



UNIVERSITY OF
LEICESTER

Professor Nishan Canagarajah
President & Vice-Chancellor

University of Leicester
University Road
Leicester LE1 7RH
UK

Dr J Choonara & Dr N Papadopoulou
On behalf of University and College Union
University of Leicester

t: +44 (0)116 252 2320
e: vc@leicester.ac.uk
w: www.le.ac.uk

Letter sent by email only

31 May 2023

Dear Dr Choonara & Dr Papadopoulou

Thank you for your letter, dated 23 May 2023, outlining your concerns regarding the University position for the withholding of pay for Action Short of Strike (ASOS) which constitutes a breach of contract.

The position of the University has been consistent regarding the withholding of pay for a breach of contract. The position with the withholding of pay was communicated in an all-staff email from Professor Henrietta O'Connor on 18 April 2023 and there was a meeting with UCU representatives on 17 April 2023 in advance of this being sent out; no concerns were raised at that stage. As you are aware, this communication is supported by links to the University's Withholding of Pay Protocol and a comprehensive set of FAQs.

We recognise that industrial action is always challenging and no member of staff participates in industrial action lightly. However, as we have previously communicated to UCU, employers are legally entitled to withhold pay from an employee who chooses to breach their contract of employment by taking part in ASOS. The University rejects partial performance and the approach being taken to withholding pay is entirely consistent with our legal rights to do so.

Members of staff who participate in the marking and assessment boycott are in breach of their contract of employment as they are not ready and willing to undertake their full duties of employment. The University does not accept this breach of contract and the partial performance which it involves. As a result, the legal position is that these members of staff are not legally entitled to be paid for any work which they carry out; the University requires them to undertake their full duties including the marking and assessment of work. In these circumstances, because the University has no legal obligation to pay a member of staff who is refusing to carry out their full duties, the University has made clear that any work they may choose to carry out will be undertaken by them on a voluntary basis. This does not mean that such employees become "volunteers" in law, whether for the purposes of the National Minimum Wage legislation or otherwise. They remain employees but are employees who are in breach of their contract with the legal consequences set out above.

For the marking and assessment boycott the withholding of pay for ASOS is calculated from the point at which the work was available to be completed until the staff member formally declares that they are now ready and willing to perform their full contractual duties and, therefore, no longer participating in ASOS. The University requires staff to prioritise marking and assessment work during the period of industrial action. The University's position is, therefore, that it is indeed possible for those taking part in the marking and assessment boycott to be in breach of contract as soon as marking work is available for them to carry out if they are not ready and willing to carry out marking and assessment duties.

It is disappointing that UCU has begun a marking and assessment boycott targeting students' learning and education and their future career prospects. HEIs have a duty to protect students and so withholding of pay for partial performance is justified. UCU are suggesting that withholding of pay is punitive but the marking and assessment boycott has potential to be extremely damaging in nature for students and their progression.

UCEA have communicated that the unions should not mislead members by suggesting that the marking and assessment boycott or further industrial action could lead to a revised pay award for 2023-24; given the current financial situation they have said that there is no possibility of this happening. However, while discussing the pay uplift is not an option, UCEA has been at the table waiting for UCU and the other trade unions to join them and discuss the important pay related issues, as agreed in the terms of reference relating to the reform of the pay spine, the disability, ethnicity and gender pay gaps, workload and contract types.

I understand that the reasons for our approach in withholding pay have been explained to UCU and that consideration was given to alternative options that were put forward. There are different approaches being taken by HEIs with a high number withholding pay at 100% for ASOS with no ex-gratia payment; we have decided not to do this.

We remain committed to working with UCU and our other recognised Unions. However, the University position on the withholding of pay will not be reversed given the breach in contracts of employment and our need to protect students.

Regards

A handwritten signature in black ink, appearing to read 'N. Canagarajah', with a horizontal line underneath.

Professor Nishan Canagarajah
President & Vice-Chancellor