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CAUT BargainingAdvisory

"Deemed Hours" for Employment Insurance Benefits

Academic staff associations should negotiate collective agreement language to establish "deemed hours" worked for the purposes of EI. Such language cannot be arbitrary, and must be based on realistic evaluations of the effort required.

Policy Statement on "Deemed Hours" for Employment Insurance
(Approved by CAUT Council, May 2017)

Despite the efforts to promote a pro-rata system for contract academic staff (CAS), the majority continue to work on per-course stipendiary contracts which have fixed termination dates. The academic calendar in turn guarantees that a substantial portion of work will be concentrated in the fall and winter terms. Many CAS members, even those with seniority entitlements such as a right of first refusal, can as a result face periods of unemployment. Since eligibility for Employment Insurance (EI) benefits is tied to the number of hours worked by an individual in the previous 12-month period,[1] CAS members are left particularly vulnerable if they have not been properly credited for the hours actually worked under their contracts. Therein lies the difficulty.

When work terminates, the employer must provide a Record of Employment (ROE) to be submitted with the application for EI benefits. Because stipendiary CAS members are not paid an hourly wage rate, the employer must provide a declaration of "deemed hours" on the ROE. Universities and colleges have often taken a cavalier attitude on "deemed hours" and frequently understate the number of hours required to do the job. This situation led to two court challenges[2] which in turn helped inform CAUT policy. This bargaining advisory is intended to assist associations in their

1. EI requires, in general, that applicants work 420 hours in the previous twelve months, although this number can vary according to the local unemployment rate and whether the applicant is a new entrant into the labour market: https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/eligibility.html, accessed on January 16, 2023

2. McKenna v. Canada (Minister of National Revenue - M.N.R.), 1999 T.C.J. No. 816, Court File No. 1999-2603 (EI), and Franke v. Canada (Minister of National Revenue - M.N.R.),, 1999 T.C.J. No. 645, Court File No. 98-487 (UI).

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efforts to transform CAUT policy into concrete collective agreement language.

A review of the human resources pages of university and college web sites suggests that few institutions have formal policies on how to calculate "deemed hours." In the absence of a clear policy, it is open to the member and the employer to agree on the number of insurable hours for their ROE. If they cannot come to an agreement, then the CRA permits the member to divide their insurable earnings by the local minimum wage.[3] Despite this very liberal policy toward non-unionized employees, administrators have proven reluctant to negotiate provisions for determining deemed hours into CAS collective agreements and in general have consistently reported very low estimates on their ROEs. Any bargaining advice must, meanwhile, take account of the existing case law. The Franke case in particular provides critical insights for negotiators.

Franke had taught at the University of Victoria where, as in most institutions, "there was no written contract containing a comprehensive statement of the Appellant's duties." In this case the court accepted as evidence Franke's detailed account of the hours he spent on various activities such as preparations and student evaluations. The university's calculation, meanwhile, had simply applied a "general rule" that three hours of preparation time would be required for every hour of class time without taking account of the significant variance between different types of courses at different levels. The arbitrator rejected the university's general rule in favour of Franke's personal log.

The Franke decision demonstrates that simple formulas – all courses require 3 "preparation" hours for each classroom hour – will not be accepted by the courts. Negotiators should not conclude, however, that a more detailed and complicated formula which takes account of multiple variables such as the level and type of course (high-enrolment first-year introductory courses vs lower-enrolment upper-level seminars), the nature of student assessment (essay examinations and term essays vs multiple-choice exams and short reports) or other factors would resolve the problem. Nor is it clear that a more complex formula would be either workable or desirable. Taylorite formulas which break down tasks such as student assessment into discreet units of labour run counter to the essential terms and conditions of labour for independent, unsupervised professional academics who exercise academic freedom over the organization, presentation and pedagogical approach adopted in their courses. Any discussion of a more complex formula which assigns specific amounts of time to particular tasks, moreover, might invite employer interference in the decision-making process about what are or are not appropriate pedagogical decisions.

Negotiators, meanwhile, would do well to remember the object of their bargaining mandate: to provide fairness to those colleagues who must sometimes rely upon EI without asking them to shoulder the additional burden of accounting for every hour worked. The agreement need only ensure that CAS members who have paid EI premiums are credited with sufficient hours to qualify for EI benefits. There is no need to account for hours worked beyond the minimum required by EI. The problem in the Franke case was not that a formula was used, but that it was arbitrary[4] and produced a very low estimate which was clearly at odds with the evidence in Franke's personal log. Viewed in this light the agreement needs to do two things: establish a fairer and more reasonable estimate of the minimum number of hours needed to complete the contract and to allow some degree of flexibility to permit deemed hours to be increased where warranted.

In establishing a minimum expectation of "deemed hours" associations should avoid being arbitrary. Although nomenclature varies, the vast majority of post-secondary teaching involves one or two semester courses of three or six credits. The mix of courses, meanwhile, will vary because of the often substantial differences in institutional size and the types of programs offered. For this reason, the exercise must be tailored as much as possible to local needs. Associations might consider analyzing course offerings and determine what a hypothetical "average" course might look like. The membership could then be surveyed on

3. See CRA's guidance at https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei/establishing-number-insurable-hours-record-employment-purposes.html , accessed on January 16, 2023.
4. As the Franke decision pointed out, "given that the number of hours required by lecturers to discharge their duties under the contract varied, it could not have been determined that there was a relationship between the time actually." Franke v. Canada (Minister of National Revenue - M.N.R.), 1999 T.C.J. No. 645, Court File No. 98-487 (UI).

actual hours worked in such a hypothetical course. This exercise, although it could never be considered precise, would likely produce a reasonable and representative estimate of "normal" expectations for a stipendiary contract which can then be used to inform bargaining proposals designed to establish a minimum for deemed hours.

Several associations have already negotiated a set number for "deemed hours" in their agreements. Art. 11.17 (d) of the Acadia agreement provides that for purposes of calculating hours of work for Employment Insurance, each three (3) credit hours taught by Employees shall constitute 200 hours of employment, and laboratories shall constitute 100 hours of employment. For online courses offered through Open Acadia, Employees shall be credited with eight (8) hours of employment per student who completes the course, and four (4) hours of employment per student who does not complete the course but who remains enrolled for more than the two weeks after registering allowed for cancellation. Development of an online course shall constitute 200 hours of employment, and the redevelopment of online courses shall constitute 100 hours of employment.[5] Art. 14.04 of the Algoma agreement sets a standard of 198 hours for a three-credit, single semester course. [6] *The standard is even higher in the CUPE 3902, Unit 3 agreement: "The parties agree that for Employment Insurance purposes only, a course instructor for a full course will be deemed to have worked 460 hours, and a course instructor for a half course will be deemed to have worked 230 hours."*[7]

Employers, meanwhile, are often reluctant to negotiate deemed hours for fear that setting hours in this way might set a precedent. For this reason, the CUPE 3902 agreement adds that:

> *the parties agree that this agreement is strictly for Employment Insurance purposes only, and is without prejudice to the positions of the parties, and shall in no way affect the interpretation, application, and administration of the Collective Agreement provisions and any University policies and practices, and shall not be relied on or referred to in any proceedings other than those under the Employment Insurance Act or Regulations.*

None of these agreements indicate the variables which were considered in the calculation or how those variables were weighted. No doubt some of the difference – 198 for a 3-credit course at Algoma vs 230 at Toronto – is explained by the very different academic structure of the two institutions, yet both achieve the primary objective of establishing for stipendiary CAS academic staff a reasonable minimum of actual hours for EI purposes. Setting a minimum may not, however, always be fair. In this context the higher number at Toronto has a distinct advantage: it ensures that a single six-credit course over eight months (two semesters) meets the minimum qualification of the EI regulations. If the CUPE 3902 agreement had been applied to Franke or McKenna (noted below), neither would have had to go to court and provide alternate evidence to make their case for eligibility.

Establishing a reasonable number of hours expected in an "average" course, meanwhile, will not alone suffice. As the McKenna decision points out, "hours of insurable employment in the period of employment were not known or ascertainable by the employer within the meaning of section 10(4) of the Regulations."[8] The court made the same argument in the Franke decision:

> *given that the number of hours required by lecturers to discharge their duties under the contract varied, it could not have been determined that there was a relationship between the time actually spent by a lecturer and the formula-based result.*[9]

If the collective agreement is to avoid the problem of a formulaic assignment of deemed hours, it must find a means to resolve the difficulty identified by the court.

As the courts have pointed out, section 10(4) of the Act requires a calculation of actual hours worked. Since the employer did not and could not know the actual hours worked, the court accepted the personal log of the appellant. Although the collective agreement should include this option, keeping a log puts an unfair

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5. Acadia University Faculty Association Collective Agreement, July 1, 2017 – June 30, 2021, Article 11.17(d)
6. Ontario Public Service Employees Union on behalf of its Local 685 Part-Time Contract Faulty at Algoma University Collective Agreement, July 1, 2019 - June 30, 2022, Article 14.04.
7. "Letter of Intent: Employment Insurance Hours for Sessional Lecturers, December 1, 2017," The Canadian Union of Public Employees, Local 3902 (Unit 3), University of Toronto Education Workers Collective Agreement, September 1, 2017 – August 31, 2021.
8. McKenna v. Canada (Minister of National Revenue - M.N.R.) 1999 T.C.J. No. 816Court File No. 1999-2603 (EI).
9. Franke v. Canada (Minister of National Revenue - M.N.R.) 1999 T.C.J. No. 645Court File No. 98-487 (UI).

additional burden on CAS colleagues who must now track their time on a daily basis. The agreement should provide a less burdensome option.

Actual hours will always vary from course to course. After having established a reasonable "normal" expectation, the agreement should acknowledge that the deemed hours can be increased and identify as clearly as possible the grounds which would justify such an increase. Again, a detailed calculation is not required to protect a member's rights. The agreement would, however, have to ensure that the member could request an increase in the deemed hours, identify the variables to be considered, identify the decision-maker -- in the majority of cases the dean -- and, finally, provide a mechanism for dealing with cases where the member and the dean cannot agree. Accomplishing this in contract language is relatively straight forward.

X.1 A member may request an increase in deemed hours based upon, but not limited to,

a. large enrolments,

b. the level of the course,

c. the nature of the assignments, or

d. whether the course involves substantial new preparations.

X.2 The dean shall not unreasonably refuse such a request.

X.3 If the dean and the member cannot agree on the number of deemed hours, the member may submit a personal log which will become the basis for determining deemed hours.

The list of variables included in X.1 a. through d. has an educative function and can be more or less detailed depending on local circumstances. In all cases, however, the clause should include the phrase "but not limited to" in order to protect those members who teach laboratory, studio, distance education or other non-standard credit courses. X.2, meanwhile, puts the burden of proof in denials on the employer rather than the member.