

23 May 2023

Dear Professor Nishan Canagarajah,

We are writing with grave concerns about your plans to stop the salaries of those participating in the Marking & Assessment Boycott (MAB) and replace them with an *ex gratia* payment worth 50% of their salary, while expecting them to continue to work on a voluntary basis. This move is potentially unlawful, and certainly unethical and punitive. We outline the basis of our concerns below.

You and your representatives from the executive board have consistently failed to engage in meaningful negotiations with Leicester UCU on these deductions. When we have met your representatives, which we have done regularly, your position has simply been restated. This attitude threatens to reverse any progress made on relations between Leicester UCU and the university's executive board since our local dispute over redundancies. The national dispute will eventually conclude and the actions you take now will have implications for our ability to work fruitfully together to continue to build the academic community to which we have given so much.

As you know, UCU has, through a national ballot of members, recently won a new six-month mandate for industrial action, including strike action. The last general meeting of Leicester UCU voted to poll our members, recommending strike action here if the University of Leicester executive refuses to alter its position on pay deductions. Our members have now voted to support further strike action, and that is an option we are considering.

We ask that you reply to us by 5pm on 31 May and let us know whether you are prepared to change course on your threatened pay deductions. We remain willing to meet with you to discuss this matter, provided the meetings offer an opportunity for meaningful negotiation rather than simply a restatement of your position. We also note the joint statement from the vice chancellor at the University of Cambridge and the president of Cambridge UCU urging UCEA to return to negotiations. This seems a more helpful approach to resolving the dispute than the intransigence of senior managers at the University of Leicester.

Legally dubious

Your approach to pay deductions during this dispute appears to contradict the legal advice on withholding pay in the event of rejection of "partial performance", including advice issued by the government. The government's advice states that in the event of a rejection of partial performance: "The courts have issued a warning to employers that they must be able to show that their position was genuine and that employees who continue to work could not have been confused or misled (for example, by being issued with work)".¹ Yet we have countless instances of managers continuing to issue work to those they know to be participating in the MAB.

Furthermore, you repeatedly say in your own guidance, as does Professor O'Connor in her correspondence with Leicester UCU, that you are *withholding 50% of pay*.² This contradicts what we believe to be your actual position, stated above. If you are, in fact, simply withholding a *percentage* of pay then the implication is that you are *accepting*

¹ <https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations/employment-law-topics-and-e-guides-4> and see also *Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493.

² For instance, in the email received by UCU on 4 May and in the guidance here: <https://uniofleicester.sharepoint.com/sites/staff/information-for-managers/absence-attendance/Shared%20Documents/strike-action-faqs.pdf>

partial performance. In this case, the onus is on you to demonstrate that this sum is proportionate, reflecting the damages incurred.³ The real confusion engendered is reinforced by the fact that you intend to process the *ex gratia* payment as salary, and to pay income tax and national insurance as usual. Your representatives have stated that this sum *is* subject to national minimum wage legislation, and we note that some staff will likely earn less than the legal minimum given the work they undertake. The confusion resulting from all this means that employees are far from clear on what your actual position is.

Moreover, your threat to cease payment of salaries from the date that marking becomes available, and to continue to do so until staff declare they are prepared to cease their action, may constitute an unlawful deduction of wages. Your claim that there is a clear breach of contract from the point at which marking becomes available is not credible. First, staff are *not* expected to mark work on the first day that it becomes available. Indeed, they are under no obligation to have decided at this point whether to participate in the MAB. Second, for this rule to be applied in a fair manner, staff *not* participating in the MAB, who fail to prioritise marking and, for instance, miss marking deadlines as a result, would also have to be held to be in breach of contract.⁴ This has not been the case. Third, given that you are allowing managers to make alternative arrangements for marking, beyond a certain point there will be no marking to do. How can staff be in breach of contract for refusing to do work that it is impossible for them to carry out? Your policy appears to mean that a staff member who failed to mark a single essay could, as a result, suffer a 50% reduction in income over several months.

Ethically dubious

As well as exposing itself to potentially costly legal action, the University of Leicester has also positioned itself among the most punitive of those institutions making the *ex gratia* 50% contribution to staff. We pointed out in our correspondence on 28 April:

- Many universities have determined a fixed period for marking, during which pay will be withheld. For instance, Manchester Metropolitan University have determined a three-week period, during which pay will be deducted at 50% from participating staff.
- At other universities, such as the University of Cambridge, deductions of 50% are only taking place on days when staff declare that they would have expected to have performed marking.
- The “least bad” model is at the University of Hertfordshire, where each School is calculating the time staff would have spent on marking and deducting an equivalent proportion of their pay for those days.

Contrary to what your representatives have claimed, this is not because these universities have a rigid and universally applied marking period; in modern universities such a period is a rather arbitrary convention. We can today add further instances. To give just two:

- King’s College London announced on 18 May that staff would see their salaries replaced with a 50% payment for just ten days, rather than the 20 days initially proposed. This followed meaningful negotiations with the UCU branch.
- Queen Margaret University has announced that it will not make any deductions following the withdrawal of a threat of strike action and negotiations with the UCU branch.

We urge you, even at this late hour, to reconsider your threatened salary deductions and work towards a joint statement with Leicester UCU, urging UCEA to return to negotiations.

Yours sincerely,

Dr Joseph Choonara & Dr Nataly Papadopoulou

On behalf of Leicester UCU

³ See for instance *Miles v Wakefield Metropolitan District Council* [1987] UKHL 15.

⁴ See s. 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).