

CAUT Bargaining Advisory

Introduction

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Procedural Fairness in Career Decisions

Academics face numerous evaluations and assessments over the course of a career. These evaluations can be of two types:

- 1) formative evaluations designed to promote professional development, or
- 2) summative evaluations designed to assess career progress.

Formative evaluations are essentially planning exercises: one reviews work performed with the strategic objective of finding ways to better accomplish goals and objectives.¹ Summative evaluations associated with renewal, tenure and promotion, by contrast, assess performance in the context of defined standards. The question is simple enough: has the individual met the criteria for renewal, tenure, promotion, or merit?² Because summative evaluations have a significant impact on the employment relationship, negotiators must ensure that natural justice and due process inform all career decisions.

Natural Justice and Due Process

Individuals involved in the negotiation and application of collective agreements frequently come across two related terms: “natural justice” and “due process.” Although collective agreements address due process directly, negotiators need to understand that procedural fairness is a component of the more inclusive concept of natural justice.

In law natural justice addresses three primary concerns. The adjudicator must be independent and unbiased and in turn must hear all of the evidence. Finally, the parties have a right to know the entire case to be considered and have an opportunity to meet the case. If natural justice is to prevail procedural protections must be built into the deliberation process. Natural justice is a fundamental concept of law applying to judicial or quasi-judicial decision-making; due process is a component of natural justice as it specifies procedures designed meet natural justice requirements.

¹See CAUT, “Bargaining Advisory: Annual Reports and Annual Reviews,” No. 19, April 2007.

²Although discipline can be considered a “summative process” in that it measures performance against a standard of what constitutes misconduct, it should not be confused with review and evaluation processes associated with career decisions. For this reason discipline is the subject of a separate bargaining advisory. See CAUT, “Bargaining Advisory: Discipline,” No. 20, May 2007.



Natural justice and due process recognize the fundamental right of an individual to know the case being made, to know the evidence being used, and to respond to the evidence. In employment law, as opposed to criminal law, we might rephrase this principle to recognize the right of the employee to know the standard to which they will be held, to be given every opportunity to meet that standard, to present evidence that they have in fact met that standard, and to respond to any evidence which might suggest they have not met the standard. Procedural fairness comes down to two concerns: what evidence will be used to inform the decision and how will that evidence be handled? The collective agreement must address both questions in a clear and comprehensive fashion.

Procedural Fairness

In the academy procedures for summative evaluations normally begin with an application which provides information showing that the criteria have been met. Additional relevant information will come from three sources: information mandated by the collective agreement such as teaching evaluations, relevant information contained in the permanent employment record, and other information added by the decision-maker.³ Although information drawn from the personnel file should already be known to the member,⁴ care must be taken to ensure that the member is aware of and is provided with an opportunity to respond to any information added to the file. Decision-makers should consider the case only after receiving the member's response. Should any concerns arise the member should be invited, either in person or in writing – preferably both – , to address those concerns directly before a final recommendation or decision is made. The member must have the right to comment on any recommendation going forward and the right to grieve any decision made.

In the case of career decisions, the member should retain the right to withdraw the application at any time prior to a final decision being made. For many this may appear self-evident which helps explain why a large majority of collective agreements in post-secondary institutions are silent on the issue. Although silence in the collective agreement does not prevent withdrawal, it ignores other concerns which need to be addressed.

The Ottawa agreement provides the broadest protection: *"At any time prior to an application being considered by the Joint Committee a member can withdraw such application and no further action shall be taken on it."*⁵ Because this clause is contained in a separate, stand alone pro-

³"Decision-maker" as used here includes as well those making recommendations.

⁴The agreement should contain an article governing the official personnel file which provides full access to the member. The collective agreement should also ensure the member's right to respond to and comment upon any information in the file and be assured that the response and/or comment remains part of the permanent employment record. See CAUT, *"Model Clause on Personnel Files."*

⁵Article 5.2.1.11, Collective agreement between the University of Ottawa and the Association of Professors of the University of Ottawa, (1 May 2004 to 30 April 2008). (Hereafter APUO). The Joint

cedural article, there are no restrictions. This article, however, also provides that “*It is understood that unless other arrangements are agreed to by the dean and the member or by the parties to the collective agreement, all documents relating to the application shall remain in the member’s file.*”⁶ Given the greater risk to the member, associations should consider reversing this clause to ensure that a withdrawn application, together with all accompanying documents, will be removed from the official file unless the parties agree otherwise. There may well be reasons for retaining information,⁷ but requiring the parties to consider new applications de novo remains the best protection for the member’s rights to due process. Article 24.13 of the Winnipeg agreement comes closest to this ideal: “*the Member may indicate to the Area Dean/Vice-President (Students)/University Librarian in writing that he/she wishes to withdraw his/her application for promotion without prejudice. Such letter shall be the only reference to the application for promotion in the Member’s personnel file.*”⁸

Normally, separate clauses or subsections of clauses, deal with renewal, tenure and promotion. This allows criteria to be tailored to the issue at hand. Good practice, however, would be to outline basic procedures which have general application in a single, separate clause. This is the approach at the University of Ottawa where Art. 5.2 describes requirements for processing recommendations and decisions. Subsection 5.2.1.2, for example, covers what information is to be considered:

at each stage of the recommendation and decision process, the committee or person making the recommendation or decision shall give proper consideration to and shall base the recommendation or decision solely on:

- (a) the documents indicated by the relevant clauses of this agreement made available by the member, including those taken into consideration at preceding stages of the process;*
- (b) all other relevant documents in the member’s file (subject to any specific exclusions otherwise stated elsewhere in this agreement) provided the member has been advised in writing, no later than the notification to him of the recommendation or decision, that said documents were considered;*

Committee at Ottawa is comprised of three nominees of the Senate, three nominees of the Board of Governors, and three nominees of the Administrative Committee including the President who chairs the meeting. The Joint Committee is designated as the decision-maker in all personnel decisions except renewal and sabbaticals which are decanal decisions.

⁶APUO.

⁷A grievance settlement, for example, might require reconsideration of only one or more aspects of a decision.

⁸This Collective Agreement is between The University of Winnipeg Faculty Association and the Board of Regents of the University of Winnipeg, April 1, 2002 to March 31, 2007. Article 25.11 contains an identical statement concerning withdrawal of a tenure application. In both cases, meanwhile, the right can only be exercised prior to April 30. CAUT recommends against placing any restriction on the right of an individual to withdraw an application.

(c) *any other relevant document added to the member's file pursuant to this agreement by the DTPC, the chair, the FTPC, or the dean, provided the member has been so advised and has received a copy prior to said document being considered;*

(d) *any recommendations made at the preceding stages of the process, if applicable; and*

(e) *the considerations set forth in this agreement, it being understood that this recommendation or decision shall be favorable when the criteria of the agreement which apply to the member as well as the other considerations set forth in this agreement have been met;*

*and shall not use, formally or informally, criteria which differ from those set forth in this agreement.*⁹

By including these procedural requirements in a separate, stand-alone clause, the Ottawa collective agreement ensures that they apply with equal force in all summative reviews which culminate in a recommendation and/or discretionary decision not only in renewal, tenure and promotion but in discipline or merit¹⁰ as well.

Collective agreement language has a descriptive as well as a proscriptive function well illustrated in this case. These statements are, arguably, unnecessary as managerial decisions will be held to collective agreement criteria and standards in grievance/arbitration. Statements instructing peer committees and academic administrators that they “*shall not use, formally or informally, criteria which differ from those set forth in this agreement*” and that recommendations “*shall be favourable when the criteria of the agreement . . . have been met*” may appear obvious, yet such statements are essential as they help reduce error and, as a consequence, reduce the potential for disruptive and costly grievance/arbitration procedures.

Less obvious, but no less essential, is the requirement that persons and committees base their decisions “solely on” the evidence contained in the file. Associations should reinforce this requirement including in the agreement a clear proscription against certain types of information which must in all cases be excluded from the process. For example, negotiators must prevent anonymous material of any kind from being used in career decisions. CAUT recommends inclusion of language such as Art. 27.04 of the Windsor agreement:

⁹APUO. The DTPC and the FTPC are the Departmental and Faculty Teaching Personnel Committees.

¹⁰Although Ottawa does not have merit increments, these procedures are recommended for those associations which do.

No anonymous material shall be kept by the University concerning any member or submitted as evidence in any formal or informal deliberation, action, or proceeding involving any member.¹¹

Such a statement is best placed in the article dealing with the personnel file, although care must be taken to ensure the proscription applies to any “file” put together for a specific purpose such as renewal, tenure, promotion or disciplinary decisions.

CAUT similarly recommends inclusion in the discipline clause, as Western Ontario has done, of a statement that “*Disciplinary processes shall be distinct from academic assessment processes such as are used for Promotion and Tenure and Annual Performance Evaluation. . . . The fact that a disciplinary measure is contemplated or has been imposed cannot be considered in an assessment.*”¹²

Associations might wish, meanwhile, to consider modifying subsection Art. 5.2.1.2 (b) of the Ottawa agreement cited above. The problem here is that the information used, unlike the information added to the file in subsection (c), is only given to the member after it has been considered and the recommendation and/or decision has already been made. The explanation for the difference between (b) and (c), no doubt, is the assumption that the member already knows what information is contained in their personnel file and presumably has already had an opportunity to comment. In practice, however, members do not review their personnel file regular; many never consult their file. Although associations typically advise members to review their personnel file prior to submitting an application for career progress, it is impossible to require them to do so.

Rather than assuming that members know what is in the personnel file, it might be better to treat information drawn from the official employment record in the same manner as other information referred to in (c). That is to say, any information from the personnel file should be drawn to the attention of the member with an invitation to comment prior to being considered by persons or committees making recommendations or decisions. Information drawn from the personnel file, unlike information added in (c), need not be communicated to the member directly. It would only be necessary to index which documents in the personnel file were to be used. This would allow the member to consult the file and make a decision on whether to comment.

The Ottawa agreement, meanwhile, provides a number of additional procedural safeguards. Article 5.2.1.3 states that “*Any letter or document concerning a member shall not be considered by any peer committee or representative of the employer unless and until the member has received a copy at least 10 working days before the time said letter or document is to be considered.*” In the case of external peer evaluations, Art. 5.2.1.4 ensures that “*the member shall be given the opportunity to provide written comments prior to the consideration of such evaluations.*” Committee chairs must:

¹¹Collective Agreement Between the Faculty Association and the Board of Governors of the University of Windsor, July 1, 2004 - June 30, 2008.

¹²Article Discipline 7 and 7.1, Faculty Collective Agreement between the University of Western Ontario and the University of Western Ontario Faculty Association, July 1, 2006-June 30, 2010. See CAUT, *Bargaining Advisory: Discipline*, No. 20, May 2007.

“ensure that the member promptly receives a copy of the recommendation or decision and the reasons therefor, the list of any documents under 5.2.1.2(b), and that portion of the committee’s minutes which is relevant to the member’s case, including the names of those present during the relevant portion of the meeting. This applies, mutatis mutandis, to recommendations by the chair and to recommendations and decisions by the dean.”

When informing members of negative recommendations in writing deans must “draw the member’s attention to the provisions of article 13 concerning a member’s right to submit a letter of disagreement or to file a grievance.”¹³ Similar procedural protections should be built into all collective agreements.

The Evaluation Process

Post-secondary institutions in Canada rely heavily on peer review which necessitates, as in so many areas, a balancing of rights. We often hear colleagues debate how to weigh the relative value of pure vs. applied research, of peer-reviewed publications vs. technical reports and conference papers or the significance of undergraduate vs. graduate teaching. Academic freedom protects, indeed encourages, individual academic assessors to exercise their professional judgement; the agreement must protect the member should those assessors adopt a restrictive view about what constitutes research and teaching. The collective agreement must be clear about the variety of activities that constitute scholarship. Associations can consider using one of two approaches to this question.

Many agreements will have an article identifying duties and responsibilities. Art. 18.1.1 of the Wilfrid Laurier agreement, for example, reads:

*The academic duties and responsibilities of Faculty Members involve the pursuit and the dissemination of knowledge through teaching, research, public lectures, conference communications, publications, artistic production and performance, professional and university service, and other similar activities. Members have the right and obligation to develop and maintain their scholarly competence and effectiveness, and to perform their duties in accordance with the clauses set out below.*¹⁴

Such a statement reinforces the principal that teaching, research and service are part of a sin-

¹³APUO, Art. 5.2.1.3, 5.2.1.4, 5.2.1.5 and 5.2.1.10.

¹⁴Agreement between Wilfrid Laurier University and Wilfrid Laurier University Faculty Association for Full-time Faculty and Professional Librarians,” (July 1, 2005 to June 30, 2008). (Hereafter WLUFA)

¹⁵See CAUT, “Policy Statement on the Nature of Academic Work,” November 2005.

gle activity of “dissemination of knowledge” while at the same time placing artistic production as well as professional activities on a par with teaching and research¹⁵. Once this basic definition of scholarship is established in the agreement other articles can then elaborate on what must be considered in the evaluation process. Article 20.26 of the Mount Saint Vincent agreement, for example, covers teaching:

Assessment of teaching performance shall include consideration of the following:

- 20.26.1 undergraduate and/or graduate teaching;*
- 20.26.2 thesis and project supervision;*
- 20.26.3 instructional and programme development;*
- 20.26.4 supervision of practica, internships, cooperative education work terms and projects, and teacher education programmes.¹⁶*

Art. 20.30 covers research:

The main criterion for assessing a candidate’s scholarship and/or professional activity shall be peer review. When the evidence presented takes the form of legitimate refereed publications, this criterion shall be taken as met.

20.31 Scholarly and/or professional activity to be considered includes:

- Books and monographs;*
- Working papers;*
- Case studies;*
- Chapters in books;*
- Research reports and briefs to government or other agencies;*
- Papers in conference proceedings;*
- Papers presented at conferences and meetings;*
- Computer software and documentation;*
- Audio-visual productions and materials;*
- Book reviews.¹⁷*

Professional activity is described as including:

20.32.1 the dissemination of information to the professional field in written form (e.g. briefs, technical reports);

20.32.2 the development of specialized training materials;

20.32.3 the development of materials and methodologies for the practice of the profession (e.g. textbooks, curricula, software, assessment tools);

20.32.4 substantive contributions to professional organizations (e.g. major in-

¹⁶Collective Agreement [Mount Saint Vincent] (1 July 2003 To 30 June 2007, Revised June 2005). (Hereafter MSVUFA)

¹⁷MSVUFA

¹⁸MSVUFA

*volvement in development of codes of ethics, policy and legislation for the regulation or practice of the profession)*¹⁸

Similar descriptions are provided for service. Such language is essential to protect a member's rights should peer assessors have different views about what constitutes evidence of scholarly activity.

Mount Saint Vincent includes such statements in the criteria for renewal, tenure and promotion, but this is not the only way to approach the question of the variety of scholarly activities. As is the case with procedures, associations should consider stand-alone evaluation clauses which apply in all cases. This is the approach taken at Wilfrid Laurier. Art. 31 deals with "Teaching Evaluations" which applies:

*Whenever this Agreement calls for an evaluation of the teaching performance of a Member in relation to contract renewal, tenure, promotion, or discipline for deficient performance of workload duties, the evaluation, recommendations and decisions shall be in accord with this article.*¹⁹

Art. 31.2.1 includes language similar to Mount Saint Vincent on what constitutes teaching.

teaching includes the following activities performed by Members either in the classroom, through correspondence, or from a distance through the use of technologically assisted instruction:

- (a) giving courses; conducting seminars; guiding tutorials, laboratories and studio work; supervising fieldwork and individual study projects;*
- (b) preparing and correcting assignments, tests and examinations;*
- (c) guiding the work of teaching assistants, markers and laboratory instructors;*
- (d) guiding and evaluating individual student's work such as theses, papers and research projects;*
- (e) consulting with students individually outside of class or laboratory meetings;*
- (f) participating in the development of teaching methods, programs or course content;*
- (g) preparing instructional material, laboratory exercises and course readers and notes;*
- (h) all other activities in which the Member engages for the purpose of preparing for courses and seminars, including those undertaken to ensure that his/her teaching is in keeping with the current state of knowledge in the subject(s) being taught.*²⁰

Queen's takes a similar approach in its article covering Assessment and Evaluation of Teaching.

¹⁹Article 31.2.1, WLUFA

²⁰WLUFA

29.1.4 Any person or Committee reviewing a Member's teaching shall seek to balance all aspects of teaching as well as the Departmental/Faculty context within which the Member works.

29.1.5 Any person or Committee reviewing a Member's teaching shall consider all relevant information, including but not limited to

- (a) the quality and utility of the pedagogical materials prepared by the Member;
- (b) the quality of the supervision of essays and theses;
- (c) the Member's contributions in the areas of pedagogical development and innovation and the complexity and risk such innovation entails;
- (d) the size, type and level of course(s) taught;
- (e) the nature of the subject matter;
- (f) the experience of the instructor with the course(s) and the number of new course preparations assigned to the instructor;
- (g) the role of the instructor and the method of delivery;
- (h) the ability and willingness of the Member to teach a range of subject matter and at various levels of instruction;
- (i) assessments by students and/or colleagues as sought through formal procedures pursuant to this Agreement; and
- (j) any issue related to Article 9.1.²¹

Similar clauses covering research and service activities can then be added to the agreement.

The advantage of providing a separate clause to provide guidelines which describe activities and govern the evaluation process is that it avoids repetition as these clauses apply in all cases, not just renewal, tenure and promotion. A separate stand-alone article helps ensure more consistent evaluations. This makes the agreement easier to use and administer. ■

²¹This Collective Agreement between Queen's University Faculty Association (hereinafter called the Association) and Queen's University at Kingston (hereinafter called the University), 7 May 2005 to 30 April 2008.

