

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

THOMPSON RIVERS UNIVERSITY

(the "Employer")

-and-

THOMPSON RIVERS UNIVERSITY OPEN LEARNING FACULTY ASSOCIATION

(the "Union")

(Online Modality Interest Arbitration)

ARBITRATOR: John B. Hall

APPEARANCES: Matthew Cooperwilliams, for the
Employer
Lesley Burke-O'Flynn, for the Union

DATES OF SUBMISSIONS: December 5 & 16, 2011 and
January 6, 2012

DATE OF HEARING: January 25, 2012

PLACE OF HEARING: Vancouver, British Columbia

DATE OF AWARD: April 24, 2012

AWARD

I. INTRODUCTION AND BACKGROUND

I have been appointed under a Letter of Understanding between the parties to issue a final and binding decision regarding “the appropriate rate of pay for ... Online Modality”.

The Employer’s Open Learning division offers, as the name suggests, post secondary open learning or distance education courses. At present, about 55 programs and 550 courses are offered, and there are over 20,000 enrolments each year. The Union is certified to represent Open Learning Faculty Members (“OLFMs”), who were previously referred to as Tutors.

Courses delivered by OLFMs are offered in various formats. As set out in Article 8.1 of the Collective Agreement, there are three types of courses in the Independent Study Modality: Print courses, Standard Web courses, and Dynamic Web courses. They are described as follows:

ARTICLE 8 WORKLOAD

8.1 Delivery of Courses in the Independent Study Modality

* * *

2) Print Courses

- a) Print courses may have a web presence which may require limited Open Learning Faculty Member involvement and may require the use of computer technology as part of the course design. This may include the use of email discussion groups, electronic media, Learning Management System (such as Blackboard), e-learning tools (e.g. white boards), power point slides, conferencing, etc. Open Learning Faculty Members are not required to provide additional course content but rather to explain and assist students

with existing course content using their personal and professional knowledge. This may include providing supplementary resources such as references or web sites. Additional duties due to the use of electronic technology, except those compensated for by the Technology Fee, must be compensated by reductions in other areas of course workload to ensure that the overall workload will remain the same.

* * *

3) Standard Web Courses

- a) These courses have similar responsibilities and duties to the print courses and the Open Learning Faculty Member is not expected to provide additional course content but rather to explain and assist students with existing course content using their personal and professional knowledge. This may include references to documents or web sites.

* * *

4) Dynamic Web Courses

- a) These courses require the active and dynamic input of the Open Learning Faculty Member who will be responsible for providing 20% additional course content in order to ensure the currency of the course and improve student success. The Open Learning Faculty Member will be responsible for the academic management of the course and the students. Duties will include those performed by Open Learning Faculty Members delivering Print and Standard Web Courses. However, the principle remains: the responsibilities and duties of Open Learning Faculty Members in Dynamic Web courses, except the 20% additional course content and re-marking assignments, are comparable to those in Print and Standard Web courses.

Article 8.2 was negotiated more recently as part of the 2010-2012 Collective Agreement, and describes the one remaining format:

8.2 Online Modality

Online Modality is a paced, cohort, faculty-led model which uses a variety of Online communication technologies, involves interaction

among students and with the Open Learning Faculty Member delivering the Online course and features problem-based pedagogy.

By virtue of Article 8.2(6)(b) and (c), the “cohort” for Online Modality courses ranges from a minimum of 5 to a maximum of 25 students.

OLFMs are compensated in a variety of ways under the Collective Agreement. Their basic remuneration is comprised of the following: (a) fixed fee for each learner, with the top rate being \$31.12; (b) a technology fee of \$5.62; (c) an hourly fee for marking final exams or projects of \$31.25; and (d) a marked assignment fee (“MAF”). The MAF is paid per learner as work is handed in during the course; thus, if a learner does not complete a course, the remuneration received by the OLFM is reduced. The MAF for Print Courses varies; the Standard Web courses have an MAF of \$148.73; and the Dynamic Web courses have an MAF equal to the Standard Web plus 20%, or \$178.49 per learner.

Until the end of 2008, courses were offered in the Print, Standard Web, and Dynamic Web formats. On or about October 15, 2008, the Employer advised that it would be proceeding with the Online Modality format, with the first course opening in January 2009. Article 6.5(1) of the Collective Agreement provides for arbitration where the parties are unable to reach agreement on the appropriate terms and conditions for a new job classification. It is evident from the record before me that the parties met at some point and negotiated over a comprehensive Letter of Understanding regarding “Delivery and Development of Courses in the Online Format”; however, they were unable to reach a final consensus, and the 11 page document tendered at arbitration is marked “DRAFT” (the “draft Letter of Understanding”).

The Union referred the rate of pay for Online Modality to arbitration in August 2009, but the matter was overtaken by collective bargaining for renewal of the 2004-2010 Collective Agreement. The most recent Collective Agreement incorporates some of the language found in the draft Letter of Understanding. Article 8.2(9) provides that payment for online Modality courses will be “... determined through Arbitration as per

the LOU on Online Modality”. This is a reference to the Letter of Understanding containing my appointment:

RE: ONLINE MODALITY

Pursuant to Article 6.5, Job Descriptions, Classifications and New Duties, agreement between the parties on the appropriate rate of pay for the Online Modality has not been reached and therefore that rate of pay is being referred to arbitration in accordance with the Union’s e-mail of August 3, 2009.

The parties agree to appoint Arbitrator John Hall, and to the extent possible, to provide the Arbitrator with an agreed statement of facts and to provide their respective written submissions to the Arbitrator for consideration. The Arbitrator shall issue a final and binding decision within thirty (30) days of receipt of final submissions.

I was not provided with an agreed statement of facts, and the parties’ extensive submissions contain numerous conflicting assertions. The parties also made oral presentations which assisted in clarifying several points. In simplest terms, the issue before me is the appropriate MAF for Online Modality work. Pending this arbitral determination, the Employer has implemented an MAF equal to the Standard Web plus 30% on a without prejudice basis.

II. GOVERNING PRINCIPLES

Both parties rely on the principles guiding interest arbitrators articulated in *Re Beacon Hill Lodges of Canada and Hospital Employees’ Union* (1985), 19 LAC (3d) 288 (Hope). That award was one of many cited in *Re Gitxsan Health Society and Hospital Employees’ Union* (2008), 172 LAC (4th) 232 (McPhillips), in support of this statement: “The overwhelming consensus is that the task of an interest arbitrator is to simulate or attempt to replicate what the parties might have agreed to in a free collective bargaining environment” (at QL para. 12). Arbitrator McPhillips proceeded to identify certain other principles found in the arbitral authorities, and I adopt by reference the discussion found at QL paragraphs 13 through 17. A more recent statement of the relevant principles by

the same arbitrator can be found *Nelson (City) -and- Nelson Professional Fire Fighters Association*, [2010] BCCAAA No. 174:

... First, replication is the desired outcome and that refers to the notion that an interest arbitration board should attempt to duplicate what the parties themselves would have arrived at if they had reached an agreement on their own. ... [I]n *Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers Association*, 8 L.A.C. (3d) 157, Arbitrator Dorsey stated, at p. 159 that "...the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an effort to obtain demands ... and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities". ...

A second principle is the requirement to be "fair and reasonable" in the sense that the award must fall within a "reasonable range of comparators" even if one party could have imposed more extreme terms. ...

Third, the exercise of interest arbitration has been described as a "conservative process" and that it "ought to supplement and assist the parties' collective bargaining relationship and not unravel or depart from it" ... Interest arbitrators are enjoined to replicate the collective bargaining process. Thus, it is predictable, and perhaps inevitable, that they will follow bargaining trends, not set them".

Fourth, as a result of this reluctance to innovate, historical patterns of negotiated settlements between the parties will carry significant weight ... (paras. 6-9)

Although the *Nelson* proceeding was governed by mandatory statutory criteria, the above excerpts are broadly accepted as applicable to any interest arbitration.

III. ANALYSIS

I have thoroughly reviewed all of the parties' lengthy submissions in the course of my deliberations, along with the numerous supporting documents and case authorities. I do not intend to address many of the points found in the submissions as they have had no influence on the outcome. Rather, the analysis which now follows will explain my

reasons for rejecting the primary positions of both parties, and provide the basis for my decision regarding the appropriate rate of pay for Online Modality work.

The Union's primary position is found at paragraph 27 of its initial written submission:

The Union says this new world of Online course work, the virtual classroom, should be paid at a rate comparable to the regular section rate of any other faculty member. It is work of complexity and demand that at least equals that of any traditional university classroom.

Consistent with this position, the Union has derived an MAF from the average of the top four rates for faculty members found in the Human Resources Database maintained by the Post Secondary Employers' Association of British Columbia. When the average is divided by the eight sections equivalent to a full-time teaching course load, and then further divided by the maximum 25 learners in a cohort, the result is \$379.32 which the Union says should be the new per student rate for Online Modality courses. The Union's position is summarized at paragraph 58 of its initial written submission:

The Union submits \$379.32 is the appropriate rate for calculating remuneration. The averaging methodology is the fairest, most reasonable formula to produce an objective standard – a standard which encompasses all variations in seniority, qualifications, status, gender, geographic location, and any other factors which might skew data. It replicates the section rate for 85% of the faculty population doing comparable work, whether online or face-to-face.

In using faculty members as a comparator, the Union repeatedly emphasizes a passage in a July 30, 2009 letter sent to OLFMs (then Tutors) by the Employer's Assistant Vice-President of Open Learning:

Online Courses

We have begun to offer a new method of course delivery, which we have called "Online." Online courses should not be confused with our other types of courses, which as you know are print, standard web and

dynamic web. The Online delivery method is teaching online, much as an instructor would teach in a classroom. *The tutor will not only be marking assignments and exams, and helping students progress through the course material, but actually leading the teaching and learning experience. Also differentiating the online courses is the tutor's responsibility to develop and provide a greater percentage of the course material than in our dynamic web courses thereby keeping the course current, much as is currently expected of a classroom instructor.* The qualifications for tutoring an online course include experience and/or training in teaching a course online.

The current Collective Agreement does not cover this type of course delivery, and over the last several months we have attempted to work with the BCOUFA/TRUOLFA executive to create a Letter of Understanding (LOU), which would address issues specific to this new delivery method and a new approach to Online Course development and delivery. Unfortunately, the talks were not successful. Part of this letter is to advise you that TRU is proceeding with Online Course development and delivery by using, as much as possible, existing provisions within the Collective Agreement. Even though a LOU is not signed, we are (as permitted by the Collective Agreement) recruiting and hiring qualified tutors, so as not to delay the implementation of Online Courses. Please watch for these new opportunities. (emphasis added)

This seemingly opens the door to equating the MAF for Online Modality courses to classroom instructors; i.e. faculty members. However, upon closer examination, I have determined there are several significant distinctions which make the comparison inappropriate. The differences include the service and scholarly research obligations of faculty members that are inherently part of their compensation but are not required of OLMFs. Further, faculty members have a much greater responsibility for developing the content of their courses. In contrast, courses offered by the Employer through its Open Learning division are initially developed, either entirely or in large measure, by its Instructional Design Group. Another difference is the number of students in a course. As mentioned, the cohort for an Online Modality course will range from 5 to 25 learners, whereas a faculty member may lecture to a class of “anywhere between 15 and 250 students”.

I have also concluded that the methodology used by the Union in its submissions to calculate a new MAF based on the salaries of faculty members is flawed -- at least to

the extent that the Union would add additional payments for matters that are incorporated into the faculty salary figures and/or are not received by faculty members. I refer here to the fact that the Union would still add the other fees received by OLFMs, such as the per student and marking fees, to its calculated MAF rate (this position was admittedly modified at the hearing). The Union would also add vacation and statutory holiday pay which are both part of the regular faculty salary.

Finally, and perhaps most importantly, there is no reasonable basis to believe that the parties would have voluntarily negotiated a rate of pay for OLFMs delivering Online Modality courses based on the remuneration paid for classroom teaching. None of the past arrangements have been based on this comparator, and there is no evidence that the parties even considered faculty salaries when they were negotiating the draft Letter of Understanding for Online Modality work. In other words, the Union's principal position does not replicate what the parties themselves would have resolved had they been able to agree on a new rate in collective bargaining. As the Employer submits, the Union is attempting to dramatically change the method of remuneration contrary to the historical basis for negotiated settlements.

All of the above considerations provide a complete answer to the Union's reliance on collective agreements at various post secondary institutions in British Columbia where faculty members apparently teach online "virtual classroom" courses and receive the same rate as that for regular classroom instruction. Moreover, there is insufficient evidence before me to draw meaningful comparisons between those virtual classroom assignments and the work performed by OLFMs who deliver Online Modality courses. For example, the excerpt from the Emily Carr collective agreement provides that "[o]n-line learning may include, but is not limited to, on-line or web-based instruction, hybrid or mixed-mode programs and courses" and does not come anywhere near the detailed Workload provision found in Article 8 of the Collective Agreement before me. The excerpt from the Douglas College collective agreement is even less insightful, and merely provides that "LMRC will define a mode of instruction applicable to the delivery of online courses".

On the other hand, the Employer's primary position constitutes an equally unsatisfactory point of reference. It maintains the remuneration model at TÉLUQ, Canada's only French language open university in Quebec City, illustrates the market and economic realities which should guide my analysis. Tutors under the applicable collective agreement may be paid \$172.21 per student, depending on the complexity and sophistication of the course. The Employer notes this is lower than the MAF of \$178.49 paid to OLFMs for Dynamic Web work.

The Union says the translation of the TÉLUQ collective agreement should not be admitted in this proceeding, and there is considerable controversy in the parties' submissions over how the work of the tutors there compares to the duties and responsibilities of OLFMs. There is no need to dwell on these and related points, because I have determined that any comparison to TÉLUQ should be rejected on the same basis that the Union's primary position was dismissed; that is, there is no reason to believe the Quebec collective agreement would have had any bearing on the outcome of collective bargaining. Indeed, an invoice provided by the Employer confirms it had the TÉLUQ collective agreement professionally translated in late 2009, but there is no indication the document was even mentioned during negotiations for the 2010-2012 collective agreement. It is also evident that the Employer appreciated during those negotiations that the Union would not accept the Standard Web MAF plus 30% for Online Modality work, even if the Employer could have put such an offer on the table under the PSEC guidelines (Meeting Notes from Day 22 - October 4, 2010 at page 5). Put simply, the TÉLUQ collective agreement provides absolutely no assistance in attempting to replicate what the parties might have produced had they been successful in concluding a rate of pay for Online Modality courses.

An alternative position put forward by the Union would see OLFMs delivering the courses in issue compensated under a different model comprised of a base rate and a per student "variable rate". The Union submits this approach can be considered because the Employer tabled a proposal in collective bargaining which read: "Online Modality of delivery - Need a *payment model* for this work" (emphasis added). The Union says this

proposal speaks to a payment model, distinguishable from the existing model in the Collective Agreement. There were also discussions between the parties during bargaining for “a simplified system of payment”. The Union notes as well that compensation for Online Modality work in the draft Letter of Understanding was premised on a similar system:

11. Fee for Course Delivery

- a. The fee for delivering a cohort of either a Type B or Type A course is flat fee of \$2200 for the first five students plus an additional \$200 for every student beyond the first five. This fee is intended to be all inclusive and as such Online Tutors will not receive any additional pay for technology fees, base pay, exam or project marking fees or assignment fees. Benefits will apply as per the Collective Agreement.

The Union’s alternative position faces various obstacles. First, as I have recorded already, some of the language from the draft Letter of Understanding, or variations of that language, can be found in what is now Article 8.2 of the Collective Agreement. The parties did not bring forward the proposed fee structure for course delivery. Nor did they agree on the framework for a new method of payment but fall short of agreeing to the actual rates. There is accordingly no foundation in the parties’ collective bargaining relationship for a base rate model. Second, it is obvious from the bargaining notes that altering the compensation model would have a number of implications for other provisions of the Collective Agreement, and could disproportionately affect the Union’s members. Those types of consequences are best resolved by parties at the negotiating table, and should generally not be the product of an interest arbitration. Thus, having regard to historical patterns and the “conservative” nature of this process, an appropriate MAF should be determined under the existing compensation structure.

This brings me to the subject of internal comparators. The Union and the Employer each seek solace in the current MAF for Dynamic Web work. The Union maintains Online Modality course delivery is significantly different than tutoring students who are studying independently, and is “far more complex than ... the Independent Study

Modality” due to its problem-based learning and pedagogy. The Employer acknowledges differences between the two modalities, but asserts the Online Modality work “is no more difficult, complex or sophisticated than independent study work”. It therefore regards the Dynamic Web work as a reliable internal comparator.

There is some support in the Collective Agreement for both of these positions. Articles 8.1(3)(a) - (b) and 8.1(4)(a) - (b) detail the role and responsibilities of OLFMs in relation to delivery of Dynamic Web courses, while Article 8.2(1)(a) - (l) lists their duties in relation to delivery of Online Modality courses. A line-by-line comparison shows many similarities. Nonetheless, there are several notable differences, such as:

- OLFMs are responsible for the academic management of Dynamic Web courses, while Online Modality courses are delivered by actively facilitating learning in paced, cohort courses with start and end dates.
- OLFMs in the Online Modality initiate, lead and manage learning activities and discussions using current technical applications.
- OLFMs are normally not responsible for Dynamic Web course maintenance, although they are responsible for providing 20% additional course content; OLFMs in Online Modality update course materials as needed (and at least once at the end of each offering), and are responsible for additional course material as the initial design may not include all the necessary material to meet learning outcomes.

At the risk of oversimplification, the commonalities between the Independent Study Modality and the Online Modality tend to relate to the administrative functions of OLFMs, and the differences relate more to their substantive teaching responsibilities, with the newer Modality being more rigorous. It is also the case that current OLFMs must be trained before they are eligible to deliver Online Modality courses; however, as the Employer observes, the training can be completed over 20 hours. Finally, there is a common thread to Independent Study Modality work. As expressed in Article 8.1(4)(a):

4) Dynamic Web Courses

- a) ... However, *the principle remains: the responsibilities and duties of Open Learning Faculty Members in Dynamic Web courses, except the 20% additional course content and re-marking assignments, are comparable to those in Print and Standard Web courses.* (emphasis added)

The same “principle” of comparable responsibilities and duties is not articulated in respect of Online Modality work. Therefore, the Collective Agreement suggests a greater distinction between Dynamic Web courses and the newer Modality than the Employer is prepared to acknowledge.

Another comparator that was canvassed less extensively in the parties’ submissions is sessional instructors who are covered by the Employer’s collective agreement with the Thompson Rivers University Faculty Association. They have no research and service obligations; however, like other faculty members, they develop their courses in addition to preparing and delivering lectures. Sessionals are paid \$5,441 per course. Payment does not depend on the number of students in the course and/or the completion rate of students. The Employer advises that the average class size for sessionals during the 2010-2011 fall and winter terms was 23.5 students. On its calculation, the average pay for sessionals was therefore \$231.534 per student. Further, if the various fees paid to OLFMs are removed from this average, the result is close to the MAF agreed to by the parties for Dynamic Web courses.

What conclusions can be drawn from the two internal comparators? In my view, the rate paid to sessionals initially provides some degree of guidance, but the relatively limited information regarding their circumstances makes a definitive comparison impossible. There is far more information regarding OLFMs who deliver Dynamic Web courses. Regrettably, because of the lack of consensus in the parties’ submissions regarding how that work compares to Online Modality, an assessment of how the differences should affect the rate of pay is equally elusive. Nonetheless, the general

impression which emerges from the evidence is that the Online Modality work should attract a rate beyond the 30% premium currently being paid by the Employer.

There is obviously an extremely wide chasm between the \$178.49 (or less) MAF advocated by the Employer, and the \$379.32 rate sought by the Union. As I have indicated, neither position can be regarded as realistic. If this were the extent of the record, determining a fair and reasonable alternative for the new MAF would approach a blindfolded toss at the metaphorical dartboard. Fortunately, there is more to consider.

I have already reproduced the fee for Online Modality course delivery in the draft Letter of Understanding. Although I have rejected the Union's reliance on the fee structure to support a new payment model for OLFMs, the figures in the document are important. Further, the Employer did not contest the statement at the hearing that the Union's counter-proposal during development of the draft Letter of Understanding was a flat fee of \$3000 (vs. \$2200 tabled by the Employer) for the first five students, plus \$250 (vs. \$200) for each additional student. I am not persuaded by the Employer's submission that these figures should be ignored because they were not put forward during bargaining for the 2010-2012 Collective Agreement. They represent real life parameters established by the parties themselves. The fact is that the proposals were made in the context of "talks" between the parties to "address issues specific to this new delivery method" (see the Employer's July 30, 2009 letter to Tutors). It is hard to conceive of more relevant evidence in order to replicate the outcome of collective bargaining.

The situation is complicated somewhat by the fact that the figures were put forward under a different payment structure. Nonetheless, they can be converted into an average per student figure according to the number of students in a hypothetical cohort. For instance, a cohort of 20 students would translate into \$260 per student under the Employer's proposal (\$2200 for the first five students plus 15 times \$200 totals \$5200 which is then divided by 20). When these calculations are done for the anticipated range (i.e. 5 to 25 students in a cohort), the result is as follows:

Number of Students	5	10	15	20	25
Employer Proposal	\$440	\$320	\$280	\$260	\$248
Union Proposal	\$600	\$425	\$366	\$337.50	\$320

Before commenting on this table, it is appropriate to include some additional information in the discussion. According to data provided by the Employer, 60 Online Modality courses were run between May 2009 and February 2011. The Union's review of the data shows the following student distribution:

2-5 Students	15 course
6-10 Students	23 courses
11-15 Students	10 courses
16-20 Students	4 courses
21-25 Students	8 courses

Thus, over half of the courses (38 of 60) had 10 or fewer students, while only 20% (12 of 60) had more than 15 students.

Returning to the above table, one number appears on both lines (i.e. \$320), although it is obviously the lowest rate resulting from the Union's proposal, and the second highest rate resulting from the Employer's proposal. But the same figure is also near the mid-point of what the respective proposals would have produced for a cohort of 15 students (albeit slightly closer to the Employer's rate of \$280 than the Union's rate of \$366). I find it represents a reasonable compromise of the positions tabled by the parties in their attempt to develop a fee for delivering Online Modality courses.

Of course, in order to derive an appropriate MAF for Online Modality work, the other fees paid to OLFMs must be deducted from the global amount. The calculation results in a net of \$252.01 (\$320 less the combined total of the \$31.12 fixed fee plus the \$5.62 technology fee and the \$31.25 marking fee). For intended ease of administration, an MAF of \$250 is hereby awarded.

At first blush, the result might seem unjustifiably more than the average per student rate paid by the Employer to its sessional instructors. But it is vital to recall that, unlike sessionals, the compensation received by OLFMs is reduced according to completion rate. The Employer advises that the latest completion rate for all Open Learning courses is 68.1% and the rate for Online Modality courses is 82.3%. Those percentages would erode an MAF of \$250 to about \$170 and \$205 respectively, and brings the effective MAF within the range of the Employer's average per student calculation for sessionals. Moreover, it is likely that total compensation of Online Modality instructors will be considerably lower than sessionals given the relatively small enrollment experience.

IV. DECISION

For the reasons set out above, I have determined that the appropriate rate of pay for Online Modality work should include a Marked Assignment Fee of \$250 under the current fee structure for OLFMs. The rate shall apply retroactively pursuant to Article 6.5(1) of the Collective Agreement.

I reserve jurisdiction in the event the parties encounter any difficulty implementing this decision.

DATED at Vancouver, British Columbia on April 24, 2012.

A handwritten signature in black ink, appearing to read "John B. Hall", written over a large, loopy circular flourish.

JOHN B. HALL
Arbitrator