

IN THE MATTER OF AN EXPEDITED ARBITRATION

BETWEEN:

Kwantlen University College

(the Employer)

AND:

Kwantlen Faculty Association (KFA)

(the Association)

Re: Interpretation of Article 1.05(e) of the Collective Agreement

Arbitrator:	Judi Korbin
Counsel for the Employer:	Colin Gibson
Counsel for the Association:	Lesley Burke O'Flynn
Dates of Submissions:	The Union: August 1 and 20, 2008
	The Employer: August 15, 2008
Date and Place of Hearing:	August 21, 2008 Vancouver, B.C.
Date of Award:	November 20, 2008

The parties agreed that I was properly constituted with the jurisdiction as an arbitrator under their Collective Agreement, and the terms of a Settlement Agreement between them, to hear and determine the matter in dispute.

The Settlement Agreement between the parties was executed on June 4, 2008 and the relevant portions read as follows:

WHEREAS:

- A. The KFA is certified under the Labour Relations Code as the exclusive bargaining agent for a unit of employees of Kwantlen (the "Bargaining Unit"), and a collective agreement covering the Bargaining Unit is currently in effect (the "Collective Agreement");
- B. The KFA filed grievances 2006-30 and 2007-10, in which the KFA alleged that Kwantlen violated the Collective Agreement by among other things failing to regularize the following five faculty members in the Criminology department: Petra Jonas-Vidovic; Shereen Hassan; Andrea Curman; Pat Pitsula; and Adamira Tijerino (the "Grievances");
- C. The Grievances were referred to arbitration before Judi Korbin;
- D. Kwantlen subsequently regularized Ms. Hassan and Ms. Jonas-Vidovic, and the KFA has acknowledged that they have not suffered any monetary loss or damage;
- E. Ms. Curman has obtained employment elsewhere and the KFA has informed Kwantlen that she has not suffered any monetary loss or damage;
- F. **Kwantlen and the KFA have reached the following agreement in full and final settlement of all issues raised in the Grievances;**

NOW THEREFORE Kwantlen and the KFA agree as follows:

...

3. **The parties agree to refer their dispute regarding the interpretation of Article 1.05(e) of the Collective Agreement, as it relates to Kwantlen's right to post regular and non-regular type 2 positions, to expedited arbitration before Judi Korbin. In the arbitration**

proceeding, the parties will not refer to the specific facts of any particular faculty member. The following schedule will apply:

- a. The KFA will deliver its written submission to Kwantlen and Ms. Korbin by August 1, 2008;
 - b. Kwantlen will deliver its written submission to the KFA and Ms. Korbin by August 15, 2008;
 - c. The KFA will deliver any reply submission to Kwantlen and Ms. Korbin by August 20, 2008; and
 - d. An oral hearing will take place on August 21, 2008, where the parties will present oral argument regarding their written submissions.
2. The KFA hereby withdraws the Grievances as settled.
- ...
8. Nothing contained in this Settlement Agreement shall be construed or considered as an admission of liability or wrongdoing on the part of Kwantlen or the KFA.
 9. Judi Korbin shall remain seized to adjudicate any dispute between Kwantlen or the KFA pertaining to the interpretation or implementation of this Settlement Agreement.

(emphasis added)

As noted in the Settlement Agreement, this matter concerns the interpretation of Article 1.05(e), the regularization language in the parties' Collective Agreement. The Association claims that under the Agreement the Employer's management right to post positions is limited by Collective Agreement language providing for regularization of faculty when certain stipulated criteria are met. The Employer contends that even when these criteria are met, under the Agreement and the case law, it always has the right to post regular positions.

The Association seeks an order that in exercising its discretion to create regular positions and to post work, the Employer must do so in a manner that does not negate or undermine a faculty member's rights to convert from non-regular to regular status.

The Union states the outstanding question to be resolved as follows:

Given faculty have rights to convert from non-regular to regular status under Article 1.05(e) of the collective agreement when all conditions are met, when is it appropriate and when is it inappropriate for the employer to otherwise post regular and non-regular positions?

Conversely, the Employer seeks an order that the regularization provisions of the Collective Agreement do not supersede or restrict its ability to post and fill regular or non-regular positions.

In addition, the Association seeks an Order that when a faculty member is in the latter part of his/her second consecutive appointment year, and all stipulated conditions are met, the Employer should include the regularization of that faculty member in its planning for the subsequent appointment year.

In its written submission, the Union frames the adjacent question in this way:

At what point during the second appointment year does a faculty member meet the workload threshold for qualifying for regularization, if all of the other requirements are met?

On this issue, the Employer seeks an order that non-regular faculty must have been employed for two consecutive years at a workload of 50 per cent or greater and meet all other qualifying conditions before possessing any right to regularization arises.

The parties agreed not to refer to specific facts about particular faculty members in this case, but rather to focus on an interpretation of the language of the Agreement. As such, no witnesses were called and the parties submitted their primary positions in writing, followed by a rebuttal submission from the Association. In keeping with the Settlement Agreement, a hearing was then convened for the purpose of oral argument on the interpretation issues.

BACKGROUND

The Employer provided a comprehensive explanation of the changes Kwantlen has undergone over the years, as well as its faculty staffing and budgetary policies, but I have only included the salient points herein.

Kwantlen University College is a post-secondary institution. It was previously a university college. On September 1, 2008, the institution became Kwantlen Polytechnic University, a special purpose teaching university governed by British Columbia's *University Act*, R.S.B.C. 1996, c.468. Kwantlen has five campuses in B.C., located in Surrey, Richmond, Langley, Newton and Cloverdale. It employs approximately 1,000 faculty, 495 support staff and 11 administrators and more than 17,000 students attend annually.

As a university college, Kwantlen developed and offered many four-year academic Bachelor degree programs. In its new capacity as a special-purpose university, Kwantlen will be required to continue to provide adult basic education, technical and trade certificate programs along with an increased focus on more academic programs leading to certificates, diplomas and Baccalaureate and Masters courses and degree offerings.

The Employer and the Association disagree on what Kwantlen's new status will mean in terms of staffing. While the Employer believes the university status and the bid to obtain membership in the Association of Universities and Colleges of Canada ("AUCC") necessitates recruitment of an increased number of specialized and PhD-qualified faculty members who are actively engaged in research and who are able to teach higher level courses, the Association vehemently disagrees, stating that Kwantlen will be a "special purpose university" with a restricted mandate.

Kwantlen employs regular faculty and two categories of non-regular faculty. Non-regular type 1 (NRT1) are hired for a defined period to perform specific work, including teaching one or more discrete courses. NRT1 faculty are not expected to undertake

workload requirements of regular faculty such as: conducting research, serving on committees and/or developing curriculum. Non-regular type 2 (NRT2) faculty are hired for an anticipated one year term with an annual workload of at least 50 per cent. NRT2 faculty have more responsibility than NRT1 faculty. They are expected to carry the same workload requirements as regular faculty and they are accorded the same salary and benefits as regular employees, with the exception of layoff rights.

The term "regularization" refers to a mechanism whereby non-regular faculty gain regular positions without having to compete for them by way of a posting/selection process. The Collective Agreement stipulates specific conditions that non-regular faculty must meet in order to be entitled to regularization. Meeting these criteria is one of two ways that individuals can obtain regular positions; the other, of course, is being hired directly into a posted regular position.

Each department at Kwantlen has a search committee comprised of up to four members: one designated by management and two or three elected by their peers to recruit regular or NRT2 faculty members. The search committee reviews applications, conducts interviews and makes recommendations based on its appraisal of who would be the best candidate for the position. These recommendations are submitted to the appropriate Vice President who makes the final staffing decisions for the Employer.

For NRT1 positions the process is slightly different, as the search committee creates a "Qualified Faculty List" (also known as the "Contract Inventory") of all individuals who have been determined to be qualified for consideration for NRT1 appointments along with the specific courses in the department/program. The Search Committee has "vetted" each individual as being qualified to teach. The Dean then selects individuals from this list for available NRT1 positions.

If, by August 1 of a given year, an NRT1 faculty member is assigned, or reasonably anticipated to be assigned, an annualized workload of 50 per cent or more for a future 12 month period, Kwantlen must issue the individual a NRT2 appointment. Under Article 1.05(d)(ii) the assessment date for determining whether a NRT1 faculty member

should be offered a NRT2 appointment is August 1 for the 12-month period starting September 1.

The Employer explained how Kwantlen prepares its education plans and determines staffing needs. In some faculties, like nursing, the requirements are predictable and relatively static. However, in a number of academic divisions the needs fluctuate significantly depending on a host of variables, thereby requiring a complicated system of analysis and timetabling before it can determine what, if any, positions are available, and the nature of those positions, i.e. if there is enough work to substantiate a regular position or whether NRT1 and/or NRT2 faculty will be used to fill the positions.

The Association outlined that once Kwantlen creates a draft timetable for the coming year it inserts qualified regular full-time and part-time faculty into the schedule. The remaining work, it says, can be packaged as either regular or non-regular and can be posted or assigned with a wide range of latitude within the parameters of the collective agreement. In this regard, the Association says, a "position" is not identifiable, other than the number of units to be taught.

The Employer argued that when it posts regular positions it is able to attract a diverse group of applicants that it cannot attract with non-regular postings. It said, "Because of their temporary nature, vacancies for non-regular positions often attract primarily local candidates who may not have the same level of qualifications and/or specialist depth of experience as those attracted by regular position vacancies."

This, the Employer argues, means that NRT1 and NRT2 faculty, while qualified to teach the courses they are assigned – often entry-level courses – may not be the best candidates to meet Kwantlen's ongoing needs as a polytechnic university offering upper level courses in a number of subject areas.

The Association submits that Kwantlen has virtually identical hiring requirements for regular and NRT2 faculty.

BARGAINING HISTORY

Regularization language has been a contested issue between the parties since its first appearance in their agreement. As well, the concept has been the subject of numerous arbitrations and, as a result, the language itself has been altered several times.

The parties first included the concept of regularization in their 1991-1993 collective agreement. This agreement provided Employers the right to post any regular position and the salient language read as follows:

(f) Regularization

Notwithstanding any other provisions of his Agreement, a faculty member will become regular when either:

- (i) the faculty member has occupied a full-time position in the same discipline/program for 24 consecutive months, including non-instructional time, where that position has not been posted and the faculty member has received only satisfactory evaluations; or
- (ii) a full-time regular position is advertised and the position has been filled by the faculty member on a full-time basis for at least 18 consecutive months, including non-instructional time, provided that the qualifications, abilities and experience of the faculty member are equal to those of the other applicants.

The temporary faculty member will be granted an interview and upon written request, will be given reasons if unsuccessful. ...

This language remained in the parties' agreement until 1998, when sectoral common bargaining was introduced and the "Common Agreement" (1998-2001) was negotiated. The Common Agreement set up a process whereby each institution was responsible for resolving issues, including employment security and regularization, within the context of the Common Agreement intent. Kwantlen and the KFA were one of 16 institutions to be party to this agreement. The relevant provisions of the Common Agreement were as follows:

ARTICLE 6 – JOB SECURITY

6.1 Employee Security and Regularization

6.1.1. Intent

The purpose of this Article is to ensure that, by April 1, 2000, provisions relating to employee security and regularization of employees are established within each collective agreement affecting employees covered by this Agreement and to ensure that the current and future employees who qualify for regularization under the provisions of this Article will be regularized ...

The Common Agreement defined regularization as “the process by which a non-regular employee converts to regular status ...” and stated in Article 6.1.3 (b) and (c):

Amendments to existing employee security and regularization provisions must include:

- (i) (1) entitlement to regularization after a period of time worked of at least two consecutive appointment years of work at a workload of fifty (50%) percent or greater for each of two (2) consecutive appointment years and where there is a reasonable expectation of ongoing employment for which the employee is qualified at a workload of at least fifty (50%) percent or greater for two semesters in the next appointment year;

or

- (2) entitlement to regularization after the employee has performed a workload at least one hundred and twenty (120%) percent of an annualized workload over at least two (2) consecutive years and there is a reasonable expectation of an ongoing workload assignment for which the employee is qualified, of at least fifty (50%) percent on an annualized basis over the immediately subsequent appointment year
- (ii) requirements that an employee receives a satisfactory evaluation prior to regularization. An employee will be deemed to have received a satisfactory evaluation if one has not been undertaken by the employer. The employer may evaluate a non-regular employee at least once each 12 month period and the employee may request an additional evaluation not more often than once in each 12 month period.
- (c) In developing revised employee security and regularization provisions, local parties and/or JADRC [Joint Administration and Dispute Resolution Committee] and/or the arbitrator must consider the effects of any conversion from non-regular to regular status, including:

- (i) entitlement to confirmation of appointment as a regular employee
- ...
- (ii) accumulation of regular seniority and severance entitlement related to appointment to regular status
- ...
- (viii) the right of the employer to create, post and fill a new position or to post and fill a vacant position.

Once the Common Agreement was in place, the parties entered into institutional negotiations at the local level to deal with the language for their local contracts. Failing agreement on the issues locally, the matter was referred to a Joint Administration and Dispute Resolution Committee ("JADRC") and if the JADRC was unable to reach agreement on the resolution of the local dispute, it was to be forwarded to interest arbitration before Arbitrator Don Munroe.

The first parties to appear before Arbitrator Munroe were Malaspina University-College and its faculty unions. In his *Malaspina University College*, [2000] B.C.C.A.A. No. 100, January 18, 2000, (the "Malaspina Munroe Award"), award, Arbitrator Munroe addressed the question of whether the right to regularization restricted the employer's normal management right to post regular positions – the very question the parties continue to debate today.

The relevant portions of Arbitrator Munroe's award, for the purposes of this case indicated that he recognized that temporary faculty are not always drawn from as wide a pool or with the same level of qualifications as regular faculty; and, that "lockstep" progression from temporary to regular employment was an inappropriate application of the contract wording.

At paragraph 31, Arbitrator Munroe found:

Management right to Regularize Positions: I agree with Malaspina that nothing in the new regularization provision should prohibit it from regularizing any position at any time as it deems necessary. That is a normal management right which ought not to be precluded by the new regularization provision. The Association fears abuse, but the assertion of potential abuse is not proof if it. I am unwilling to presume bad faith.

And, at paragraph 35, he found:

Right of First Refusal (Article 9.2.2): I accept Malaspina's argument that temporary faculty are not always drawn from the same broad hiring pool as regular faculty and may be hired with lesser or different qualifications than would be required or expected for a regular position; that the retention of the "right of first refusal" (which can arise after only one year of temporary pro rata employment) along with the new regularization provision could result in lockstep progressions from temporary to regular status which are inappropriate; that the bargaining history between the parties reveals Article 9.2.2 as the hard-fought compromise of past collective bargaining disputes about regularization of the person – in effect as the parties' bargaining surrogate for a regularization provision; and that it would be wrong and unfair to the institution as a whole, including its student body, to continue in force the "right of first refusal" contained in Article 9.2.2 in addition to the new regularization provision.

The next parties to appear before Arbitrator Munroe were Kwantlen and the KFA. The KFA submitted a proposal to Arbitrator Munroe outlining terms it suggested under which the Employer was entitled to post positions. The following was the Association's proposed language (at page 4 of its Regularization Language Proposal):

Preamble (Declaring a vacancy)

Before declaring a vacancy and initiating the Search process, the Employer will follow the following allocation of available work:

- (1) All regular full time faculty have the right to maintain workloads pursuant to 1.04(g)
- (2) When work becomes available within a department, it shall be offered by the administrator responsible for the department to qualified faculty in the following order:
 - (a) to regular part time faculty, in order of seniority, in order to obtain work up to a full time annualized workload, then
 - (b) to non-regular faculty with more than two years of FTE service per 1.04(j), in order of seniority, to obtain work up to a full course load, then
 - (c) to non-regular faculty with less than two years of FTE service per 1.04(j), in order to obtain work up to a full time annualized workload.

- ...
- (3) An employee is qualified to perform work if:
 - (a) the search committee determined at the time of initial hire or subsequent review that an employee has the qualifications to perform the work; or
 - (b) an employee has performed work since their date of hire that is substantially similar to the available work.
 - (4) If a faculty member has previously performed work that is substantially similar to the available work and was evaluated by the administrator responsible as "unsatisfactory" in the performance of that work, the administrator may offer the work to another qualified faculty member with less seniority.
 - (5) Notwithstanding this allocation procedure, the Employer has the right to declare that a full or part-time regular position vacancy exists, and initiate the Search process, when a position is created by the Employer consisting of new work not previously performed in the bargaining unit.
- ...

Under the Association's proposal, the Employer would only be permitted to initiate a search "when a position is created by the Employer consisting of new work not previously performed in the bargaining unit."

In his award, *Kwantlen University College*, [2000] B.C.C.A.A.A. No. 218 (the "Kwantlen Munroe Award") Arbitrator Munroe declined to accept any of the above noted changes to the parties' agreement and, pursuant to an amendment proposed by Kwantlen to the preamble of Article 4.02, he stated at paragraph 27:

I think the better place to locate such a provision is in the article dealing with regularization. The point, quite simply, is that the right of conversion from non-regular to regular status is not to the exclusion of the normal management right to post a position as a regular vacancy as management may decide in good faith to be necessary. In the present proceeding, the Association argued that Article 6.1.3(c)(viii) of the Common Agreement effectively sets aside the normal management right as I have just summarized it. However, I do not read the last-mentioned provision as precluding an employer from declaring a position occupied by a non-regular faculty member to now be a regular vacancy requiring posting and filling as such. But that said, I am concerned about Kwantlen's precise formulation of the right intended to be

codified. As worded by Kwantlen, it might be construed as validating the posting of a position as a regular position for the sole purpose of defeating an individual faculty member's right to regularization. **As I said in Malaspina, I am not prepared to presume bad faith; but neither am I prepared to award language which may later be argued as warranting something more than the exercise in good faith of a normal management right. Accordingly, my award on this point is that a sub-article (b) shall be added to the new regularization language aforesaid which shall read as follows:**

(b) Nothing in the above paragraph (a) prohibits the employer's right to regularize any position as it deems necessary.

(emphasis added)

That is the same as the language adopted in Malaspina; and, as I trust is clear from my comment at page 17 of the award in that case, I am presuming good faith in the exercise of the management right as codified. (At paras. 27 & 28)

Arbitrator Munroe went on to say the following about the KFA's proposals regarding the allocation of available work, the posting of vacancies and the search process (at paras. 30, 31 and 35):

The existing local collective agreement includes provisions dealing quite extensively with such matters. Apart from the regularization language itself, these can be found at Articles 1.04(c)(iv), 1.04(g) and the several sections and subsections comprising Articles 4.01-4.04.

The Association has made proposals which would fundamentally change the local collective agreement as it relates to such matters. In brief summary, the Association's proposals, if accepted, would: (a) prohibit the declaring of a vacancy and the initiating of the search process until the available work (unless it is "new work not previously performed in the bargaining unit") had been allocated internally; (b) recast the rights of regular full-time faculty members under Article 1.04(g); (c) enlarge upon the existing rights of regular part-time faculty members under Article 1.04(c)(iv) to accumulate additional work; (d) deem employees to be qualified to perform available work in certain circumstances; (e) collapse the existing search processes for non-regular faculty (i.e., the former temporary and contract faculty) and regular faculty into a composite search process; (f) further alter the search process so as to be consistent with the requirement aforesaid for internal allocation; and (g) completely change the existing "relative ability" selection test (where seniority is a tie-breaker) to a "sufficient ability" test (where the senior applicant with two or more years of FTE service gets the work provided s/he is found by the Search Committee or deemed to be qualified).

That takes me back to the Association's proposed changes in this area. With one exception, I decline to award any of the proposed changes. They are not mandated in the sense of required by the Common Agreement, and their adoption would result in wholesale changes to the local collective agreement in areas which undoubtedly have been the subject of prior hard bargaining. In my view, the Association's proposals largely run up against Article 6.1.6(c) of the Common Agreement which states that, "In making his/her decision, the arbitrator will make changes necessary to amend employment provisions within the parameters established under Article 6.1.3 above that require the least amount of change in existing provisions necessary to meet the requirements of this article and that the arbitrator considers to be reasonable".

In the result, Mr. Munroe rejected all of the KFA's proposed changes in the above areas, with the exception to an adjustment to Article 4.02(n) to alter the "relative ability" test in that provision to a "sufficient ability" test.

The 2001-2004 agreement between these parties reflected Arbitrator Munroe's conclusions and contained regularization language as follows:

Article 1.04 DEFINITIONS

(e) Entitlement to Conversion to Regular Status

The conversion of status from non-regular to regular will occur when the faculty member has a workload of 50% or greater for each of two (2) consecutive appointment years of work, or who has worked at a workload equivalent of 120% in total over a period of two (2) consecutive years, provided that:

(i) there is a reasonable expectation of ongoing employment at a workload level of at least 50% in each of two semesters within the appointment year subsequent to that in which the entitlement to conversion arises or there is a reasonable expectation of an ongoing workload assignment of at least 50% on an annualized basis within the appointment year subsequent to that in which the entitlement to conversion arises, and

(ii) the employee is qualified for the work in question, as determined by the Search Committee at the time of initial hire or subsequent review, and

(iii) the employee's most recent evaluation for regular employment within the preceding twelve (12) month period has been satisfactory. The

employee will be deemed to have received a satisfactory evaluation if one has not been undertaken by the employer. The employer may evaluate a non-regular employee at least once each 12 month period and the employee may request an additional evaluation not more often than once in each 12 month period.

Nothing in the section above prohibits the employer's rights to regularize any position as it deems necessary.

This language is the seed for the regularization language that exists in the parties' current Agreement.

In addition, the 2001 agreement also included language providing incumbent NRT2 faculty with a right to automatically be awarded a further non-regular position if one continued to exist in a relevant department. It also provided certain rights to NRT1 faculty members. These are as follows:

Article 4.02

...

- (m) In the event a non-regular type 2 faculty member has satisfactorily filled a non-regular type 2 appointment and if the non-regular type 2 position continues to exist and is filled by the Employer, the non-regular type 2 faculty member who has been filling the position will be offered the appointment. (See Article 1.04(e) on regularization)
- (n) Non-regular type 1 faculty members who have two (2) or more years FTE service as per Article 1.04(i) and who have successfully taught in the discipline/program will be given preference over other applicants for non-regular type 2 positions, providing they have the qualifications and abilities for the non-regular type 2 position.

In the 2004-2007 round of bargaining, the parties declined to participate in multi-institute bargaining at a common table and bargained a single collective agreement harmonizing the terms of the Common Agreement and the local agreement. Outstanding matters in this set of bargaining, included one entitled "all issues related to regularization" and this was referred to interest arbitration before Vince Ready, who issued *Kwantlen University College v. Kwantlen Faculty Association*, [2005] B.C.C.A.A.A. No. 148 (Ready). This decision and Arbitrator Ready's March 19, 2008 Kwantlen decision constitute the most

recent determinations on the content and application of regularization language in the agreement.

In the KFA's 2005 submission to Arbitrator Ready it summarized, among other points, that it sought to "ensure regularization is not prevented by the posting of work externally." In that matter, the KFA submitted at page 5 of its submission:

One of the key elements of the Munroe decision was the role that posting could play in preventing regularization. Munroe allowed the insertion of the sentence: "nothing in the section above prohibits the Employer's rights to regularize any position as it deems necessary." However, he cautioned that he was "presuming good faith in the exercise of the management right as codified." The KFA has concerns that the management has not acted in good faith in this matter. The KFA has had to grieve the posting of positions that have prevented regularization.

The KFA also requested that the allocation of work for non-regular faculty (as per Article 4.02(n)) be based on seniority even before the incumbent achieved two years FTE experience.

The Employer's submission in the present case phrased the KFA amendments as follows:

Attached to the KFA's submission were proposals for amendments to the Collective Agreement, which included substantial changes to the regularization language in Article 1.04.

In its proposed 1.04(b), the KFA proposed a work allocation process similar to the process it had proposed unsuccessfully to Arbitrator Munroe, whereby qualified non-regular faculty would obtain a right of first refusal over available work on the basis of their seniority.

In its proposed 1.04(c), the KFA proposed new criteria for regularization, which eliminated the prospective "reasonable expectation" requirements in Article 1.04(e)(i), and replaced them with the following:

An employee will be regularized if they have met one of the following criteria:

- (i) The employee has worked at least 50% of an FTE workload in each of the two preceding 12 month periods; or

- (ii) The employee has worked at least a total of 120% of an FTE workload over the previous 24 months; or
- (iii) The employee has worked at least 20% of an FTE workload each of the preceding four 12 month periods.

For its part, the Employer sought to have the automatic regularization provision, Article 1.04(e), deleted from the agreement and further requested that Article 4.02(m) be amended such that Kwantlen could post NRT2 positions, rather than always having them go to the incumbent, and to delete the "conveyor belt provision", Article 4.02(n), entirely.

In the result, Arbitrator Ready in *Kwantlen, supra*, [2005] rejected Kwantlen's proposal to delete Article 1.04(e) and at the same time rejected the Association's regularization-related proposals. Regarding the awarding of NRT2 positions per Article 4.02(m) and 4.02(n), he stated at paragraph 71:

The other notable distinction is that at Malaspina – and at a number of community colleges that have similar regularization language – the continuous stream provisions that appear in Kwantlen's Articles 4.02(m) and 4.02(n) do not exist. Whereas non-regular faculty at such institutions are entitled to be regularized *if they achieve* a specified amount of workload, they do not have the same *rights to claim* available non-regular work that Kwantlen's non-regulars enjoy. This "right of first refusal" for available non-regular work was specifically rejected by Arbitrator Munroe in the Malaspina award as "inappropriate", "wrong" and "unfair" in the context of regularization language:

Right of First Refusal (Article 9.2.2): I accept Malaspina's argument that temporary faculty are not always drawn from the same broad hiring pool as regular faculty and may be hired with lesser or different qualifications than would be required or expected for a regular position; that the retention of the "right of first refusal" (which can arise after only one year of temporary pro rata employment) along with the new regularization provision could result in lockstep progressions from temporary to regular status which are inappropriate; that the bargaining history between the parties reveals Article 9.2.2 as the hard-fought compromise of past collective bargaining disputes about regularization of the person – in effect as the parties' bargaining surrogate for a regularization provision; and that it would be wrong and unfair to the institution as a whole, including its student body, to continue in force the "right of first refusal" contained in Article 9.2.2 in addition to the new regularization provision.

Arbitrator Ready amended Article 1.04(e) by deleting the words "or who has worked at a workload equivalent of 120% in total over a period of two (2) consecutive years" in the first paragraph, deleted Article 4.02(n) entirely, and amended Article 4.02(m) to reflect the fact that in the case of an ongoing NRT2 position, it was the Employer's discretion to either offer it to the incumbent or to post it. The Association says that the overall effect of Mr. Ready's changes was to make it more difficult for non-regular faculty to fulfill the required service to become qualified to convert to regular status.

THE COLLECTIVE AGREEMENT

For the current Agreement language, Kwantlen and the KFA negotiated outside the Sectoral Table. At this round of negotiations, the KFA again tabled proposals requesting improved regularization procedures including allocation of work stipulations that were very similar to those it had previously proposed, i.e. work was to be allocated first to regular employees and then to qualified non-regular employees and only work not previously allocated would go to new employees.

All of these proposals were rejected by the Employer and therefore none of these proposals were included in the current language between the parties. The relevant portions of the current Collective Agreement follow:

1.05 DEFINITIONS

(a) Regular Faculty Position

A regular faculty member's position is one that exists or is established to meet the ongoing needs of the Employer on a half-time basis or greater basis.

(b) Full-time Regular Faculty

A full-time regular faculty member is one who occupies a full-time regular position established by the Employer or by this Agreement. Full-time regular faculty members shall receive all benefits provided by this Agreement.

(c) Part-time Regular Faculty Members

A part-time regular faculty member is one who occupies a part-time regular position established by the Employer. Part-time regular faculty members have

the same rights and obligations as full-time regular faculty members and are entitled to all benefits provided by this Agreement on a pro-rated basis ...

(d) Non-Regular Faculty Members

Non-regular faculty members are those that do not hold a regular position or who have not satisfied the requirements for regularization in Article 1.05(e). There are two (2) types of non-regular faculty.

(i) Non-Regular Type 1 Faculty Members

A non-regular Type 1 faculty member is a non-regular faculty member who is hired for a defined period, to teach specific courses or perform specific work. non-regular Type 1 faculty may only be hired for specialized requirements, experimental offerings, timetabling anomalies, substitution, vacation replacement, short-term emergency circumstances, work that is not expected to be ongoing or work that does not provide them with an assignment that qualifies for non-regular Type 2 status at the August 1 assessment date. All non-regular Type 1 faculty members will receive salary according to the provisions of Article 10.

(ii) Non-Regular Type 2 Faculty Members

A non-regular Type 2 faculty member is one who is assigned or reasonably anticipated to be assigned an annualized workload of 50% or greater for a future 12-month period.

Status Assessment

There is one assessment date: August 1 for the 12 month period starting September 1. The purpose of this assessment date is to determine whether a Type 1 non-regular faculty member should be offered a Type 2 appointment. It shall not prevent the Employer from establishing non-regular Type 2 positions with different appointment terms or commencement dates in accordance with the Employer's needs.

It is the responsibility of non-regular faculty who are on the "qualified faculty list" in more than one discipline/program to notify the relevant administrator(s) of this fact at the time work is offered to them by the administrator(s). It is the responsibility of the administrator(s) who have been so notified to check if the workload assigned across disciplines/programs would qualify as Type 2.

Replacement of Regular Faculty

When the Employer replaces a regular faculty member on leave, Long Term Disability, alternate duty or fills a position that is not expected to be ongoing and the workload available meets the requirements as outlined above, the Employer will issue a Type 2 non-regular appointment.

(iii) Additional Work

Where additional work is assigned to a non-regular Type 2 faculty member after the beginning of his/her appointment year, the Type 2 faculty member's designated workload percentage will remain unchanged for all purposes, including benefits, professional development and vacation, for that appointment year. The Type 2 faculty member will be paid for the additional work on the Article 9 salary scale plus 25% for the period of additional work performed.

Where additional work is assigned to a non-regular Type 1 faculty member after the beginning of the 12 month period starting September 1st, such that the Type 1 faculty member's annualized workload for that year becomes 50% or greater, the faculty member will retain Type 1 status, but will be paid for all work during that year at the contract rates set out in Article 10 for the applicable mode, plus 32%. The Type 1 faculty member's pay will be adjusted accordingly, retroactive to the beginning of that year.

Pension contributions for additional work will be made as required by the applicable regulations pertaining to the College Pension Plan.

(e) Entitlement to Conversion to Regular Status

The conversion of status from non-regular to regular will occur when the faculty member has a workload of 50% or greater for each of two (2) consecutive appointment years of work, provided that:

- (i) there is a reasonable expectation of ongoing employment at a workload level of at least 50% in each of two semesters within the appointment year subsequent to that in which the entitlement to conversion arises or there is a reasonable expectation of an ongoing workload assignment of at least 50% on an annualized basis within the appointment year subsequent to that in which the entitlement to conversion arises, and
- (ii) the employee is qualified for the work in question, as determined by the Search Committee at the time of initial hire or subsequent review, and
- (iii) the employee's most recent evaluation for regular employment within the preceding twelve (12) month period has been satisfactory. The employee will be deemed to have received a satisfactory evaluation if one has not been undertaken by the employer. The employer may evaluate a non-regular employee at least once each 12 month period and the employee may request an additional evaluation not more often than once in each 12 month period.

Nothing in the section above prohibits the employer's rights to regularize any position as it deems necessary.

...

ARTICLE 4 – SEARCH PROCEDURES

...

4.02 SEARCH FOR REGULAR AND NON-REGULAR TYPE 2 FACULTY MEMBERS

Preamble:

Whenever a vacancy arises, as determined by the Employer, it shall be filled by the following process:

...

(i) In the event a regular position is advertised and the position has been filled by a non-regular type 2 faculty member for two or more years, the non-regular type 2 faculty member who has been filling the position will be given preference over other applicants providing the qualifications, abilities, and experience of the non-regular type 2 faculty member are equal to the applicant(s).

...

(m) If a non-regular type 2 position that has been filled by a non-regular type 2 faculty member continues to exist and is filled by the Employer, the Employer may elect to either:

- (i) offer the incumbent another non-regular type 2 appointment, provided that he or she has filled the position satisfactorily; or**
- (ii) post the non-regular type 2 position.**

(emphasis added)

ARTICLE 12 – WORKING CONDITIONS

12.01 NORMAL DUTIES

(a) Faculty members are accountable for 10 months of the year. The 10 months accountable time includes such activities as teaching, the counseling of students, curriculum/program development, professional development and participation on a variety of educational committees.

...

(i) There is an inherent assumption that the duties of regular and non-regular type 2 faculty members involve responsibilities beyond those expected or non-regular type 1 faculty members.

In the fall of 2007, Kwantlen and the KFA advanced to interest arbitration their dispute over the wording in Article 1.05(e), specifically “ongoing employment” and “ongoing

workload assignment". Arbitrator Ready phrased the question before him as "the issue of replacement hours in the calculation of conversion to regular status under Article 1.05(e) remains outstanding." In *Kwantlen University College v. Kwantlen Faculty Association*, [2008] he found that a "reasonable expectation of an ongoing workload" was not an onerous qualification for conversion to regular status and thus did not "require the kind of stringent and detailed analysis being proposed by the Employer." Arbitrator Ready then went on to address the Employer's concerns about ending up with too many regular employees as a result of his decision (at page 18):

While the concerns of the Employer are understandable, it has other methods at its disposal to prevent the negative outcomes it suggests might flow from the regularization of non-regular faculty. The comments of Arbitrator Munroe in *Re Kwantlen*, supra, should be reinforced:

The point, quite simply, is that the right of conversion from non-regular to regular status is not to the exclusion of the normal management right to post a position as a regular vacancy as management may decide in good faith to be necessary. (para 27)

In other words, the Employer retains its management rights and is fully able to post and fill regular faculty positions subject, of course, to the other provisions contained in the Collective Agreement.

POSITIONS OF THE PARTIES

The Association posits that faculty members are granted the right to convert from non-regular to regular status under Article 1.05(e). At the same time, it acknowledges the Employer's right to post positions. Therefore, it says, the question is whether the collective agreement, and specifically the Article in question, places a limit on that managerial right for some regular positions.

And from this question, it says, flows an adjacent question regarding the timing of meeting the workload threshold for qualifying for regularization.

The KFA contends that seniority is one of the most important and far-reaching benefits of the trade union movement and that Article 1.05(e) provides the closest thing to seniority in the agreement between the parties. As a result, it argues, "the rights

afforded by this language cannot be underestimated." And those rights, it says, include the right to be regularized providing certain specific conditions are met.

The Association submits that the Employer's discretion to post is tempered by its obligation to do so fairly and reasonably and within the context of the language of the collective agreement so as not to negate or undermine a faculty member's right to regularize, and therefore deny that employee job security.

The Association asserts that the language of Article 1.05(e) is clear and unequivocal. It points out that it states, "The conversion of status from non-regular to regular *will occur*" (emphasis added). Therefore, it says, the Employer's discretion does not lie between regularizing or posting a position, rather its discretion lies over the qualifications identified in Article 1.05(e) that must be met to obtain the right to regularize – those being: a workload of 50 per cent or greater for two consecutive years; reasonable expectation of ongoing employment; that the employee is qualified for the position; and, that the employee's most recent evaluation was satisfactory.

The KFA contends that if Article 1.05(e) did not create an obligation to regularize when particular conditions are met, then the Employer would be unfettered in its discretion under 4.02 to always post regular positions and thus it could prevent non-regular faculty from ever being regularized. Such an interpretation, it argues, cannot be the intended effect of the agreement or of the jurisprudence. Indeed, it says, such a reading does not support an "entitlement" to conversion to regular status, as the title of Article 1.05(e), Entitlement to Conversion to Regular Status, declares.

According to the Association, the Employer's position that it can post any position puts Article 4 and Article 1.05(e) in conflict and negates the rights of non-regular faculty who qualify to become regularized. Instead, it says, a fair and reasonable interpretation "would be to recognize that the employer's discretion to post regular and non-regular work is a broad, but not an unlimited management right." The limits are the conditions for regularization set out in 1.05(e). Once a non-regular employee meets those conditions, he/she is entitled to be regularized and it would not be fair or reasonable for

the Employer to post the position in question. It says that its interpretation of limitations to management rights fulfills Arbitrator Ready's mandate for a "proper balance."

The Association says that once it has established non-regular employees' rights to regularize, the next question is, at what point during the second appointment year (assuming all other criteria are met) does an employee meet the workload threshold for regularization?

The Collective Agreement states that a non-regular faculty member must have had a workload of 50 per cent or greater for each of two consecutive appointment years of work to be eligible for regularization. The Association points out that most faculty teaching assignments go from September 1 to August 31, with the teaching requirements usually fulfilled by April. As a result, the Association submits that during the latter part of the second consecutive appointment year (the faculty member's fourth semester), the "employee should be regularized" as Kwantlen's staff forecasting is completed at least six months ahead of the next intake semester and as such management would be aware of positions coming up.

It argues that this means the employees in question would be considered regular during the course planning and staffing for the subsequent year so the employee goes on annual summer vacation knowing he/she will have regular status at the beginning of the new September term, otherwise they would be either delayed or denied their regularization rights. The Association says this interpretation of the timing is necessary to ensure that employees are not forced to wait another year after they have completed the required two, to access the benefit of regularization.

The Association relies on the following cases in support of its position: *Malaspina University-College –and- Malaspina Faculty Association and BC Government and Service Employees' Union*, (Munroe), *supra*; *Kwantlen University College –and- Kwantlen College Faculty Association*, (Munroe), *supra*; *Kwantlen University College –and- Kwantlen Faculty Association*, (Ready), *supra*; *Kwantlen University College –and- Kwantlen Faculty Association*, unreported, March 19, 2008 (Ready); *Kwantlen College –and- Kwantlen College Faculty Association*, [1995] B.C.C.A.A.A. No. 464 (Greyell);

Health Services and Support – Facilities Subsector Bargaining Association et al v. Province of British Columbia, 2007 SCC 27; *Re School District No. 75 (Mission) –and- CUPE Local 593* (2002), 71 C.L.A.S. 164 (Foley); *Re Blue Line Taxi Co. Ltd. –and- Retail, Wholesale & Department Store Union, Ontario Taxi Union, Local 1688* (1992), 28 L.A.C. (4th) 280 (Bendel); and *Principles of Administrative Law*, Jones & de Villars, 2nd Edition.

The Employer, on the other hand, asserts that the main issue in this dispute is whether the particular language in Article 1.05(e), or any other provision, supersedes or limits its ability to exercise its management right to post regular and NRT2 positions. If there is any such restriction of management rights, it says that the onus is on the Association to prove that it clearly and unequivocally agreed to restrict its fundamental management right to post positions as per the ruling set out by Arbitrator Chertkow in *Re Wire Rope Industries Ltd.* (1982), 4 L.A.C. (3rd) 323.

The Employer contends that contrary to the Association's assertions, the collective agreement contains no such restrictions on management's rights to post positions, much less any indication that management agreed to restrict this right. In fact, it says, the language actually confirms that management rights supersede regularization rights. Here it relies on the last sentence of Article 1.05(e) which reads:

Nothing in the section above prohibits the Employer's rights to regularize any position as it deems necessary.

The Employer interprets this sentence to mean that it can post any position and bolsters its argument by the fact that Article 4.02(m) expressly grants it the right to post NRT2 positions, even when there is an incumbent.

It also relies on what it characterizes as Arbitrator Munroe's finding that the Employer has the right to post at any time but says this right is tempered by the Employer's acknowledged obligation to act in good faith when posting a position, i.e. post only for a proper and bona fide reason.

Furthermore, the Employer relies on Arbitrator Munroe and Arbitrator Ready's emphasis on preventing "lockstep" regularization and the right of first refusal.

So, how does the Employer believe the regularization process should work? It explains that when regular vacancies are posted, the Employer states that non-regular faculty members are entitled to apply for these positions and may be awarded the regular position by way of the search process described in Article 4.02. Here the Employer says,

If the position is posted as an NRT2 vacancy and the non-regular incumbent meets the workload requirements set out at the beginning of Article 1.05(e) and is successful on the NRT2 posting he/she will also be entitled to be regularized.

However, the Employer adds, if the non-regular faculty member is unsuccessful in attaining the posting, and if there is no other work available for his/her qualifications, then the employee is not entitled to regularization because there will be no "reasonable expectation" of work for that person in the subsequent year with the meaning of Article 1.05(e)(i).

The Employer contends that its interpretation is what Arbitrator Ready contemplated in his 2005 award when he removed Article 4.02(n) from the agreement and expressly gave the Employer the right to post an NRT2 position in 4.02 (m). The Employer argues that this outcome preserves management's right to post and ensures non-regular faculty members who meet the qualifications will be regularized, but prevents the lockstep progression from non-regular to regular that Arbitrator Munroe found to objectionable. It also underlines the fact that non-regular faculty members are not necessarily the best candidates for regular positions.

The Employer summarizes that the limited regularization language pre-1998 was tempered in the 1998-2001 negotiations and "leveled the playing field" by balancing the interests of individual NRT2 faculty members while being mindful of management rights. It argues that Arbitrator Ready's 2005 and 2008 awards reinforce that balanced perspective.

In practice, the Employer explains that if an otherwise qualified NRT2 faculty member (i.e. a faculty member who has met all the criteria listed in Article 1.05(e)) is about to complete his/her second consecutive year at 50 per cent or more workload level – thus meeting all the prerequisites for regularization, and if it appears that the work will continue, the dean of the department can either not post the position, at which point the incumbent will be regularized as per the language and intention of Article 1.05(e); or, post the position as a regular or non-regular vacancy for which the incumbent can compete. If the incumbent is the successful applicant, then he/she will obtain regularization regardless of whether the posting was regular or non-regular. If not, then he/she will not obtain regular status in that position. In all of this, the Employer agrees, management must exercise its rights reasonably and in good faith.

The Employer asserts that the Association has repeatedly been thwarted in its attempts, through arbitration and bargaining, to oblige the Employer to regularize faculty without posting or to tie regularization rights to seniority.

The Employer vociferously argues that its right to post regular positions is in the best interests of the university, as it enables it to hire the best available candidates – a requirement that it says has become increasingly important as the school attempts to live up to its new status. It says that as a four-year undergraduate institution faculty its academic departments now require areas of specialization and expertise that complement one another and support the Department's needs and degree programs. As such, it strongly objects to what it characterizes as the KFA's suggestion that it can "mix and match" faculty, stating that "regular faculty are not interchangeable; they have distinct qualifications, expertise and specializations."

According to the Employer, non-regular and regular faculty do not necessarily require the same qualifications as the non-regular employees typically teach entry-level courses. It submits that Munroe accepted this premise.

If the KFA succeeds, the Employer says its ability to perform with respect to delivering quality educational programs within a defined budget will be severely curtailed – an

outcome that is avoided by maintaining the Employer's right to post and source the best faculty for the job.

With respect to the Association's question about the timing of regularization, the Employer asserts that the answer clearly lies in the collective agreement which states that non-regular faculty must complete two consecutive appointment years before meeting the qualifications for regularization. The Employer asserts that there is no language to support an argument that the right to regularization crystallizes at some point before the completion of the faculty member's second consecutive appointment year.

Moreover, the Employer asserts that not all faculty has the summer semester off and further, that appointing faculty in the spring would limit its flexibility in terms of meeting budgets and student needs.

The Employer relies on the following case law in support of its position: *Re Wire Rope Industries, supra Kwantlen University College v. Kwantlen Faculty Association*, [2005] B.C.C.A.A.A. No. 148 (Ready); *Kwantlen University College –and- Kwantlen Faculty Association*, unreported, March 19, 2008 (Ready); and *Malaspina University College*, [2000] B.C.C.A.A.A. No. 100, January 18, 2000 (Munroe).

The Association argued in reply the Employer has control of every aspect of an employee's potential entitlement to regularization from hiring, to regular evaluations, to setting teaching schedules, and finally to the right to lay off when circumstances require it. As well, in its rebuttal, the Association explained that it is not seeking a significant intrusion into management rights, but rather a balancing of those rights in order to create a harmonious reading of the various collective agreement provisions.

As well, in reply, the Association asserted that both it and the Employer have had "partial success" at both the bargaining table and at arbitration and that changes to the regularization language have not altered the entitlement to regularization, only the criteria required to get there.

The Association also argued in reply that there is no correlation between Kwantlen obtaining university designation and a drive for greater flexibility in hiring regular staff because Kwantlen actually falls into a new category of university, a "special purpose teaching university" with a restricted mandate that limits its ability to engage in research.

Moreover, the Association says that the Employer is obfuscating the hiring situation by claiming that it cannot attract qualified applicants to NRT2 positions. In fact, the Association argues, the Employer only has one set of minimum qualifications that must be applied to every regular or NRT2 candidate.

Finally, the Association argued in its reply that the aversion to the "lockstep" process that Arbitrator Ready was trying to eliminate referred to the old wording of Articles 4.02(m) and 4.02(n) which accorded non-regular employees the right to automatically obtain available non-regular positions and hours, and had nothing to do with regularization.

ANALYSIS AND DECISION

There are two questions before me in this matter. The first is whether the Employer's right to post positions is limited by the Collective Agreement language providing for regularization of employees.

In order to interpret the parties' Collective Agreement language in this matter, I have carefully reviewed not only their arguments and the jurisprudence with respect to the interpretation of Collective Agreements, but the words of both Arbitrators Munroe and Ready as noted herein.

Of particular importance in this analysis was the following stated by Arbitrator Munroe in *Re Kwantlen, [2000] supra*, at paragraph 27 and restated herein for the reader's convenience.

...

The point, quite simply, is that the right of conversion from non-regular to regular status is not to the exclusion of the normal management right to post a position as a regular vacancy as management may decide in good faith to be necessary. In the present proceeding, the Association argued that Article 6.1.3(c)(viii) of the Common Agreement effectively sets aside the normal management right as I have just summarized it. However, I do not read the last-mentioned provision as precluding an employer from declaring a position occupied by a non-regular faculty member to now be a regular vacancy requiring posting and filling as such. But that said, I am concerned about Kwantlen's precise formulation of the right intended to be codified. As worded by Kwantlen, it might be construed as validating the posting of a position as a regular position for the sole purpose of defeating an individual faculty member's right to regularization. As I said in Malaspina, I am not prepared to presume bad faith; but neither am I prepared to award language which may later be argued as warranting something more than the exercise in good faith of a normal management right. Accordingly, my award on this point is that a sub-article (b) shall be added to the regularization language aforesaid which shall read as follows:

(b) Nothing in the above paragraph (a) prohibits the employer's rights to regularize any position as it deems necessary.

That takes me to the Collective Agreement language at issue which has not changed significantly since Arbitrator Munroe's comments. It is trite law to note that all words in a collective agreement are to be given meaning and words of a particular clause must be interpreted in the context of the agreement as a whole. In this case, the provisions of Article 1.05(e) and Article 4 are of particular significance.

Article 1.05(e) entitles an NRT2 who has met certain conditions to be regularized, notwithstanding that the parties have agreed that nothing "in the section above prohibits the Employer's rights to regularize any position as it deems necessary."

While Article 4.0, "Search for Regular and Non-Regular Type 2 Faculty Members", does not contain a clear statement about the "right to post all regular positions," I am satisfied it presumes and implies the right to regularize and post such positions when the Preamble of Article 4.02 and the language of 4.02(i) are read together with Article 1.05(e). For the reader's convenience these provisions are repeated herein.

4.02.1 SEARCH FOR REGULAR AND NON-REGULAR TYPE 2 FACULTY MEMBERS

Preamble:

Whenever a vacancy arises, as determined by the Employer, it shall be filled by the following process:

...

- (i) **In the event a regular position is advertised** and the position has been filled by a non-regular type 2 faculty member for two or more years, the non-regular type 2 faculty member who has been filling the position will be given preference over other applicants providing the qualifications, abilities, and experience of the non-regular type 2 faculty member are equal to the applicant(s).

...

1.05 DEFINITIONS

(e) Entitlement to Conversion to Regular Status

The conversion of status from non-regular to regular will occur when the faculty member has a workload of 50% or greater for each of two (2) consecutive appointment years of work, provided that:

- (i) there is a reasonable expectation of ongoing employment at a workload level of at least 50% in each of two semesters within the appointment year subsequent to that in which the entitlement to conversion arises or there is a reasonable expectation of an ongoing workload assignment of at least 50% on an annualized basis within the appointment year subsequent to that in which the entitlement to conversion arises, and
- (ii) the employee is qualified for the work in question, as determined by the Search Committee at the time of initial hire or subsequent review, and
- (iii) the employee's most recent evaluation for regular employment within the preceding twelve (12) month period has been satisfactory. The employee will be deemed to have received a satisfactory evaluation if one has not been undertaken by the employer. The employer may evaluate a non-regular employee at least once each 12 month period and the employee may request an additional evaluation not more often than once in each 12 month period.

Nothing in the section above prohibits the employer's rights to regularize any position as it deems necessary.

(emphasis added)

In Arbitrator Ready's *Kwantlen, supra*, [2005] Award, he removed the "conveyor belt process," which enabled NRT2 employees to automatically obtain more NRT work, without being subjected to a competition. In so doing, Arbitrator Ready effectively gave the Employer greater control over the workload of non-regular employees and thus their

potential to meet the workload threshold identified in Article 1.05(e) for regularization. In other words, the effect of amending Article 4.02(m) and deleting Article 4.02(n), was that an employee's right to automatically gain more NRT experience was removed and Arbitrator Ready effectively provided the Employer with greater control over the amount of NRT service an individual faculty member could achieve.

As the Association pointed out, the Employer also has control over the criteria for hiring faculty; over the employees' performance appraisals; and over the packaging of teaching assignments, subject always to reasonableness and good faith.

Consequently, up to the point of an employee's right to regularization, the Employer has a great deal of control over a faculty member's ability to meet certain of the stated regularization conditions, which, in summary, includes the providing of 50% or greater experience for each of two consecutive appointment years of work, ensuring a faculty member is qualified at the time of hire and providing a satisfactory performance evaluation within the preceding 12 months.

With respect to the fourth condition of "a reasonable expectation of ongoing employment or workload assignment at a level of 50% or greater", that was the issue before Arbitrator Ready in 2007. As he stated in his *Kwantlen, supra* [2008] Award, the question, put simply, was whether or not replacement work in the subsequent assignment year is to be included in the calculation for the purpose of measuring whether the provisions of Article 1.05(e) have been met."

Arbitrator Ready found at pages 18 and 19 (repeated for the reader's convenience):

In other words, the Employer retains its management rights and is fully able to post and fill regular faculty positions subject, of course, to the other provisions contained in the Collective Agreement. Article 1.05(e), however, requires that, where non-regular faculty meet the listed qualifications and meet the established thresholds, regularization of such employees "will occur". As noted above, the test in sub-section (i) requires only a reasonable expectation that "ongoing employment" of 50% workload on an annualized basis be available. Replacement work can, quite reasonably, be included in the calculation of this in

the third year of the qualification. As noted in *Re Malaspina, supra*, at para. 27, albeit in the context of Article 6 of the former Common Agreement:

Replacement Work: I disagree with Malaspina that replacement work should be excluded from the measurement of workload for regularization purposes. Leaves of absence of regular faculty requiring replacement can range up to several years' duration. The exclusion of replacement work would effectively preclude a sizeable proportion of temporary pro rata faculty from ever being regularized, and would unduly dilute the entitlement to regularization contemplated by Article 6 of the Common Agreement.

These two arbitrators have clearly determined that the Employer must include replacement work in the fourth condition stipulating that there be a reasonable expectation of workload in the future.

After full consideration of the relevant arbitral decisions, the bargaining history, and the clear Collective Agreement language, there can be no doubt the Employer has the right, under Articles 1.05(e) and 4.02, to regularize and post positions. Having said that, I am also satisfied that the right of employees to regularization as expressed in Article 1.05(e) is not a hollow right and has substantive meaning in the sense that an NRT2 faculty member, who has met all four of the conditions outlined in Article 1.05(e), is entitled to conversion to regularization.

The balance referred to by Arbitrator Ready in this ongoing issue between the parties is the question of finding the correct relationship between a faculty member's rights under Article 1.05(e) and the Employer's right to "regularize any position as it deems necessary."

In my view, each situation will depend on all of the particular circumstances involved. For example, a case could exist where a faculty member has met the three individual conditions of experience, qualifications and satisfactory performance, and not be converted to regularization due to the absence, for that faculty member, of a "reasonable expectation of ongoing workload assignment of at least 50% in each of two

semesters within the appointment year subsequent to that in which the entitlement to conversion arises or there is a reasonable expectation of an ongoing workload assignment of at least 50% on an annualized basis within the appointment year subsequent to that in which the entitlement arises.” In the event that situation arises when there is a reasonable expectation of an ongoing workload as noted in Article 1.05(e) and the Employer regularizes and posts the position, (i.e., holds a competition) with the result that someone other than that faculty member is appointed to the position, then the onus will turn to the Employer to provide clear evidence as to why that particular faculty member did not achieve regularization. Such evidence must demonstrate good faith in the context of normal management rights and no less.

In other words, the Employer cannot ignore the provisions of Article 1.05(e) of the parties' Collective Agreement by filling a regularized position with a candidate it simply prefers over an NRT2 who has met the other conditions, where there is the potential of the “reasonable expectation” element of the criteria, as defined by Arbitrator Ready, in *Kwantlen*, supra, [2005], identified in Article 1.05(e).

It is so declared.

The second question before me is as follows, as stated by the Association:

At what point during the second appointment year does a faculty member meet the workload threshold for qualifying or regularization, if all of the other requirements are met?

With respect to this matter the relevant Collective Agreement language in Article 1.05(d) and (e) states the following:

(d) Non-Regular Faculty Members

...

Status Assessment

There is one assessment date: August 1 for the 12 month period starting September 1. The purpose of this assessment date is to determine whether a Type 1 non-regular faculty member should be offered a Type 2 appointment. It shall not prevent the Employer from establishing non-regular Type 2 positions with different appointment terms or commencement dates in accordance with the Employer's needs. ...

...

(e) Entitlement to Conversion to Regular Status

The conversion of status from non-regular to regular will occur when the faculty member has a workload of 50% or greater for each of two (2) consecutive appointment years o work, provided that:...

Notwithstanding that the Status Assessment date is August 1 in determining whether a Type 1 non-regular faculty member should be offered a Type 2 appointment, I am persuaded that if the parties intended to have a different date for the NRT2 faculty member assessed for regularization purposes, they would have stated so. When reading these two Articles together, it is clear that the assessment is to be done after two years and the August 1 date for the 12-month period preceding it starting with September 1 is generally the appropriate date for measuring whether the faculty member has met the threshold. Obviously it would be helpful to employees if the Employer is able to make that assessment prior to August 1 of a year, as per the second sentence of the Status Assessment noted above, but it is not compelled to do so, and it is beyond my jurisdiction to add to or alter the provisions of the parties' own agreement.

It is so declared.

Dated at the City of Vancouver in the Province of British Columbia this 20th day of November, 2008.


JUDI KORBIN, Arbitrator