables would become totally unwieldy. Thus, while some of the witnesses stressed the difficulties involved in Dr. Ross' and Ms. Bednarski's new course, both parties in fact recognized, I think, the practical necessity for saying that each was teaching, simply, one-half of the normal load, more or less.

In my view all of the non-classroom aspects of teaching a university course must be included in this first category of academic duties. Thus in keeping office hours and otherwise maintaining reasonable student contact, in preparing for lectures and grading student papers and in keeping up by reading in the subject a faculty member is simply discharging his or her teaching function. There is no doubt that both Dr. Ross and Ms. Bednarski performed this function to the full.

With respect to "research, scholarly, artistic and/or professional activity" I have already indicated that the University's expectations of Ms. Bednarski were that she would involve herself to some degree in scholarly activities, presumably in the form of translations for publication. During the academic year 1981-82 Ms. Bednarski was a member of the English language jury for the annual Canada Council Translation Prize, and worked on her third full-length book of French Canadian literature in translation.

The University's expectations of Dr. Ross in that respect were minimal. In fact Dr. Ross did some minor non-academic translations, gave a paper on "Acadian French" to the Dalhousie-Kings Women's Reading Club in November of 1981, and published a piece in the Association Newsletter of the Association for Canadian Studies, June 1982 entitled "Vases Communicants or Two Solitudes?". Certainly the first of these is not the context for a scholarly research paper and there is no evidence to suggest that the second involved much scholarly research. As I already indicated, I do not think that Dr. Ross' general reading in her field, with no particular research or scholarly object in mind, can be considered in this category.

Just as I can say, in a general way, that both Dr. Ross and Ms. Bednarski carried a half teaching load, more or less, so can I say in a general way that neither carried more than a small fraction of the normal research and scholarly

workload of a full- time faculty member. In Dr. Ross' case it was a very small fraction indeed. While I have been confining myself here to a consideration of the facts it is perhaps worth pointing out that Article 18.04 of the Collective Agreement after specifying the four components of the workload of a regular faculty member states:

> Unless otherwise indicated in the Members letter of appointment, or, unless this conflicts with established practice within the Members Department or other unit, (a) [that is teaching] and (b) [that is research and scholarly work) constitute the Members principal duties.

Thus, to the extent that I must attempt to quantify Dr. Ross' and Ms. Bednarski's workload for purposes of the "de facto argument" it appears that their half teaching loads are offset by their limited, or lack of, involvement in research.

With respect to "academic administration within Dalhousie University" I am satisfied that neither Dr. Ross nor Ms. Bednarski was significantly involved. The norm for members of the French Department is to be involved on two departmental committees and one University committee as well; as the coordination of a teaching area. Precisely because Dr. Ross and Ms. Bednarski were part-time and so badly remunerated neither Dr. Runte not the other members of the department felt it was fair to ask them to do these things, and it is clear from the evidence that in 1981-82 they did not do them. There was considerable discussion about the fact that Dr. Ross and Ms. Bednarski attended departmental meetings. In my opinion to the extent that they did attend those meetings, and I believe they were quite regular, that was part of their de facto workload, as was Dr. Ross' participation in the reception of visiting scholars in her field. I do not think that the latter was scholarly activity, as seems to have been suggested, but, to some degree, it was “work”', probably in this third category.

Both Ms. Bednarski and Dr. Ross have been involved continuously in building the Dalhousie library in their area of expertise. I am unsure whether this should be counted in connection with teaching or "academic administration". In any event, their dedication was obvious and admirable and I have attempted to take it into account in assessing their de facto workloads. In general, I could make the same comment about Dr. Ross' involvement in French films on the campus and in the so-called “mini courses” which the Department offered to prospective students for the French Department. Rather than detailing these activities here I will simply say that in my view if they can be counted as "teaching" they boost Dr. Ross’ contribution under that category past the half-load mark, but teaching remains only one of the two categories of “principal duties”. If they are counted as “academic administration” then involvement, again particularly of Dr. Ross, in that non-principal category of academic duties becomes rather significant, but, because it is not one of the two principal categories of duties, her overall workload is not so significantly affected.

Finally, with respect to “professional responsibilities outside Dalhousie University”, while Dr. Ross and Ms. Bednarski have been involved in such activities in the past, and probably will be in the future, the evidence does not disclose any such involvement for the academic year 1981-82. For purposes of quantifying their workload I must, of course, note that this is not one of the categories of "principal duties".

I have not attempted to deal here with the difficult issue raised where a part-time member of Faculty engages in duties which are normal for a full-time member of the Faculty to a degree which exceeds the expectations of the University; exceeds in other words, what he or she is being paid to do. I return to that issue below.

Finally, I turn to the evidence of the alleged pre-certification agreement between then Vice President MacKay and then Dalhousie Faculty Association

President Rodger that a faculty member at Dalhousie teaching one and one-half courses is by definition a member of the bargaining unit. This evidence was admitted over the objection of Counsel for the University, who took the position that the words of the Collective Agreement are clear on the issue of membership in he bargaining unit and that extrinsic evidence of a pre-Collective Agreement oral arrangement ought not therefore to be admitted. President Mackay and Dr. Rodger each testified to this recollection and understanding of the pre-certification arrangement.

There is no question that at the stage in the certification proceedings where the University and the Faculty Association were attempting to resolve the question of who should be considered to be in the Bargaining Unit for purposes of counting his or her vote in the Labour Board's certification election one of the rules of thumb agreed upon was that anyone teaching one and one- half courses or more would be in the Bargaining Unit. Moreover, President MacKay and Dr. Rodger both testified that there had been no debate whatever with regard to whether or not this rule of thumb would have any "after life", that is, any continuing effect after the counting of the votes for certification purposes. Dr. Rodger testified that in his opinion the one and one-half course rule of thumb "was a convenient device for certification" and was intended to have an "after life", but he did not suggest that President MacKay had given any indication at the time that he had a similar intention. President MacKay testified that he did not understand at the time that the rule of thumb was to have any continuing effect after the Labour Board vote. He testified, however, that any faculty members who were considered to be in the Bargaining Unit for the purpose of the vote were considered by the University to be in the Bargaining Unit for all purposes after the advent of the Collective Agreement. President MacKay stressed that it was not until after the Collective Agreement had been made that there was any very clear definition of what the duties of regular full-time members of the Faculty were.

Dr. Rodger testified the he knew of no faculty members other than Dr. Ross and Ms. Bednarski teaching one and one-half courses who were not in the Bargaining Unit. Subsequently Dean Betts testified with respect to three faculty members who teach two courses and are not members of the Bargaining Unit. I was advised by Counsel for the Faculty Association that the case of one of them is currently the subject of a grievance and that the other two are on post-retirement status which, he suggested, made their cases dissimilar under the Collective Agreement. I do not see support for the latter proposition in Articles 22.05 and 12.15(a) (iv) of the Collective Agreement but I do not decide or even further pursue that issue here.

The Issues:

(1) Before dealing with the issues of substance here I will consider briefly counsel's objection to the admissibility of the evidence with respect to the pre-certification agreement as to who should be treated as being in the Bargaining Unit.

(2) Next I will consider whether the Collective Agreement should be interpreted as providing that all faculty members who teach one and one-half courses or more are members of the Bargaining Unit, particularly in light of the evidence of the pre-certification agreement.

(3) If it is decided that not all faculty members who teach one and one-half courses are in the Bargaining Unit the question arises whether Dr. Ross and Ms. Bednarski, or either of them, was nevertheless within the Bargaining Unit as defined in the Collective Agreement during the academic year 1981-82. I note that the question here will not be whether the percentages assigned to their workloads, that is, 25% of full-time for Dr. Ross and 35% for Ms. Bednarski were correct. Rather the questions will be whether work in excess of those percentages can be taken into account and, if so, whether either or both of Dr.

Ross and Ms. Bednarski actually carried a workload equal to 50% or more of that of a regular full-time faculty member.

If, on the basis of either (2} or (3) it is determined that Dr. Ross and Ms. Bednarski, or either of them, was in the Bargaining Unit in 1981-82 it would follow that the University has been in breach of Articles 7.02, 7.05, 7.08(a) and 7.08(b).

Decision:

(1) In support of his objection to the admissibility of testimony with respect to the pre-certification agreement between then Vice President MacKay and then Faculty Association President Rodger Counsel for the Employer relied, among other authorities, on the unpublished award of a board of arbitration between the University and C.U.P.E., Local 1392 chaired by Judge J. A. MacLellan, dated September 24, 1979, in which the majority quotes at length from R. v. Barbour et al. ex parte Warehousemen and Miscellaneous Drivers Union Local 419 (1968), 68 D.L.R. (2d) 682 (Ont. C. A.). The most relevant passage is that in which the Ontario Court of Appeal considered the Ontario equivalent of sections 41 and 15 of the Trade Union Act, S.N.S. 1972, which empower a board of arbitration in this province to “accept any evidence ... as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not “ and stated:

> Nor does the sub-section alter the principles of law as to the construction of written documents, and the rule which permits extrinsic evidence of intention to be considered only in construing ambiguous writings is essentially one of construction. Where writing is unambiguous such evidence, although received , cannot be used to construe it.

Thus, Counsel for the University submitted, because the Collective Agreement is unambiguous with respect to the issue of membership in the Bargaining Unit the evidence here in question was inadmissible, or having admitted it, I should not

now rely on it to construe the Agreement. Further, Counsel submitted, the mere fact that the interpretation of the Agreement was arguable, or at least being argued, did not mean that it was ambiguous. In support of this he quoted the well known passage from Canadian Kodak Co. Ltd. (1968), 19 L.A.C. 100 (Weatherill, chairman) at p. 101:

> It is, in our opinion, essential to distinguish between "awbiguity" in a collective agreement — or indeed in any document — and the arguability of different constructions of that document. If this were not so, then any disagreement as to the construction of a document would open the door for the admission of extrinsic evidence. The interpretation of documents, however, is a matter for argument, rather than evidence, except in certain special circumstances.

While I agree that the mere fact that the parties disagree as to the meaning of terms in a collective agreement does not mean that those terms are ambiguous, I have difficulty in understanding how ambiguity can mean anything different than, simply, uncertainty. Where the uncertainty is apparent on the face of the document the ambiguity is "patent". Where the uncertainty appears only when sufficient evidence has been adduced to point up an uncertainty peculiar to the circumstances of a particular collective agreement or its application the ambiguity is "latent". In either case it is not, of course, the mere difference between the parties that constitutes either uncertainty or ambiguity. It is the uncertainty in the mind of the arbitrator or other decision-maker which is the determinant and the measure of ambiguity. That, in my opinion, is what Chief Justice Gale meant when he said in Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Inc.) (1968), 3 D.L.R. (3d) 161 (Ont. H.C.) at p. 216:

> Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of a document alone and can be applied without difficulty to the facts of the case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to effect its interpretation. On the other hand, where the language is equivocal or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be

implied generally to all cases of doubtful meaning or application.

See Alliance Canners Ltd. (1978), 17 L.A.C. (2d) 370 (S.B. Linden chairman) and the arbitration awards cited there.

It is in this sense that I have asked myself whether the Collective Agreement before me is ambiguous with respect to whether part-time faculty members are to be included in the Bargaining Unit.

Article 5 of the Collective Agreement, entitled “Recognition”, provides:

> The Board, pursuant to the certification by Nova Scotia Labour Relations Board, recognizes the Association as exclusive bargaining agent for all Members described in Certificate No. 2478, dated November 24, 1978 as amended from time to time, for which the Association is sole bargaining agent. A copy of the Certificate, and a letter of clarification which accompanied it, are given in Appendix III.

Article 1.03 provides:

> The word “Member”, when printed with an initial upper-case letter, shall mean a Member of the bargaining unit as defined on the Certificate cited in Article 5.

The so-called '”Certificate No. 2478”, referred to in Article 5 provides, in part:

> The Labour Relations Board (Nova Scotia) in consideration of the agreement of the parties as to the description of the bargaining unit, does hereby certify the Dalhousie Faculty Association, Dalhousie University, Halifax, Nova Scotia, as the Bargaining Agent for a Bargaining Unit consisting of all full-time and regular part-time employees of Dalhousie University who hold positions as academic staff with the rank of lecturer and above but excluding [certain specified employees]. [underlining added.]

In a letter dated November 24, 1978 over the signature of K. H. Horne, acting chief executive officer to Dr. R. S. Rodger, then President of the D.F.A., the

"agreement of the parties" mentioned in the Labour Board order is set out, the relevant part being:

> The Board wishes to note the agreement of the parties on the following issues:
>
> > The phrase “regular part-time” means an employee whose duties and responsibilities are 50 percent or more of those of full-time employees in the same classification in the same Faculty.

Thus, finally, we reach the critical definition of “regular part-time employees”, and the specific question of whether the words “an employee whose duties are 50% or more of those of full-time employees in the same classification in the same Faculty” are ambiguous. While it might be that there is no patent ambiguity about any of those words, the most cursory consideration of the evidence referred to above reveals the latent ambiguity in the words "duties and responsibilities" when applied to any University faculty member, whether it be the part-time faculty member being assessed or the full-time faculty members against whose duties and responsibilities those of the part-timer are being rneasured. Even if the definition in question is viewed, not from the perspective of its place in the certification process, but as part of the current Collective Agreement which specifically addresses the duties and responsibilities of bargaining unit members there remains a very considerable degree of ambiguity. If nothing else, there is uncertainty about how activity in one category of a faculty member's workload is to be balanced against activity, or the lack of it, in another. Take the obvious example; how is teaching to be balanced against research? To ask that question is to reveal the latent ambiguity in the definition of "regular part-time" which is incorporated into the Collective Agreement's definition of the Bargaining Unit. Because of that ambiguity the evidence that I heard with respect to the MacKay-Rodger pre-certification agreement was properly admissible and may be taken into account.

(2) The testimony of president Mackay and Dr. Rodger, described above, does not lead me to conclude that the “agreement of the parties”, that anyone who was teaching one and one-half or more courses should be considered to be “regular part-time”, extended beyond the then immediate concern of determining whose vote was to be counted for purposes of certification. In my opinion both witnesses were truthful, which means, simply, that there was no agreement on whether the one and one-half course rule of thumb was to have any "after life". The agreement was made for the apparent purpose of certification. That the D.F.A. President Dr. Rodger thought it would apply for other purposes cannot make it do so where the University did not so intend and there was nothing in the circumstances to lead Dr. Rodger to think that more than certification was under consideration. The Faculty Association bore the onus of satisfying me that, based on what was said and done at the time, it would have been reasonable for the University to assume that there was an agreement with respect to purposes beyond certification. It has not discharged that onus.

While, as I have said, there is latent ambiguity in the definition with which I am dealing, it does seem a strained interpretation of the Collective Agreement to suggest that in carrying a half teaching load a part-time faculty member is performing duties and accepting responsibilities which are 50% or more of those of a regular full-time faculty member, regardless of what else the part-time faculty member is doing; regardless in other words, of whether he or she is doing anything at all in the other three categories of duties. Articles 15.15 to 15.21 inclusive leave no room for doubt that a regular faculty member’s non-teaching duties are highly significant. In the face of that I am unable to conclude that a bare 50% performance in one category of duties, albeit in one of the principal categories, can, in and of itself, be regarded as 50% or more of the totality of the duties and responsibilities of a regular full-time faculty member.

In sum, while the reference to the duties and responsibilities of a part-time or a regular full-time faculty member involves some latent ambiguity I do not find that evidence of the pre-certification agreement assists me in understanding the true intentions of the parties with respect to the shape of the Bargaining Unit after certification. Notwithstanding the ambiguity, the words of the Collective Agreement do not lend themselves to the interpretation of the definition of "Bargaining Unit" sought by the Faculty Association. Thus, if Dr. Ross and Ms. Bednarski are within the Bargaining Unit it must be because, de facto, their duties and responsibilities in 1980-81 amounted to 50% or more of those of their Department colleagues.

(3) The "de facto" issue is not simply a question of whether Dr. Ross or Ms. Bednarski can be said to have performed 50% or more of the amount of academic work performed in 1980-81 by a regular full-time member of the French Department. Fundamentally at issue is the significance of their arrangements with the University. What is the legal effect in this context of a letter of appointment which specifies, as does President MacKay's letter to Dr. Ross, that the appointment “would constitute less than 50% of a regular full-time appointment” or specifies, as do both that letter and the President's letter to Ms. Bednarski, that the appointee will not be included in the D.F.A. Bargaining Unit? What is the significance of the University's specification of part-time percentages?

It is clear that Articles 12.05 and 18.03 do not assist here. They provide that the fraction of full-time for which a part-time member of the Bargaining Unit is employed shall be that stated by the Head of his or her unit or specified in his or her letter of appointment, but those Articles only apply to members of the Bargaining Unit. They do not, therefore, appear to me to be apt where the very question is whether an employee is or is not in the Bargaining Unit.

Counsel for the University agreed that the University could not require or authorize a part-time faculty member to do more than 50% of the work of a regular full-time faculty member and then rely on the fact that that person's initial appointment specified less than a half-time basis as justification for keeping the faculty member out of the Bargaining Unit. The Collective Agreement is the governing document and it is between the University and the D.F.A. The definition incorporated into the Collective Agreement would override any private arrangement between the University and faculty member to the effect that the faculty member was to be outside the Bargaining Unit even though he was required or authorized to do more than 50% of regular duties. On the other hand, a University faculty member's duties and responsibilities are inherently fluid, and Counsel for the Faculty Association agreed that a part-time faculty member cannot, simply by doing more than he or she has been hired, required or authorized to do, slip past the 50% mark and claim membership in the Bargaining Unit, or have it claimed on his or her behalf by the Faculty Association.

Where the percentage of full-time duties to be performed by a part-time faculty member has been specified in the letter of appointment I should not assume that the faculty member has been required or authorized to do more, unless I am satisfied that the limitation on his or her duties implied by the specified percentage has been changed, expressly or by clear implication, by someone in authority. It is therefore important that I make a finding on whether the percentages of full-time put forward by the University were part of its employment arrangements with Dr. Ross and Ms. Bednarski.

Clearly there was some confusion. The percentages determined by Dean Betts in June were not stated to Dr. Ross and Ms. Bednarski in writing until November. I am not satisfied that Dr. Ross and Ms. Bednarski really were unclear what their salaries or teaching responsibilities were to be, but I do accept that initially it was not clearly brought to their attention what percentage of the total duties of a full-time regular faculty member they were to fulfill. I think that in

July they could fairly have assumed that they were to continue as before, with the additional responsibility of each teaching one-half of their new course. In other words Dr. Ross was not expected to be involved in any real research and Ms. Bednarski to continue her degree of involvement. At that point, in early July, 1981, I do not think Dr. Ross could honestly have believed that the University expected her to discharge more than one-half of the duties of a regular full-time faculty member. Indeed her letter of appointment did specify that her appointment was less than 50% of that of a regular full-time faculty member. Certainly she knew that she was not being paid at anything like half the rate of a full-timer. The same applies to Ms. Bednarski.

Whatever may have been the case earlier, by November both Dr. Ross and Ms. Bednarski knew that the University expected only 25% and 35% of full-time duties from them, respectively. Thereafter, if any work on their part beyond those limits is to count toward making them members of the Bargaining Unit I must be satisfied that it consisted of duties clearly authorized or required by Dr. Runte, Dean Betts or someone else with authority. In other words, I must be satisfied that any such authorization or requirement could reasonably have been viewed by them as a change in their terms of employment. Thus after November it is, strictly speaking, not a question of what Dr. Ross and Ms. Bednarski actually did beyond their teaching duties but what they were authorized or required to do or, at best from the Association's point of view, what they could reasonably have regarded themselves as authorized or required to do. In this perspective there was no evidence to suggest that they were required or authorized to do more than teach one and one-half courses, and in Ms. Bednarski’s case, do some research. There was, in other words, nothing to make them think that the 25% and 35% figures of which they certainly learned in November did not represent accurately what the University expected them to do. In that context if either or both of them wished, for example, to involve herself in the mini-courses offered to high school students to the extent that her total workload went beyond the stated percentage that extra involvement must be regarded as having been gratuitous.

This reasoning may leave open the suggestion that, at least from July to November, Dr. Ross and Ms. Bednarski, were de facto members of the Bargaining Unit, even if they could not be considered as such after November. In my view, however, that suggestion is not justified.

Even if Dr. Ross and Ms. Bednarski did not know in July and had not been advised in writing in November of their 25 and 35 percent rates of duties, respectively, the evidence does not, in my opinion, indicate that either of them performed duties and responsibilities that were 50% or more of those of a regular full-time member of the Department of French. Each had one-half of the teaching load of a regular full-time member. There was no real dispute about that. Dean Betts introduced in evidence an analysis of “Workload Distribution of Members of the Faculty of Arts and Science during 1980-81 by Group” compiled from the year end survey faculty members that he conducted in that year. It shows that, as an average, in the Department of French 45% of a faculty member’s workload is in the teaching function. Even allowing for a 15% margin of error and treating teaching as 60% of a regular Department member’s workloads, Dr. Ross’ and Ms. Bednarski teaching approximated no more than 30% of the overall workload of a regular full-time faculty member. The facts as I have found them from the evidence simply do not lead me to conclude that the efforts of either Dr. Ross or Ms. Bednarski outside the teaching function brought either of them up to the 50% mark. Excellent teacher though she probably is and notwithstanding some involvement in academic administration, I had no difficulty in reaching this conclusion in Dr. Ross’ case, once I accepted that reading in a course area is an aspect of teaching, rather than research; but Ms. Bednarski's was a closer case. Her research was difficult to quantify. I will repeat, therefore, that once she knew, in November, that the University's expectations of her were limited to 35% of full-time duties she could not put herself in the Bargaining Unit, intentionally or unintentionally, by doing more than she was hired, or subsequently required or

authorized, to do. Therefore, in the cases of both Dr. Ross and Ms. Bednarski the Faculty Association's de facto argument fails as well.

In conclusion, the Collective Agreement does not provide that all faculty members who teach one and one-half courses or more are in the Bargaining Unit, even taking into account the pre-certification agreement between then·Vice-President MacKay and then D.F.A. President Rodger. Neither Dr. Ross nor Ms. Bednarski can be considered to have carried a workload equal to 50% or more of that of a regular full-time member of the Department of French in the academic year 1981-82.

The Faculty Association’s grievance is therefore dismissed .

Innis Christie
Arbitrator

Halifax, N.S.
July 16, 1982.