



University College London UCU Branch

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Dr Michael Spence AC
Provost and President
University College London
London

Friday, 21 April 2023

Dear Provost,

We are writing formally to dispute the basis that UCL has set out for making pay deductions for participating in the national UCU marking and assessment boycott.

Here we must highlight three fundamental objections to you. These are

1. Proportionality
2. Deductions prior to boycott participation
3. Unilateral variation of contract.

There are some additional issues that we have identified, and further ones may become clearer over time.

We believe that UCL's threats of excessive pay deductions, and UCL's communications regarding deadlines for staff to inform management of participation in the marking and assessment boycott, are likely to be in breach of legislation protecting the right to freely participate in lawful industrial action.

Among the many errors in UCL's correspondence we need to highlight the claim or implication that UCU is calling for a boycott of formative assessment.

This is not true, and the UCU boycott statements and FAQs¹ explicitly refer to summative assessment only, i.e., assessments for the purposes of marks and grades. We are not boycotting support for students during this time. We also ask that you urgently correct this in your communications.

This issue also speaks to the presumed lawfulness of the proposal to make deductions from the commencement of the 'central assessment period' in all cases. We return to this below.

¹ <https://www.ucu.org.uk/MAboycottFAQs>

1. Proportionality

The proposal is to deduct 50% of full pay for the ‘central assessment period’ of 24 April to 6 July, a total of 73 calendar days (or 74 days inclusive). It is not clear to us whether you propose to deduct for the 3 bank holidays in May, including the extra one for the Coronation.

This amounts to potentially 36.5 or 37 days’ pay at a rate of 1/365, or 0.1FTE (10%) of an annual contract. By contrast, a typical workload model of a staff member with substantial marking is a total year-round FTE of 0.03-0.04FTE (3-4%). Many staff have more limited obligations, such as one-off in-person assessments such as upgrade and thesis vivas, or assessing student presentations, tasks which may not even be deemed sufficient to quantify in workload calculations.

UCL is adopting a one-size-fits-all approach that does not relate to the actual duties boycotted by individuals. This is automatically guaranteed to fail a test of proportionality.

Your HR email of 20 April asserts that the justification for this approach is that the boycott covers a wide range of duties beyond marking and processing marks. Much of this statement is remarkably poorly informed about the boycott:

UCU has made clear that the boycott covers all marking and associated assessment activities and duties. This includes not providing informal guidance/feedback to students concerning their likely mark/grade or assessed progress, and other assessment-related work such as exam invigilation, the processing of marks and preparation for and running of exam boards. These activities make up a significant proportion of the workload of most staff in student-facing roles (whether academic or PS), particularly at this time of year. Many of these activities, such as preparing students for assessment or providing feedback to them, are not limited to a singular moment in time but are continuous duties throughout the central assessment period (24 April –6 July). This is why we consider that participation in the boycott is continuous between these dates.

The first sentence is not correct. The boycott is of summative assessments, not formative ones. We are not boycotting preparing students for assessments or refusing to provide feedback on their progress.

To the extent to which this passage mentions additional duties that could fall under the scope of the boycott, it fails to quantify them. Many are minimal. To take one obvious example, if staff were normally to give advice to students, it would be in a conversation in a tutorial (which is not being boycotted) and would take no additional time, or in an email or Moodle forum post. Staff do not tell students about their ‘likely marks’ informally, for multiple reasons, including the risk of encouraging complacency. Most staff at UCL do not perform exam invigilation.

Contrary to the impression this paragraph in your email creates, most of these additional duties are negligible in workload, and apart from invigilation which few staff perform, all of those duties covered by the boycott can only take place following marking. For example, the relaying of a mark to a student may only be done once marks are finalised.

Secondly, UCL is not proposing to determine on an individual basis whether staff are intending to carry out these duties. It is insufficient to assert that ‘most staff’ in ‘student-

facing roles' are required to perform particular duties. It is necessary to show that *every individual* staff member subject to deductions for participation in the boycott was required to perform specific duties, and chose not to do so, i.e. they chose to boycott those duties at that time.

Consequently, the deductions proposed are grossly disproportionate, and contrary to the judgment in *Miles v Wakefield Metropolitan District Council* [1987], where the principle of *quantum meruit* was identified as the correct one to consider.

UCL HR's email also implies that the reasoning is premised on an assessment of the proportion of work not undertaken because it is based on 'these activities and duties':

Boycotting these activities and duties represents a continuous partial performance of contractual duties related to this assessment period and, as such, we will withhold 50% of pay.

However, if this is not the position, and UCL wishes to assert a lawful method for calculating deductions other than *quantum meruit*, we must ask UCL to state it.

2. Deductions prior to boycott participation

We maintain that up until the time that staff are required to perform marking duties, they can ultimately decide not to perform them. *It is not possible to fail to fulfil an employment obligation that does not yet exist.*

However, UCL's email asserts that it is legitimate to make deductions for staff prior to the staff member being issued with material to mark or assess.

It quotes UCU's FAQ as stating that 'you can have pay deducted for every day of the marking and assessment boycott'. That statement is valid insofar as a particular staff member could conceivably be given marking prior to the boycott and then fail to hand it in. But this statement does not license deductions on days prior to boycott participation by an individual member of staff who began their participation at a later time.

Whereas it is potentially lawful to make proportionate pay deductions for partial performance following a contractual breach as outlined in the previous section, 'partial performance' (i.e. failure to fulfil a contractual obligation) can only begin at the point in time when the contractual obligation concerned first materialized.

Indeed, given the normal flexibility surrounding student submission and staff contracts, staff are not contractually obliged to mark work on the first day of receipt. Most employers have concluded the only 'safe' point in time for work to be deemed to have been not marked by an employer is the final return submission deadline. This was UCL's position in 2006.

These pre-boycott deductions are therefore a deduction from salary covering a period of time during which staff are not yet engaged in a boycott. We believe these deductions are simply unlawful.

Moreover, the *threat* of making them to staff who have not yet made a decision to participate in the boycott but are contemplating doing so also likely constitutes unlawful employer

intimidation towards those staff, contrary to Human Rights Act and TULR(C)A 1992 provisions protecting the right to freely participate in lawful industrial action.

3. Variation of contract

Staff contracts contain no statement referring to a ‘central marking period’. UCL has not approached the recognised trade union (i.e. UCU) to establish such a policy term that would have contractual application.

Nor is there an expectation set out in contracts that during any such ‘marking period’ staff would be obliged to spend 50% or more of their time on marking and related activities.

Staff are normally allocated marking work by managers, typically by discussion in teaching teams, at the start of the academic year, with variation negotiated once student numbers are confirmed. Marking is due at various times in the year, and internal deadlines not pertaining to progression or graduation are frequently moved.

Crucially, staff are not required to accept work from others except in very limited circumstances. Staff are limited in their marking and related duties by multiple factors, from professional expertise to knowledge of the marking scheme and course expectations. There is no requirement on any staff member to mark work that they have no expertise in, and students expect that their work will be marked, second marked, and quality assured through proper processes. In most cases, the first marker will be the staff member who taught the course.

To provide an illustrative example, a staff member who is expecting work to mark in late May would not be obliged by contract to perform any marking-related duties prior to that point. Nor would they be obliged to announce their intention to refuse such duties before they were offered.

We are very concerned that UCL is setting a precedent that amounts to a *de facto* unilateral contractual change on all staff (whether ‘student-facing’ or not) that implies that such staff will be obliged in future to accept greater quantities of additional marking, including potentially marking outside their areas of expertise or teaching. This would be a significant contractual change, one that we strenuously dispute.

We believe this point is of critical academic importance. UCL is a research-intensive university that puts primacy on research-led teaching where research-active academic specialists perform the lead role in course teaching, and where students expect their work to be marked by the same specialists. Our scholarship and UCL’s reputation is at stake.

4. National Minimum Wage and Living Wage

As we understand it, UCL is proposing to make deductions for ‘partial performance’ at 50%, but will not reduce working hours.

The National Minimum Wage is £10.43 an hour, or £10.18 an hour for workers under 23.

If their pay is cut by 50% with no loss of hours, a staff member on Grade 7 point 29 (from February: paid £20.76 an hour, therefore £10.38 an hour after a 50% cut) will earn less than

the National Minimum Wage (unless they are under 23). Staff on Grade 6 (including PGTAs and Research Assistants) will also be in this category.

As a Living Wage Employer,² UCL is committed to paying all staff at least the Living Wage, which is currently £11.95 an hour for London (£10.90 outside London). A staff member in London on point 34 or below (currently paid £23.62 an hour) will be paid less than the London Living Wage.

We believe that the courts would rule the National Minimum Wage a mandatory minimum, because this is also a requirement when staff are subject to other deductions from salary. We must also ask whether UCL will also guarantee that staff subject to deductions will be paid no less than the Living Wage.

5. The position of non- ‘student-facing’ staff

UCL has announced a blanket policy for all staff. However, its recent communication was caveated to ‘student-facing’ staff (see the email quote above).

As you know, many staff in non- student-facing roles are also asked to perform some marking or assessment, which they are entitled to choose to boycott.

The implication of the email is that where staff do not have substantial marking and related duties (typically, research staff and research-intensive academics), they will still be subjected to a 50% pay deduction for a long period despite having a very small marking responsibility.

Additional conditions may apply. For example, UKRI-grant funded research staff are subject to an express provision in their grant funding conditions that no more than 15% of workload may be allocated to non-research duties (usually teaching, but may include some marking).

We dispute all cases on grounds of (dis)proportionality, but we would draw your attention to the fact that UCL has simply failed to address the position of staff in these groups.

Conclusions

UCL must withdraw threats made to staff to declare in advance of any decision to boycott. At the present time we cannot see how the proposed deductions would be lawful, so asking staff to submit data so that they can have their pay deducted on an unlawful basis is manifestly not a reasonable management instruction (leaving aside the intimidatory element of some of these demands).

UCL has adopted an extremely unusual and aggressive position with respect to deductions. This may be because you have misunderstood the scope of the marking and assessment boycott to include pre-examination support to students and formative assessment, which you appear to believe justified deduction for boycotting duties that would occur prior to any work being given to staff to mark. We call on you to change your position on this.

Many universities in the sector have adopted a more sensible position of recognising the reality of student submission processes and internal flexibility around deadlines and proposed

²See <https://www.ucl.ac.uk/news/2021/oct/ucl-celebrates-london-living-wage-accreditation>

deductions on or around the final due date for marks. I would expect that those who have not yet changed their position to be challenged by UCU.

We believe that the proposal to deduct at 50% per day cannot be justified by the sweeping statements that have been made thus far by UCL. There is a wide range of variation in the duties of staff who are called upon to mark work at UCL. A one-size-fits-all approach is not consistent with legal principles of proportionality, whether by *quantum meruit* or by other means. UCL has not applied its mind to this question concretely in relation to individual circumstances, which the law requires.

UCL is accepting partial performance and is not sending staff home. Consequently, we are entitled to ask formally how this 50% figure was arrived at. Our view is that these deductions are bound to be excessive and unlawful for most, if not all cases.

We urgently demand that UCL reconsiders its position. The current situation is extremely damaging to UCL's reputation, not least because it simply ignores the wide variety of staff who participate in marking UCL's examinations and assessments.

We note that several universities, including Oxford have not announced that they intend to make deductions, whereas UCL's fixed penalty of '50% for 73 days' or 0.1FTE is one of the most draconian in the sector.

Unless UCL is prepared to engage in meaningful negotiation with UCU we will be compelled to consider what further action we might take. This is clearly urgent given the stated commencement of the 'central marking period' (sic) on Monday 24 April, and the deadline that UCL seeks to impose for reporting, Friday 28 April.

Our members are meeting on Thursday 27 April to discuss further steps.

We look forward to your reply.

Yours sincerely



Sean Wallis
UCL UCU Branch President

cc: Donna Dalrymple, HR Director of People
cc: Andrew Young, UCU RSO
cc: Jo Grady, UCU General Secretary
cc: Saladin Meckled-Garcia, UCL UCU Branch Secretary
cc: David Ladd, UCL UNITE Branch Secretary
cc: Joanne Tapper and Jacqueline Sheehan, UCL UNISON Joint Branch Secretaries