**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**YORK UNIVERSITY** **("the University")**

**and**

**YORK UNIVERSITY FACULTY ASSOCIATION**

**("the Association")**

**AND IN THE MATTER OF A POLICY GRIEVANCE DATED OCTOBER 16, 2019 REGARDING CONTINUING EDUCATION**

**Louisa M. Davie** **Sole Arbitrator**

**Appearances:**

**For the University:** **John Brooks**
**Amanda Lawrence Patel**

**For the Association:** **Emma Phillips**
**Gabriel Hoogers**

## Award

This is a policy grievance filed October 16, 2019. The grievance raises issues about the appropriate interpretation and application of the recognition and bargaining unit scope clauses of the collective agreement between York University ("York" or "the University") and the York University Faculty Association ("YUFA").

The dispute between the parties centres around those who teach in continuing education programs at York. YUFA does not assert that all teaching in continuing education is bargaining unit work. Rather, YUFA argues that when bargaining unit members are engaged to teach in continuing education programs they are covered by the collective agreement between the University and YUFA.

York takes a contrary position and asserts that the non degree studies work in continuing education programs performed by members of the bargaining unit is excluded from the collective agreement. Instead, such work constitutes permitted "Outside Professional Activities" for bargaining unit members. It is York's position that the work of teaching in non degree continuing education programs is not bargaining unit work and the individuals who are engaged to deliver non-degree studies in continuing education are not covered by the collective agreement when performing that work.

### The Grievance

1. The Grievance in issue is as follows:

> The York University Faculty Association grieves on its own behalf that the Employer has violated Article 2, 4, 5 and Appendix A, and any other relevant articles of the Collective Agreement by treating YUFA members as excluded from the bargaining unit and the protections of the collective agreement insofar as they are carrying out work in Continuing Education (i.e. York University School of Continuing Studies, Osgoode Professional

Development, Schulich Executive Education Centre, Glendon Continuing Education, Health and Leadership Learning Network, Professional Leaning for Educators, and any other relevant centres or programs). In doing so, the Employer has further violated Articles 8, 9, 12, 13, 16, 18, 21, 25 and 26 and any other relevant articles of the Collective Agreement by not providing YUFA with the requisite information about compensation paid to its members; by denying members access to the complaints and grievance process with respect to their work in Continuing Education; by awarding courses through an independent and unilateral appointment process; by classifying work performed for the University as outside professional activities and thereby excluding it from considerations for tenure and promotion; by undermining the fair and equitable distribution of workload and teaching opportunities; by negotiating compensation and terms and conditions of work with YUFA members outside of the collective agreement; by excluding courses taught in Continuing Education from YUFA's dues base; and by excluding such income for the purposes of calculating pension contributions.

The following remedies are requested:

1. A declaration that the Employer has violated the Collective Agreement.
2. A declaration that the terms and conditions of work carried out by YUFA members in Continuing Education is governed by the collective agreement.
3. An order that any work carried out by YUFA members in any of the Continuing Education programs be paid at standard overload rates or otherwise negotiated between YUFA and the York Administration.
4. An order that the York University Administration negotiate with YUFA to establish hiring processes for the Continuing Education programs in question.
5. An order that the Employer compensate YUFA for lost revenue from membership dues.
6. An order that any YUFA member who has received less than the negotiated overload rate be made whole.
7. Any other appropriate remedy.

At the commencement of the hearing counsel for YUFA indicated that YUFA was only seeking a prospective remedy to be effective May 1, 2021, the date following the expiration date of the collective agreement under which this grievance was filed.

As noted, York views the work of YUFA bargaining unit members in continuing education programs to be “Outside Professional Activities” as contemplated by the collective agreement. The collective agreement provides

> **Outside Professional Activities**
> 18.04 The nature of the professional competence of many employees affords opportunities for the exercise of that competence outside the employee’s University duties, on both remunerative and non-remunerative bases. Recognizing that such outside professional activities can bring benefits to and enhance the reputation of the University and the capacities of employees, the Employer agrees that employees have the right to engage in part-time outside activities paid or unpaid, including participation in their Professional Associations and/or Learned Societies or professionally-related community service, provided that such activities do not interfere with their obligations, duties, and responsibilities to the University, and subject to the following conditions:
>
> > (a) Employees shall, upon request, make available to their Dean/Principal/Dean, University Libraries or designate information on the scope of outside activities of a substantial or continuing nature. Further, between requests, employees shall report to their Dean/Principal/Dean, University Libraries the fact and scope of outside activities of a substantial or continuing nature.
> >
> > (b) When an employee’s outside activities involve the use of University facilities, supplies, or services, permission for the use of such facilities, supplies, or services, and agreement on appropriate reimbursement therefore shall be obtained in advance by the employee from their Dean/Principal/Dean, University Libraries or designate. Costs in excess of the agreed reimbursement shall be borne by the employee on the request of the Employer.

I note at the outset that it is not disputed that currently there are seven (7) continuing education programs at York. In the five (5) years before the grievance was filed bargaining unit members have only been engaged in three (3) of those programs namely, the Health and Leadership Learning Network (“HLLN”), Osgoode Professional Development (“OPD”) and Schulich Executive Education Centre (“SEEC”). Of these three continuing education programs most of the teaching of non-degree courses by bargaining unit members has taken place in the SEEC continuing education programs. I was provided with all the agreements between York and the various YUFA members

who have taught in the continuing education programs. Approximately 95% of the agreements related to continuing education programs at SEEC.

Evidence and Submissions

YUFA was certified as bargaining agent in 1976 for a bargaining unit broadly defined as all full-time faculty and full-time professional librarians employed by York save and except certain exclusions. It is important to note that the description of the bargaining unit for which YUFA was certified was agreed upon by the parties. The Ontario Labour Relations Board ("the OLRB") decision indicates that at the time of certification the parties agreed that "the unit does not include… members of the Centre for Continuing Education (unless they are full-time members of faculty)."

The Centre for Continuing Education ("CEC") referenced in the OLRB decision has had name changes over the years and is now known as the York University School of Continuing Studies (for ease of reference it will continue to be referred to as the CEC throughout this award.) At the time of certification, and in the years since, continuing education at the CEC and in the other continuing education programs at York consists of "non-degree" courses, that is courses which do not earn the student a credit towards a University degree (hereafter "non-degree")

The breadth of continuing education studies consisting of non-degree courses offered by York is impressive. Over the years since certification continuing education at York has seen significant growth in both the number of programs offered and in the number of students enrolled in such programs. In addition to student enrollment a variety of the continuing education programs, and especially those offered by SEEC, are provided specifically to a wide and diverse range of third-party entities such as Loblaws, Toyota Canada, CIBC. The Ontario Association of Children's Aid Societies and other clients in

healthcare, social service agencies, the municipal sector, banking, manufacturing, retail etc.

The extent and length of each non-degree continuing education program offered is also diverse and ranges from days to weeks.

Those teaching in non-degree continuing education programs include outside contractors such as practitioners, specialists and subject matter experts in various fields, faculty from other universities and YUFA faculty members. YUFA does not claim that the collective agreement applies to all those working in non-degree continuing education and does not assert that all non-degree continuing education work is bargaining unit work. YUFA asserts instead that when full-time faculty members of the bargaining unit work in those continuing education programs the collective agreement applies to them and their work.

It is not disputed that there are no full-time faculty members appointed to the CEC. Indeed, YUFA members who may on occasion teach in non-degree continuing education programs hold their appointments in one of the academic units or faculties at York set out in the collective agreement.

The various agreements submitted in evidence indicate that over the past five years approximately thirty-eight (38) bargaining unit members have signed agreements to work in non-degree continuing education. Over that period most bargaining unit members have had only one or two agreements with York, with less than a handful of YUFA members signing multiple agreements.

The remuneration paid to YUFA members who teach in non-degree continuing education programs is also varied and ranges from a few hundred dollars to several thousand dollars. At the commencement of the hearing the parties agreed that when bargaining unit members are engaged to teach in non-degree continuing education programs they are assigned the same employee identification number in the University payroll system as the number they are assigned for teaching in their faculty degree programs. Their pay stubs show an amount separate from their regular faculty salary for the non-degree continuing education program work (although the paystub does not specifically characterize it as continuing education remuneration.) To date, because York views continuing non-degree education program work as falling outside the collective agreement, York has not treated this income as pensionable and has not deducted union dues from that income.

With respect to the continuing education programs in which bargaining unit members have been engaged, the evidence confirms that the overwhelming majority of non-degree continuing education program work done by YUFA members is in the SEEC. Over the past 5 years less than 10 contracts were tendered in evidence for non-degree continuing education work done in OPD and HLLN.

SEEC is a business unit within the Schulich School of Business faculty. It is not disputed that at the time of certification the predecessor to what is now SEEC existed and offered non-degree continuing education programs. There is no evidence to suggest that either the HLNN (a unit in the Faculty of Health) or the OPD (a unit in the faculty of Law, Osgoode Hall Law School) existed at the time of certification. To the contrary, the evidence suggests both HLLN and OPD were established to provide non-degree continuing education courses much later, with the HLN established in 2008.

As noted below it is York's submission that the surrounding circumstances and context at the time YUFA was certified and the first collective agreement was negotiated, and the circumstances and context which existed in the following forty (40) years until the filing of the instant grievance in 2019, are critical to the interpretation of the collective agreement language at issue in this grievance.

The certificate issued by the OLRB sets out several inclusions and exclusions agreed upon by the parties and certified YUFA as the bargaining agent

> "of all full-time faculty and full-time professional librarians employed by York University in the Municipality of Metropolitan Toronto save and except…"

In the first collective agreement negotiated by the parties that "all employees" description was amended. The recognition clause of the first collective agreement states:

> Recognition
>
> Whereas the Association has been certified by the Ontario Labour Relations Board and the Ontario Labour Relations Act requires that a recognition clause in accordance with the certification be contained herein, the Employer recognizes the York University Faculty Association as the sole and exclusive bargaining agent of the members of the bargaining unit as defined and to the extent required by the interim Certificate…, dated 6 April 1976, as amended by the parties in Appendix A hereto….

The relevant sections of Appendix A of that first collective agreement stated:

> APPENDIX A
>
> To the Collective Agreement between YORK UNIVERSITY and the YORK UNIVERSITY FACULTY ASSOCIATION
>
> A. York University and the York University Faculty Association agree to the following unit appropriate for collective bargaining.
>
> <u>All persons holding appointments</u> as full-time faculty members or full-time librarians and archivists employed by York University…, save and except:

(1) President,
(2) Deans (except the Dean of Students at Glendon College),
(3) Associate Deans,
…
(7) Director of Research and Executive Development (Faculty of Administrative Studies)
…

B. The York University Faculty Association and York University further agree that:

…

4. The unit does not include Post-Doctoral Fellows, Research Associates, or persons appointed to the Centre for Continuing Education, unless they are full-time members of faculty.

5. The bargaining unit includes:

(a) persons holding appointments as full-time faculty members:

(i) at the rank of Instructor,

(ii) in the Department of Physical Education,

(iii) in the Writing Workshop,

…

At the time the parties negotiated their first collective agreement, and as in the current collective agreement, the parties defined “Employee” and “Faculty Member” in the following manner

> **Employee** designates a member of the bargaining unit, as defined by the [interim] Certificate of the Ontario Labour Relations Board …as amended by the parties in Appendix A hereto….
>
> **Faculty Member** designates an employee appointed to York University in either the Professorial or Teaching Stream.

The structure and language of the collective agreement detailing the recognition and scope of the bargaining unit under which this grievance was filed has essentially

remained unchanged since the first collective agreement. Appendix A now contains a specific heading entitled “Bargaining Unit Inclusions/Exclusions” and has updated names for various faculties, but, for the most part, the applicable language has remained the same over the forty plus (40+) years since the first collective agreement was negotiated.

York maintains that when YUFA was certified it offered both credit degree courses in various academic units and faculties, and non-degree continuing education courses in its CEC and through the Executive Development Program in the Faculty of Administrative Studies (now Schulich School of Business). Although aware of the non-degree continuing education programs offered by the University, YUFA did not to seek to represent those teaching in continuing education. Instead, it sought to be certified, and was in fact certified, only to represent full-time faculty members employed to teach and deliver credit degree courses. It was not certified to represent persons employed to teach and deliver the non-degree courses found in continuing education programs unless those persons were appointed as full-time faculty members to the CEC (now York School of Continuing Studies).

York argues that the work performed by those engaged by York to provide non-degree continuing education falls outside the scope of the bargaining unit. That is evident from the specific amendments to the recognition and scope clauses of the collective agreement which the parties first negotiated and have maintained throughout.

It is the University’s position that the recognition and scope clauses, and indeed the entire structure of the collective agreement, makes it clear that YUFA represents persons “appointed” to “academic units” at the University to teach credit or degree courses. In this regard it is appropriate to note that “Academic Unit” is a defined term in the collective agreement. At the time the parties negotiated their first collective

agreement, and as in the current collective agreement, the definition of “Academic Unit” states

> **Definitions**
>
> **Academic Unit** designates a Department or Division headed by a Chairperson, or, where Departments or Divisions do not occur, a Faculty headed by a Dean.

“Faculty” is and has always been a defined term which “designates a Faculty, or a College with the status of a Faculty, created according to the statutes of the University.” Only the number and names of the faculties have changed over the years and in successive collective agreements. Neither the CEC nor any of the other continuing education programs such as SEEC, HLLN, or OPD are “Academic Units” or “Faculties” as defined in the collective agreement. Full-time faculty members are not “appointed” to the CEC or any of the other continuing education programs.

Much of the evidence led by York focused on the differences between credit degree courses taught by YUFA members as part and parcel of their appointment to an academic unit, and the non-degree courses offered through the various continuing education programs. That evidence was tendered through the viva voce evidence of Dr. Lyndon Martin, Vice-Provost, Academic at York.

There is no doubt that the processes which relate to the hiring of full-time faculty members and their “appointment” to either professorial or teaching streams in a faculty, the processes that relate to their teaching assignment and the determination of their normal teaching load, together with the processes which deal with the development and approval of credit degree courses, are vastly different from those relating to the hiring of persons to teach in continuing education programs and the development of non-degree continuing education non-degree courses.

The process for the development and approval of credit degree courses and programs is extensive, involving many layers of the collegial process, including external review, and culminating in approval by York's Senate and the Ontario Universities' Council on Quality Assurance (an external body comprised of universities in Ontario).

None of these processes apply to the non-credit non-degree courses taught in continuing education. York Senate does not approve the continuing education courses. The Ontario University Council on Quality Assurance is also not involved in approving courses offered in continuing education. Instead, each faculty which offers continuing education is responsible for their own non-degree courses and programs.

The faculties are required to have in place an internal process for the approval of non-degree courses. That process is ultimately approved by a Committee on Non-Degree Studies at York. It is important to note however that the involvement of a Faculty Council and Dean is limited to approval of the process and not approval of the non-degree continuing education course or program. Oversight by York Administration of non-degree courses in continuing education programs is only to ensure those processes are adhered to and that the program is of "high quality" which enhances York's reputation and "enhance York's standing and profile." It is each faculty which is responsible for their own non-degree continuing education activities, courses, and programs.

An examination of the hiring and assignment of teaching load to faculty members is also different when one compares the processes used for teaching credit degree courses and those used for teaching non-degree continuing education courses.

The collective agreement sets out the process for hiring faculty members into the bargaining unit. It is complex and involves the collegial process. The collective

agreement contains extensive and detailed provisions relating to the hiring of full-time faculty members to the professorial or teaching stream. (Each of those streams provide for three classifications namely tenured, probationary, or contractually limited.) The recruitment, and hiring process set out in the collective agreement for full-time faculty members into the bargaining unit ultimately culminates in a recommendation by the President of York to the Board of Governors which then makes the “appointment” into the bargaining unit. Pursuant to section 10 (c) of the *York University Act 1965* it is the Board of Governors which has the power “to appoint…all members of the teaching and administrative staffs…” Article 12.14 of the collective agreement states:

> Appointments Selection
>
> 12.14 All York University appointments are made by the Board of Governors, which may make appointments only on the recommendation of the President, except in the case of appointment of the President.

When the Board of Governors approves the hiring of the candidate, a formal letter of appointment to a faculty is made. As noted, the definition sections of the collective agreement define "academic unit" as including a faculty so that the full-time faculty members which YUFA represents hold their appointments in an academic unit.

There is no collective agreement provision which outlines the hiring of those teaching in continuing education. As noted, faculty members teaching non-degree courses in continuing education are <u>not</u> “appointed” to the York CEC or to any of the other continuing education programs offered by specific faculties. None of the 7 continuing education programs are an “academic unit” within the meaning of the collective agreement. Simply put, the collective agreement provisions and processes detailing the hiring of faculty members who teach credit courses in degree programs do not appear to apply to encompass those who teach non-degree courses in continuing education programs.

The collective agreement also contains detailed and extensive provisions about the calculation and assignment of workload to the full-time faculty members who teach credit degree courses. The collective agreement sets out provisions which include a collegial consultative process to determine what constitutes a "normal teaching load" and approval and assignment of the teaching duties by the Dean of a Faculty. Article 18 states:

Workload of Faculty Members

18.08.1 The workload of faculty members shall, consistent with the stream concerned, include teaching, research/scholarly/creative activities, and service to the University. The Employer shall attempt to achieve an equitable distribution of workload among faculty members. The “normal workload” of a Faculty shall be defined by current practices, or as may hereafter be agreed to by the parties.

The “normal teaching load” component of workload or “normal workload” is recognized to constitute a complex of course direction (including duties attendant on mode of delivery), tutorial direction or advising or their equivalents, supervision of dissertations, theses, senior essays or their equivalents and directed reading courses. The number of full courses or full course equivalents constituting a “normal teaching load” shall be defined by current practices. In calculating full course equivalents, the factors named below shall be considered, in particular class size and student load. Determination of the full course equivalents taught by a faculty member in any given year in satisfaction of the “normal teaching load” shall include consideration of……

In the context of the teaching load of the unit as a whole, units shall, using normal collegial and consultative processes, specify which of the factors listed above are used to calculate full course or full course equivalents, and “normal teaching load”, and how the factors are applied. This may include a unit committee established specifically for this purpose.

Newly created or revised teaching load documents setting out the specifications described in the preceding paragraph using collegial processes, shall, upon approval of the Dean/Principal, be submitted to JCOAA for information. Following the ratification of this Collective Agreement, units shall provide updated teaching load documents.

> The teaching load of each member of the unit and the unit as a whole shall be made available annually to each member of that unit by 15 March of the year in which the teaching loads are applicable. …

As continuing education programs do not deliver credit degree courses and are not part of the academic program, work performed in the continuing education program has not been considered or factored into the academic workload established by the academic unit or the teaching assignments made by the Dean. Non-degree courses in continuing education programs have been treated as unrelated to the workload provisions set out in Article 18. Similarly, because York considers teaching in its continuing education programs to be "outside professional activities", and the courses to be non-degree courses outside the academic degree program, the Dean does not play any role in the assignment of continuing education courses.

Article 18 refers to “full course equivalents”. Workload in the academic degree programs offered by the various academic units is determined on a "full course equivalent" ("FCE") basis with a .5 FCE generally equating to 36 hours of student contact time over the 12 weeks of a typical semester.

Workload in the non-degree continuing education programs are not measured having regard to FCEs or semesters. Indeed, the work performed by YUFA members in the continuing education programs which YUFA claims is covered by the collective agreement generally involve only 1 to 3 days of instruction or work. A handful of the contracts tendered in evidence provide for 4 or more days of instruction with none exceeding 10 days or 75 hours.

Unlike degree credit courses, there are no collective agreement provisions which relate specifically to the structure, format, or mode of delivery of non-degree courses in the

continuing education programs. By way of contrast, article 18.08.3 of the collective agreement provides

> “Normally, the structure, format and mode of delivery of course(s) shall be determined by the relevant unit(s) in conformity with the requirements of the curriculum as approved by Senate and with established practices."

Although York's Senate will have approved the degree programs and the approved curriculum to be delivered in a particular way, as noted herein the Senate does not play any role in the structure, format or mode of delivery of courses in the non-degree courses of the continuing education programs.

The collective agreement between the parties has a detailed tenure and promotion policy including criteria and procedures. Teaching, Service and Research/Scholarship are described, as are the standards employed in the evaluation or assessment of these criteria. It was Dr. Martin’s evidence that in evaluating or assessing the "teaching" of a candidate seeking tenure or promotion, that assessment focused only on teaching in degree courses. In cross-examination Dr. Martin also did not agree that teaching in non-degree continuing education courses could be relied upon as evidence of Service to the University and was not aware of any circumstances where a faculty member sought to introduce evidence of their non-degree teaching in continuing education as part of their promotion and tenure application.

In contrast, it is YUFA’s position that there is nothing in the collective agreement which precludes an applicant from relying upon teaching in non-degree continuing education programs to support their promotion and tenure application.

Finally, I note that although Dr. Martin’s evidence highlights the significant differences between credit, degree course offered by academic units and the non-degree courses offered through continuing education programs, in cross-examination Dr. Martin

acknowledged that he was unaware of any distinction drawn in the collective agreement between degree and non-degree teaching.

That is the primary thrust of YUFA response to the Employer's evidence about the differences and various distinctions which York seeks to draw between credit or academic degree courses and the non-degree courses in the various continuing education programs. YUFA suggested these distinctions were immaterial.

YUFA counsel submitted that much of that evidence was irrelevant. It was argued that the collective agreement did not draw a distinction between credit degree courses and non-degree courses and argued that the status of the course being taught as a non-degree course was not determinative of the scope or application of the collective agreement. It is YUFA's position that the faculty members who teach in continuing education programmes are in the bargaining unit because they hold full-time appointments. Once in the bargaining unit, the collective agreement applies to that member, and the work performed by the member, unless there is specific language which excludes the work. It was argued that in this collective agreement there is nothing which excluded the work in continuing education programs from the scope of the collective agreement when that work was performed by full-time faculty members of the bargaining unit.

Rather than focusing on the differences and distinctions between credit and degree courses and programs and the non-degree programs or courses in continuing education, YUFA focussed on the similarities in the nature of the work performed, and the skills utilized by faculty members to perform it.

YUFA noted that each of the agreements signed by YUFA members to perform work in various continuing education programs tendered in evidence referred to the YUFA member as an "employee".

When paid for the work in continuing education York's own internal administrative process assigns to the YUFA bargaining unit member the same employee identification number as the one used for payment for performing other bargaining unit work (although it is not obvious from the pay stubs that the money is being paid for work in continuing education programs or that dues are not being deducted and the payment is not considered pensionable earnings). Faculty members working in continuing education are paid using the same payroll system rather than through an invoice method typically used by outside contractors. Thus, York itself does not draw a distinction between employment in continuing education and employment in the bargaining unit. It does however draw a distinction between outside contractors and its own employees who work in continuing education.

It was submitted also that often the work performed by YUFA members in continuing education programs was done on York property.

YUFA argued, and the evidence confirms, that when employed in non-degree continuing education programs the YUFA members engage in the same type of activities and draw on the same expertise and skill as when engaged in the credit, degree work under the collective agreement. While working in continuing education programs YUFA members engage in such activities as designing classroom lectures, creating educational content, curriculum design and course development, providing subject matter expertise, ensuring the course content meets learning objectives, developing course outlines, arranging for guest lecturers, building or modifying case studies etc. Moreover, in carrying out these activities the YUFA member brings to this work (which York claims falls outside the bargaining unit) the very same knowledge, skill

and expertise as that brought to their degree credit teaching in their home faculty or unit.

In this regard YUFA also emphasized the way York markets the various continuing education programs. In its marketing material York leverages its reputation, and the reputation of YUFA members, to attract students. The marketing material and brochures speak of the continuing education programs as being offered by an "internationally recognized research University" and the courses as being taught by "leading academics" and being "University level" and "University lead". In so doing York is relying upon and using its own employees – YUFA faculty bargaining unit members – to develop and grow continuing education at York. As a result, there has been tremendous growth, and non-degree continuing education programs have become a new source of generating revenue for York.

It was submitted that the line which the University sought to draw between credit degree course and non-degree courses not offered for credit was not a bright line, but a line which was often blurred, especially when YUFA members are engaged in teaching continuing education courses or delivering continuing education programs.

Where the line between credit and non-credit teaching is particularly blurry is in the case of "standalone" certificates offered through continuing education programmes. In acquiring certain "standalone" certificates students enrolled in the certificate program take the same credit degree courses as those enrolled in a degree program. However, instead of acquiring a degree (which requires 120 credits), students work towards and acquire an often-specialized certificate which requires far fewer credits. Students may enroll at York to work towards the certificate either concurrently while enrolled in a degree program at York, or as a direct entry student without being enrolled in a degree program.  I note however that the evidence indicates that where YUFA members teach the credit degree courses required for the “standalone” certificates offered through

continuing education programmes they are covered by the terms of the collective agreement. The courses are part of the YUFA members' teaching load as students taking the course for their certificate join in classes with students taking the course as part of their degree program of study. The academic degree courses taught for these standalone certificates therefore are distinct from the non-degree continuing education courses at issue in this grievance and I do not propose to say any more about them.

Finally, and with respect to students, I note that from the student's perspective there is no relativity between enrolment in a non-degree continuing education program at York and enrolment in a degree program. That is to say that one need not be enrolled at York in a degree program (graduate or undergraduate or certificate) to be enrolled in a continuing education program or course. Each faculty offering continuing education programs establish their own admission requirements.

Extrinsic Evidence

During the hearing YUFA argued that the language of the collective agreement is clear and unambiguous, and that extrinsic evidence was therefore inadmissible and could not be relied upon to assist in the interpretation of the collective agreement. York held a contrary view about the admissibility and relevance of the past practice evidence which it sought to adduce. The evidence was adduced, and the parties reserved their respective positions to argue about the admissibility, relevance and weight in their final submissions.

In their final oral and written submissions (on February 28, 2022, March 11, 14 and 16, 2022) the parties reiterated their respective submissions.

With respect to this issue, I am of the view that arbitrators have, quite properly, moved away from the traditional *Leitch Gold Mines Ltd. (1968) 3 D.L.R. (3d) 161 (Ontario High Court)* analysis which focuses on showing latent or patent ambiguity before extrinsic

evidence is admissible and relevant. Taking their cue from the courts in such cases as *Sattva Capital Corp. 2014 SCR 53* and *Dumbrell v. Regional Group of Cos. (2007) 85 O. R. (3rd) 616 (Ontario Court of Appeal)*, in ascertaining contractual intention arbitrators are focused on context and the factual matrix as they interpret the words used by the parties. The past practice evidence adduced by York may go into that contextual mix. In the circumstances of this case, and standing on its own, I find the evidence does not go so far as to demonstrate a mutual understanding of the Recognition clause or the Inclusions and Exclusions of the bargaining unit set out in Appendix A of the collective agreement. The facts underlying the past practice evidence however are part of the factual matrix I have considered when addressing the issue of the application of the collective agreement (see below).

The past practice evidence related to two (2) specific circumstances.

First, a Chief Steward was engaged in delivering non-degree continuing education courses while at the same time he was involved in a grievance regarding “overload rates” to be paid to those teaching in the credit degree EMBA program. I accept York’s position that the Chief Steward knew, or reasonably ought to have known, that York was not applying the terms of the collective agreement to him while he was engaged in that non-degree continuing education work. That is to say that he knew, or should have knows that matters such as the assignment of that work to him, or his remuneration for that work, did not comply with various articles of the collective agreement,

The second past practice circumstance is that a bargaining unit member of the Joint Committee On The Administration Of The Agreement received an unsigned letter about her involvement in the Division of Continuing Education (DCE) wherein the University states

> “…although DCE is not subject to collective agreements concerning stipends to instructors, the parties agree that the stipends will be equivalent to those paid for undergraduate degree credit courses (i.e. the CUPE/YUFA rate of $112/hour plus vacation pay or benefits)” …

In the circumstances I am not persuaded that this evidence is sufficient to attribute to YUFA knowledge that it was York's position that work in continuing education programs was exempt from the YUFA collective agreement. However, it is a fact or circumstance which forms part of the overall factual matrix which I have considered when addressing the application of the collective agreement.

Submissions Of The Parties About The Language Of The Collective Agreement

This leads me then to the submissions of the parties about the interpretation of the language of the collective agreement. For ease of reference the critical language pertaining to the scope of the bargaining unit of the current collective agreement is reproduced again.

> APPENDIX A
>
> BARGAINING UNIT INCLUSIONS/EXCLUSIONS
>
> (Article 2)
>
> A. York University and the York University Faculty Association agree to the following unit appropriate for collective bargaining.
>
> All persons holding appointments as full-time faculty members or full-time librarians and archivists employed by York University…, save and except:
>
> (the article then lists exclusions which are "managerial" exclusions)
>
> B. The York University Faculty Association and York University further agree that:
>
> …
>
> 3. The unit does not include Post-Doctoral Fellows, Research Associates, or persons appointed to the Centre for Continuing Education, unless they are full-time members of faculty.
>
> 4. The bargaining unit includes:
>
> (the article then specifically lists a number of inclusions)

As indicated, it is YUFA's position that the distinctions drawn by the University between academic degree courses and the non-degree courses in continuing education are immaterial. YUFA submitted that the language of Appendix A was clear and unambiguous. The bargaining unit was very broad and very inclusive ---"all persons holding appointments as full-time faculty members" are included.

YUFA argued that Appendix A indicates that the parties specifically turned their minds to which individuals and what work was to be excluded from the bargaining unit. None of the exclusionary language excluded YUFA members teaching in non-degree programs. Although the parties could easily have done so, and clearly knew how to draft exclusions, it is telling that they did not carve out full-time faculty teaching in non-degree continuing education programs. Indeed, paragraph B.3 indicates the parties turned their minds to full-time bargaining unit members engaged in continuing education and clearly determined they should be included in the bargaining unit. Although the parties could have said that YUFA members teaching continuing education are excluded (because that is non-degree work) it is telling that they did not state that so plainly in B.3. In Appendix A paragraph A the parties specifically excluded the Director of Research and Executive Development (Schulich School of Business) but they did not exclude faculty members teaching in the executive development non-degree continuing education programs in either paragraph A or paragraph B.3.

YUFA disagreed with York's interpretation that paragraph B.3 indicates those teaching continuing education are excluded from the bargaining unit unless they are full-time members of the CEC . In any event YUFA argued that article B.3 is irrelevant to this case as it is not disputed that none of the full-time YUFA members engaged in continuing education are appointed full-time to the CEC (or to any of the other continuing education programs.) The YUFA members teaching in continuing education therefore do not fall within the parameters of the exclusion set out in B.3. Instead, they are YUFA full-time members appointed to another faculty and fall within the opening words of Appendix A, paragraph A. In the result it was argued, YUFA members

appointed as full-time faculty members working in non-degree continuing education programs are not excluded from the bargaining unit by reason of the opening paragraph of Appendix A, and are not excluded by paragraph B.3 because they have not been appointed to the CEC (now School of Continuing Studies).

YUFA asserted that the onus in this case rested on York which seeks to carve out an exclusion from this all-inclusive unit. In order to carve out specific positions or specific types of work (i.e. non-degree continuing education teaching) there must be express language in the collective agreement articulating the mutual intent of the parties to carve out work or positions from an otherwise all-inclusive bargaining unit. Such language was absent in this case.

YUFA submitted that the case law supported its position that the bargaining unit status and application of the collective agreement accompanies the employee and was not dependent on the nature of the work they performed in non-degree continuing education programs. Once the employee is a member of the bargaining unit (here by virtue of their full-time appointment to faculty) unless there is specific language to exclude the work, the work is included, and the collective agreement applies to the full-time bargaining unit member performing that work. Simply put, the collective agreement applies to those who teach and not to the program in which the members are engaged. The fact that the work in continuing education may be different doesn't mean it or the YUFA members teaching it are excluded from the entire application of the collective agreement. As noted by arbitrator McDowell in *St. Lawrence College v. OPSEU, 2005 CanLII 92939 (ON LA) (MacDowell)* in a similar context involving non-credit courses at a community college

> Neither Article 1.01 (the recognition provision) of the negotiated collective agreement, nor Schedule 1 of the CCBA, are framed in terms of the work, or the course assignments, of individual "teachers" (i.e. what they teach, or how they teach it). Nor is there any reference to the organizational structure or administrative subdivisions of the College (departments, faculties, campuses, buildings, schools, programs, etc.); or to the nature of

> the students taking the courses; or to the funding arrangements for the courses; and so on. So long as an individual is "employed....as a teacher" within the meaning of the CCBA and s/he is not caught by one of the explicit exclusions in the CCBA, then (if one just looks at the statute) s/he is "in" the statutorily defined bargaining unit; and if s/he is "in" the statutory bargaining unit, then s/he is caught by the deemed recognition clause, and the collective agreement necessarily "applies" to him/her.
>
> That said, we think that it is very important to distinguish between the scope of the bargaining unit (i.e. who is "in" the bargaining unit – and therefore who the collective agreement applies to), on the one hand, and the actual terms and conditions of employment for particular employees within that bargaining unit, on the other. The former [the scope of the bargaining unit] is determined by statute. The latter [ the substantive terms, applicable to particular bargaining unit employees] depends upon what the parties have actually negotiated for the class of employees under review.
>
> Employees "covered" by the academic collective agreement (in the sense of being in the bargaining unit), do not necessarily all have the same terms and conditions of employment. Nor do all of the clauses of the collective agreement necessarily apply, to all employees in the bargaining unit.

In response to York's position that YUFA faculty members teaching in non-degree continuing education programs do so pursuant to article 18.04 (Outside Professional Activities), YUFA argued that this work was not "outside" the employee's University duties at all. On the contrary it was work done <u>for</u> York and <u>on</u> York property. It was submitted that much of article 18.04 could not be applied in a sensible, coherent manner to those YUFA members teaching in continuing education. For example, article 18.04 states "provided that such activities do not interfere with their obligations, duties, and responsibilities to the University." That sentence makes no sense given that the teaching in continuing education is <u>for</u> the University. Similarly, if continuing education work is an "outside" activity within Article 18.04 it makes no sense for YUFA members to seek permission to use University facilities as set out in the article because the work is generally performed on York property.

YUFA counsel referred to the collective agreement provisions which disallow the University from bargaining directly and individually about terms and conditions of employment with bargaining unit members (article 5). It was YUFA's position that this language of the collective agreement prohibited York from entering into the individual agreements to teach in continuing education with YUFA members which have been tendered into evidence.

It was submitted that the only way to understand additional payments to full-time YUFA bargaining unit members working in non-degree continuing education programs is to consider continuing education as part of "overload". Article 25.09 of the collective agreement provides for "overload rates". Although "overload" is not defined, YUFA stated that this provision applies when members work "over and above" their normal workload and normal teaching load and duties. Teaching non-degree continuing education would be encompassed in being over and above normal workload.

In support of these various submissions YUFA refer to and relied upon in *St. Lawrence College supra; Canadore College v. OPSEU, Award of Arbitrator Brown, dated February 20, 1990, Fanshawe College of Applied Arts and Technology v. OPSEU, Award of Arbitrator Brown, dated June 28, 1996, Algonquin College v. OPSEU, Local 415 (FSL Grievance), [2001] OLAA No. 632 (Knopf) York University v. YUSA, 2010 CanLII 33087 (ON LA) (Goodfellow) Huntsville District Nursing Home Inc. v. UFCW, Local 175, 2014 CarswellOnt 3398 (Randall) Spar Aerospace Ltd. v. S.P.A.T.E.A., 1994 CarswellOnt 6079 (Brown), Defining the Bargaining Unit, Brown & Beatty 5:1100*

York argued that in interpreting the collective agreement the arbitrator must have regard to the language of the collective agreement and the words used must be given their "plain and ordinary contextual labour relations meaning" (*Ontario Power Generation and Society of Energy Professionals (Xu Grievance), 2015 CarswellOnt 10247 (Surdykowski)).* In interpreting the collective agreement, it is important to consider the

relevant context of the collective agreement, including the labour relations context, past practice and bargaining history. In support of these propositions York counsel relied upon *Ontario Power Generation supra, York University and York University Staff Association, 2004 CarswellOnt 10789 (ON LA) (Surdykowski), Air Canada v. Air Canada Pilots Assn. (Letter of Commitment 50 Grievance), [2012] O.L.A.A. No. 164 (Burkett), The Corporation of the City of Sault Ste. Marie and Amalgamated Transit Union Local 1767, 2014 CanLII 71973 (ON LA) (Hayes), Waterloo Region Record and Unifor Local 87-M (Southern Ontario Newsmedia Guild), 2014 CanLII 59675 (ON LA) (Hayes).*

The University submitted that in this case the context was very important. At the time YUFA was certified it was aware that York offered non-degree study programs. That is evident from the references in the OLRB decision that the parties agreed to exclude from the unit the Director of Division Research and Executive Development and members of the CEC who the parties agreed were specifically excluded from the agreed-upon bargaining unit. In addition, the OLRB decision indicates the parties specifically agreed also upon who was included as full-time faculty and it is notable that those teaching in non-degree programs were not referenced in the list of included members of the bargaining unit. In the result, although aware of the non-degree programs, YUFA did not seek to represent faculty engaged in those programs and was not certified to represent those persons by the OLRB. Moreover, following certification, and in their first collective agreement the parties amended the OLRB's certificate and themselves described the bargaining unit in a manner which clearly indicated that it did not include those teaching in non-degree programs.

In their first collective agreement the parties again specifically excluded persons appointed to the CEC and their list of "inclusions" in the bargaining unit again did not reference those teaching in the existing non-degree programs. Significantly, the parties also amended the OLRB's description to specifically indicate that it applied to persons "holding appointments" and not merely those "employed". The University submits that a

plain reading of Appendix A, in its entirety, indicates the bargaining unit does not include persons appointed to the CEC unless those persons are appointed to the CEC as full-time members of the faculty.

It was the University's position that in this collective agreement the addition of the words "holding appointments" in the bargaining unit description is important. The evidence indicates full-time faculty members hold their appointments in an "academic unit" (a defined term which does not include any of the continuing education programs). The words "holding appointments" and "appointed" have special and unique meaning. The "appointment" is based on the recommendation of the President to the Board of Governors. The collective agreement contains detailed provisions on how persons are appointed. Persons are appointed to academic units and faculties. Persons teaching in continuing education are not "appointed" within the meaning and processes of the collective agreement, and the continuing education programs are not an "academic unit". That labour relations context is very important. These parties understood how full-time members were appointed, and to what they are appointed--- academic units. The evidence is clear that there are no full-time members of faculty "appointed" to the CEC or any other continuing education program. The continuing education programs at issue in this case are not academic units to which full-time faculty can be/have been appointed.

That York's interpretation of the scope of the bargaining unit and the application of the collective agreement is appropriate is evident from the fact that the structure of the recognition clause has not changed in the 40+ years since certification. The "appointment" language and the structure of inclusions and exclusions have remained the same. For decades, and to the knowledge of YUFA, York has been involved in offering non-degree continuing education. Yet, until the filing of this grievance in 2019, the parties have never treated that work as being covered by the collective agreement or treated the persons performing that work as members of the bargaining unit. In this regard the University emphasized also that much of the non-degree work at issue in this

case is delivered by external contractors whom YUFA agrees are not covered by the collective agreement. It was submitted that the thrust of YUFA's interpretation was to argue, in effect, that a subset of those engaged in teaching non-degree continuing education courses (namely YUFA members,) are nevertheless covered by the collective agreement, when for 40+ years the parties have treated that subset and that work as falling outside the scope of the bargaining unit and the collective agreement.

It was York's position that a plain reading of Appendix A paragraph B. 3 indicates that the bargaining unit does not include persons appointed to the CEC (now School of Continuing Studies) unless those persons appointed to the CEC are appointed as full-time members of the CEC. In crafting this language, the parties recognized that YUFA was not certified to represent those engaged in non-degree studies delivered through the CEC. The parties intended however to provide for the circumstance that if the CEC came to be like other faculties and academic units and appointed its own full-time faculty, those full-time faculty members so appointed to the CEC would be covered by the collective agreement. The structure of Appendix A paragraph B. 3 makes it clear that only full-time faculty of the CEC are included in the bargaining unit. Others working in continuing education programs delivering non-degree courses are excluded from the bargaining unit and the application of the collective agreement.

It was submitted that the long-standing practice of full-time faculty working in continuing education and delivering non-degree courses without any grievance supports York's interpretation. Prior to 2019 neither YUFA, nor any individual faculty member of the bargaining unit, filed a grievance or complaint about any matter relating to the work in the non-degree courses offered by various continuing education programs. For example, no one has ever complained or grieved that the individual contracts, or payments for non-degree courses, breached the YUFA collective agreement. They have not sought to have that work remunerated in accordance with the "overload" rates which YUFA seek in this grievance, nor have they sought to have this work included or considered as part of their "normal teaching load". Instead, individual members have

accepted that their work in non-degree continuing education programs is properly considered “Outside Professional Activities” as permitted by this collective agreement.

Finally, York’s interpretation of the scope of the bargaining unit and application of the collective agreement is consistent when the collective agreement is read in its entirety. It is apparent that key provisions of the collective agreement can’t be meaningfully applied to those teaching in non-degree continuing education programs. The collective agreement provisions relating to such matters as the assignment of courses and normal teaching workload, the process for appointment to the professorial and teaching stream, the provisions relating to the assessment of faculty for purposes of tenure and promotion and the collective agreement articles which relate to the professional responsibility of bargaining unit members etc. make it clear that the collective agreement applies to academic credit and degree work done by full-time faculty in “academic” units as defined in the collective agreement. These provisions and articles of the collective agreement have not been applied, and can’t be applied, to work in the non-degree continuing education programs. In this collective agreement the parties have not bargained any terms or conditions of employment for bargaining unit members which relate to, or can be applied to, non-degree continuing education programs.

It was York’s position that full-time YUFA members who choose to teach in any of the non-degree continuing education programs do so voluntarily and outside the collective agreement or their duties and responsibilities under the collective agreement. It was argued that the conduct of both YUFA and its individual members indicated this was an accepted fact.

Decision

I find that in their respective positions and submissions the parties have somewhat conflated two distinct concepts under the “scope of the bargaining unit” rubric. The first

concept revolves around the recognition clause and who is “in” the bargaining unit. The second revolves around the “work” of the bargaining unit and application of the collective agreement to those in the bargaining unit. In this award I have separated these two concepts because, in my view, interpreting the recognition clause and determining who is in the bargaining unit does not adequately address the crux of the dispute between the parties as to whether the work performed by those in the bargaining unit is governed by specific provisions of the collective agreement.

I start with the basic proposition that the purpose of a recognition clause is to define the rights of a union to represent employees in the bargaining unit as their sole and exclusive bargaining agent. A recognition clause generally identifies bargaining unit members, those for whom the union holds representation rights, by their status as employees, and not by the work they do. A recognition clause may touch upon the work of the bargaining unit, but otherwise does not necessarily address whether, or how, a collective agreement applies to the employees in the bargaining unit.

As indicated herein I find that the recognition clause and bargaining unit description at issue in this case does no more than define who is “in” the bargaining unit by reference to the status of persons as holding appointments and as being full-time faculty. Appendix A sets out who is in the bargaining unit and who is excluded from the bargaining unit. It addresses those persons for whom YUFA holds representation rights. In so doing the recognition clause says very little about the work of the bargaining unit, and does not address at all how the remainder of the collective agreement applies to those in the bargaining unit.

Before addressing the interpretation of Appendix A, and the inclusions and exclusions listed, I find it convenient to address the authorities relied upon by YUFA, which, for the most part have limited application and are readily distinguishable from the facts and circumstances of the instant case. A key distinction in the applicability of the college

cases relied upon by YUFA arises from the fact that the bargaining unit at issue in the college cases is a statutorily defined bargaining unit which applies to “employees” who “teach”. Thus, the work of the bargaining unit is specifically referenced in the statutorily defined description of the bargaining unit.

The college cases do however highlight that “scope of the bargaining unit” grievances can raise separate issues about the “status” of the persons doing certain “work” in continuing education, and/or whether negotiated collective agreement provisions apply to non- degree studies in continuing education. In this regard I have found the analysis of arbitrator McDowell in the *St. Lawrence College* case supra to be most apt. In particular, the succinct summary found on page 68 of that case neatly summarizes the predicament faced by the difference in “members” of the bargaining unit and “work” of the bargaining unit. Arbitrator MacDowell noted

> In summary then, the fact that an employee is included in the bargaining unit (because the statute says so), [here because the recognition clause and Appendix A says so] does not, in itself, determine whether one or more clauses of the collective agreement applies to him/her. Nor does it determine whether a particular clause applies to the circumstances that gave rise to the dispute. That depends upon the interpretation of the clause itself. And of course, even if a particular clause may *nominally* “apply” to an employee, or to the situation, there may be a number of reasons (or employer “defences”) which may preclude giving effect to that clause, in the particular circumstances of the case – for example: arguments about estoppel, or laches, or the failure to “grieve” about the situation in a timely way, and so on. The fact that a clause could apply, does not mean that it does apply, or should be applied in the particular circumstances giving rise to the grievance.

Returning then the circumstances of this case, and the interpretation of the recognition clause in Appendix A of the collective agreement, I find that a plain reading of the recognition clause and the inclusions and exclusions listed in Appendix A indicates that YUFA represents all employees who are appointed as full-time faculty (as well as full-time librarians and archivists) employed by York. For purposes of this award therefore the three (3) defining status characteristics of bargaining unit membership is that

persons must be employees (“employed by York University”), must be full-time (not part-time) and must be “appointed” (“holding appointments”).

I find that “persons holding appointments” denotes that the full-time faculty member has gone through the appointments process set out in the collective agreement. That process culminates in the President making a recommendation to the Board of Governors appointing the person to either the teaching or professorial stream. A plain reading of paragraph A of Appendix A indicates that the bargaining unit is comprised of persons who have been appointed in accordance with the provisions of the collective agreement to a full-time professorial or teaching stream position. Such appointment may fall within the tenured, probationary, or contractually limited classifications. Stipulated in the opening words of Appendix A is that the person “employed by York” holds an “appointment” as a full-time member of faculty. I agree with York’s position that in their first collective agreement the parties made a key and material change to the description of the bargaining unit set out in the OLRB’s certificate. Whereas the OLRB certificate certified YUFA to represent “all full-time faculty… employed by York University…”, in their first collective agreement the parties further refined and defined that bargaining unit description by requiring that bargaining unit members must be “appointed” as full-time faculty. Thus, it is no longer sufficient to merely be “employed” as full-time faculty. Instead, to be in the bargaining unit, persons must be “appointed”.

Appendix A also speaks to those <u>not</u> included in the bargaining unit. In addition to the usual “managerial” exclusions (Vice Presidents, Associate Deans, Provost etc.) paragraph B.3 of Appendix A indicates that the bargaining unit does <u>not</u> include, amongst others, persons appointed to the CEC (now School of Continuing Studies) <u>unless</u> those persons are appointed as full-time members. I find the repetition of the words “appointed” and “full-time members of faculty” in paragraph B.3 to be significant. The repetition of the fundamental criteria for inclusion in the bargaining unit (appointment and full-time membership) in the exclusion provision found in paragraph B.3 supports the University’s position that this paragraph means that the unit does not

include persons appointed to the CEC unless those persons appointed to the CEC have been appointed as full-time members of the faculty. The paragraph B.3 exclusion provides within it an exception. The bargaining unit does not include persons appointed to the CEC unless they are appointed as full-time members of faculty.

The language of this exclusion clause, with his own exception of “unless”, indicates that the parties contemplated that there may be bargaining unit members who are full-time members of faculty who are appointed to the CEC. If they are so appointed they are in the bargaining unit and YUFA has representational rights for those full-time members. If they are not appointed to the CEC, and are not full-time members of faculty, YUFA does not have representational rights just as YUFA does not have representational rights with respect to others – external third parties or faculty members from other universities – who, from time to time, work in the CEC. Paragraph B.3 draws a distinction based on status between “appointed” full-time faculty and others who may work in the CEC. I accept the University’s position that a plain language reading of paragraph B.3 of Appendix A indicates that the parties agreed that if the [CEC] came to be like other faculties and “appointed” its own full-time faculty then that faculty member would be in the bargaining unit and covered by the collective agreement. However, I find that this is so regardless of whether such faculty is involved in credit or non-credit continuing education programs.

Viewed linguistically I find that with respect to the "scope" of the bargaining unit (that is persons in the bargaining unit) the bargaining unit includes all full-time faculty who have been appointed to their faculty positions by the Board of Governors but excludes persons appointed to the CEC unless those persons appointed to the CEC have been appointed as full-time faculty members.

In this case the parties have agreed that no full-time members of faculty have been “appointed” to the CEC. The University submits “this is a complete answer to the

grievance." I can't agree with that conclusion because it does not adequately answer the question of how one treats full-time members holding an appointment in another faculty or academic unit who, by virtue of such appointment, are in the bargaining unit pursuant to paragraph A of Appendix A, but who on occasion may work in non-degree continuing education programs. Does one lose status as a member of the bargaining unit in those circumstances? When performing continuing education work for the University can a faculty member be both "in" the bargaining unit by reason of Appendix A paragraph A and yet be excluded from the bargaining unit by reason of Appendix A paragraph B.3 because they have not been "appointed" to the CEC? This is where the issues relating to the "work" of the bargaining unit intersect with the membership status of those "in" the bargaining unit.

An interpretation of the recognition clause says very little about the "work of the bargaining unit", or application of specific articles of the collective agreement to the members of the bargaining unit. Mere inclusion in the bargaining unit does not tell one much about the substantive rights of the collective agreement which accompany bargaining unit membership.

The University has argued that YUFA was not certified to represent persons engaged in non-degree continuing education. It points, inter alia, to paragraph B.3 of Appendix A in support of its position that work in continuing education is not bargaining unit work.

I am unable to accept that assertion. I find instead that the "unless" exception found in the exclusion language of paragraph B.3 of Appendix A contemplates that there may be bargaining unit members who are full-time members of faculty who are appointed to the CEC. If so appointed, those full-time members would be in the bargaining unit and could perform non-degree continuing education work. The contemplation that full-time members may be appointed prohibits me from finding that the parties agreed that all work related to non-degree continuing education is not bargaining unit work.

However, even the fact that the collective agreement contemplates that full-time faculty may be appointed to the CEC does not in and of itself address the kind of work that may be undertaken by bargaining unit members. In this regard it is important to note that the CEC is a department or organizational unit within the University. The CEC is not a description of bargaining unit work. Similarly, the other continuing education programs within which full-time faculty have worked are also organizational or administrative units of other faculties at York. That these organizational units have been created to deliver a specific type of product (non-degree continuing education courses as opposed to academic degree courses) is not determinative of what constitutes bargaining unit work.

Generally, in labour relations, a "scope" or recognition clause and the exclusions of certain persons from the bargaining unit does not address the “work” of the bargaining unit except in the most peripheral of ways. A bargaining unit is not generally defined in terms of kinds of work. It is defined with reference to the status of persons employed by an employer (here “full-time” members “appointed” to faculty) for whom the union holds representational rights. However, by excluding certain types of employees (i.e. managerial employees, or employees at a specific location, or employees doing a specific type of work as denoted by their title) it is presumed that the work of those employees is not bargaining unit work and that the collective agreement does not apply to that work. Absent specific provisions however, a collective agreement is generally presumed to apply to the employees who are identified in the recognition clause as being “in” the bargaining unit when those employees perform work for the employer.

In this instance, having regard only to the language of the recognition clause and Appendix A which describes the inclusions/exclusions to the bargaining unit, I am unable to conclude that the collective agreement does not apply to appointed full-time faculty when they are engaged in non-degree continuing education work. The opening paragraph of Appendix A indicates appointed full-time faculty employed by York are "in" the bargaining unit and therefore covered by the collective agreement when they are employed by York. The language of Appendix A does not lead me to conclude that such

faculty are not "in" the bargaining unit and lose the protections of that bargaining unit status when they are employed in non-degree continuing education programs by York.

Having said that however it is important to state also, as did arbitrator McDowell in *St. Lawrence College supra*, that just because a person is "in" the bargaining unit does not mean that all articles of the collective agreement apply to them. Employees in a bargaining unit may not all have the same terms and conditions of the collective agreement apply. It is not unusual for a collective agreement to provide for different terms and conditions for different employees, or to provide those different circumstances will result in differing applications of clauses of the collective agreement. Whether the substantive terms of the collective agreement apply to bargaining unit members, or the work which they perform, will depend on what the parties have negotiated.

This is where the terms of the collective agreement, the 40+ years of how the parties have applied the collective agreement, and the past practice evidence tendered by the University provides relevant context for it indicates that, until the filing of the grievance in 2019, the parties had not treated the work in non-degree continuing education programs as subject to the terms of the collective agreement. One should not simply ignore that history and easily dismiss how the parties themselves have interpreted and applied collective agreement articles to bargaining unit members.

In this grievance YUFA grieves that treating YUFA members as being excluded from the bargaining unit when they are carrying out work in non-degree continuing education programs violates inter alia articles of the collective agreement pertaining to the appointment of faculty (article 12), the tenure and promotion article (article 13), the conditions of employment article which includes provisions relating to workload and teaching load, (article 18), and the compensation and benefits provisions of the collective agreement (articles 25 and 26). Thus, broadly speaking, in this grievance

YUFA appears to assert that the assignment of work in continuing education, the selection of employees to perform that work and the compensation and benefits to be paid for that work are all subject to various articles of the collective agreement. Certainly, assignment of work, who can access the work and payment for work are generally matters which attract a certified bargaining agent's representation rights and are matters about which parties to a collective agreement may negotiate. Yet, a review of this collective agreement indicates that the articles which deal with such things as assignment of work, workload, and compensation are not easily applied to the non-degree continuing education work at issue in this grievance.

Moreover, prior to the filing of this grievance, since certification and the negotiation of the first collective agreement in 1976, neither YUFA nor any individual bargaining unit member engaged in non-degree continuing education work have ever grieved or complained about York's assignment of that work, the selection of employees to perform it or the compensation paid for that work. For example, with respect to the appointment article, there is no evidence that any bargaining unit faculty member has ever complained that they should have been given a particular non-degree continuing education work assignment. With respect to the tenure and promotion article there is no evidence that any faculty member has ever sought to refer to, or rely upon, their work in non-degree continuing education programs for purposes of tenure and promotion or otherwise. With respect to the terms and conditions of employment article there is no evidence that non-degree continuing education work has ever been related to the "normal workload" or "normal teaching load" under article 18.08. There is no evidence that non-degree courses have ever been referenced in the teaching load documents referred to and required by that article. Indeed, the evidence is to the contrary. Moreover, there is no evidence that anyone has ever raised any issues about that. Neither an individual full-time faculty member nor YUFA has ever complained or grieved that the full-time faculty member's work in non-degree continuing education programs should be considered in the determination of their teaching load.

Finally, with respect to compensation and the issue of "overload" rates there is no evidence that any bargaining unit member engaged in non-degree studies in continuing education has ever complained that the compensation received was not in accordance with the terms of the collective agreement. In this regard the University's evidence that YUFA's Chief Steward was engaged to work in a non-degree continuing education program at the same time as he was engaged in dealing with a grievance about overload rates is particularly significant. In the face of that evidence, I can't accept YUFA's assertion that it was not aware that the terms of the collective agreement were not being applied when its members performed non-degree continuing education work.

The point to be made is that if the currently negotiated terms of the collective agreement applied, or could be applied, to work performed by bargaining unit members working in non-degree studies in continuing education one would have thought that in the 40+ years since certification a grievance or complaint about these types of matters would have surfaced. Either an individual member of faculty or YUFA would have raised an issue that such work should be considered in some fashion when determining teaching load or normal workload. Someone would have raised an issue about access to that work, or compensation for that work. The fact that until the filing of the grievance no one did supports the University's position that the parties did not intend for the collective agreement to apply to the work of non-degree studies in continuing education programs.

Thus, I return to the issue of the "work of the bargaining unit". YUFA agrees that the non-degree work in continuing education programs is not exclusive to the bargaining unit. Others, beyond full-time faculty members of the bargaining unit, are and have been engaged to work in non-degree studies in continuing education programs. In effect, YUFA acknowledges that York can, and has, "contracted out" non-degree continuing education work to outside professionals, faculty from other universities and other subject matter experts. (Indeed, York could have all non-degree work in continuing education programs performed by persons other than full-time faculty members of the bargaining unit.)

YUFA does not seek to represent all those teaching in continuing education. Rather it has taken the position that when members of its bargaining unit are engaged in non-degree studies in continuing education they are covered by the collective agreement. I accept that, as exclusive bargaining agent for appointed full-time faculty members employed by York, YUFA has representational rights to bargain with the University about non-degree continuing education work when it is performed for York by bargaining unit members.

The difficulty in this case is that it does not appear to me that YUFA has ever sought to exercise those representational rights. As noted, the language of the current collective agreement is not easily applied to the non-degree studies work in continuing education voluntarily undertaken by bargaining unit members from time to time. That is not to say that it can't be applied. Merely to say that in this grievance, and in the absence of a specific individual circumstances or complaint, I am not prepared to say that all terms of the collective agreement, or any specific term of the collective agreement, apply to continuing education non-degree work when that work is performed by appointed full-time faculty who are members of the bargaining unit.

The remedial relief requested by YUFA is extensive and in my view much too broad. It should not be granted in this policy grievance and must await specific factual circumstances in an individual complaint or grievance. It is only then that the issues raised by this grievance, including who gets the non-degree continuing education assignment, how that assignment factors into normal teaching load or normal workload, what compensation or benefits attach to that work, etc. can be properly addressed. Addressing the issues and consequences which arise from application of the collective agreement is complex and extends beyond determining who is “in” the bargaining unit and declaring that their work “is governed by the collective agreement” as stated in paragraph 2 of the remedial relief requested in the grievance.

As the parties made specific reference to the “Outside Professional Activities” (article 18.04) and “Overload Rates” (article 25.09) provisions of the collective agreement in their submissions I will however briefly comment on them. Simply put, I do not think that either clause can be applied to bargaining unit members engaged in non-degree studies in continuing education.

I find that there is nothing “outside” about these activities carried out for York. Bargaining unit members who work in these non-degree continuing education programs do so as employees of York as evidenced by the contractual agreement they sign (which refer to the bargaining unit member as “employee”) and their payment through the York payroll system. It appears to me that article 18.04 is more of a permissive provision designed to benefit YUFA members and allow them to “moonlight”. It is not an article designed to enable York to have work done by bargaining unit members, for the University’s benefit, but outside of the collective agreement.

I also find that the “overload rates” article is not easily applied to bargaining unit members who teach in non-degree studies in continuing education programs. Not only is “overload” not defined in the collective agreement, but there is also little in the collective agreement to indicate when or how the schedule of overload rates set out is to be applied in specific circumstances. It is significant that the past practice evidence indicates it has not been applied to non-degree continuing education work. There is nothing in the overload article or elsewhere in the collective agreement which assists in calculating the remuneration to be paid for the kind of “one-of” contracts (which range from a few hours to several days of work) for the non-degree continuing education work at issue in this proceeding. Neither do I have evidence to indicate that bargaining unit members who work in the non-degree continuing education programs are/can be classified as “Course Director” “Tutorial Leader” or “YUFA Overload Marker/Grader” which are the only three “classification” descriptions for which overload rates are set out.

Conclusion

In the result, and for these reasons, I have determined that while employed to work in non-degree continuing education members of the bargaining unit (that is full-time faculty appointed by the Board of Governors of York) continue to be members of the bargaining unit to which the collective agreement may be applied. Put slightly differently the collective agreement may apply to non-degree continuing education work when that work is performed by full-time faculty bargaining unit members. A full-time faculty bargaining unit member does not lose the protection of the collective agreement when they perform non-degree continuing education work even though they do so voluntarily and are not compelled to perform that work.

I have not however determined how the collective agreement applies in any individual circumstance where a bargaining unit member works in non-degree continuing education. It is not obvious to me that the provisions of the collective agreement under which this grievance was filed can be readily applied to that work. Rather, it seems to me that there may be a variety of outcomes dependent on the circumstances and which article of the collective agreement is at issue. As indicated, in the absence of an individual grievance detailing specific facts and circumstances and alleged violations of the collective agreement it is premature to opine now how articles dealing with the appointment of faculty, tenure and promotion, workload, teaching load, compensation and benefits etc. apply to non-degree continuing education work voluntarily performed by bargaining unit members. Those matters are better left to an individual grievance and/or further negotiations between the parties.

Dated this third day of May, 2022

Louisa Davie

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