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File: 561-34-67

Citation: 2006 PSLRB 29

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Professional Institute of the Public Service of Canada v. Canada Revenue Agency

In the matter of a complaint under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Dan Quigley, Board Member

For the Complainant: Harinder Mahil, Professional Institute of the Public Service of Canada

For the Respondent: Harvey Newman, Counsel, and Martine Beaudry, Counsel

Heard at Vancouver, British Columbia,
January 17 and 18, 2006.

Complaint before the Board

[1] On May 2, 2005, the Professional Institute of the Public Service of Canada (PIPSC) filed a complaint pursuant to section 190 of the *Public Service Labour Relations Act* (*PSLRA*). It alleges that the Canada Revenue Agency (CRA) violated the statutory freeze provisions found in section 107 of the *PSLRA* by cancelling the Alternate Work Arrangements Policy (telework) for employees of the Audit, Financial and Scientific (AFS) Group working at the Burnaby-Fraser Taxation Services Office (BFTSO).

[2] The applicable part of section 190 of the *PSLRA* reads as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> > *(a) the employer has failed to comply with section 56 (duty to observe terms and conditions);*
> >
> > *(b) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
> >
> > *(c) the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions);*
>
> . . .

[3] Section 107 of the *PSLRA* reads, in part, as follows

> ***107.*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition . . .*
>
> . . .

[4] Five witnesses testified on behalf of the PIPSC and four exhibits were introduced. One witness testified on behalf of the CRA and it filed one exhibit.

Summary of the evidence

[5] Both parties made brief opening remarks. As well, they filed an Agreed Statement of Facts (Exhibit A-1), which reads as follows:

> *1. The expiry date of the collective agreement between the Canada Customs and Revenue Agency (CCRA) and The Professional Institute of the Public Service of Canada (PIPSC) for the Audit, Financial and Scientific (AFS) Group was on December 21, 2003.*
>
> *2. PIPSC served notice to bargain on CCRA on September 22, 2003.*
>
> *3. PIPSC and CCRA reached a tentative agreement on July 12, 2005.*
>
> *4. PIPSC members ratified a new collective agreement on August 19, 2005.*
>
> *5. PIPSC and CCRA signed a new collective agreement for the AFS group on August 22, 2005.*
>
> *6. The CCRA has a policy on telework, which was effective July 22, 2003. This policy was instituted after consultations with PIPSC. The objective of this policy is "to enable employees to achieve a balance between their work and personal lives, while fulfilling performance expectations and CCRA objectives."*
>
> *7. Article 36.03 of the collective agreement between CCRA and PIPSC reads: "Wherever possible, the Employer shall consult with representatives of the Institute at the appropriate level about contemplated changes in conditions of employment or working conditions not governed by this Agreement."*

Although the Agreed Statement of Facts references CCRA, it should be noted that as of December 12, 2005, CCRA became CRA.

[6] In their opening statement the PIPSC stated that 14 members of the AFS Group who had been working from their residences (telework), some for as long as 10 years, were advised by the CCRA on March 16, 2005, that telework would be cancelled effective April 29, 2005. The PIPSC alleges that the decision to cancel telework was made after it had served notice to bargain on September 22, 2003, and before ratification of the collective agreement on August 19, 2005. According to the PIPSC, cancelling telework resulted in a change to the terms and conditions of employment in force and thereby violated section 107 of the *PSLRA*.

[7] The PIPSC requests that the Board issue the following order:

> *a. that the Respondent violated Section 107 of the PSLRA.*
>
> *b. that the Respondent respect all terms and conditions of employment that existed at the time of the notice to bargain.*
>
> *c. that CRA post notices in conspicuous locations at BFTS0 of the Respondent's violation of the PSLRA and the remedial actions imposed by the PSLRB.*
>
> *d. that CRA withdraw notices given to employees at BFTSO cancelling Alternate Work Arrangements.*
>
> *e. that CRA, in the event it proceeds to cancel Alternate Work Arrangements for employees at the Burnaby-Fraser Taxation Services Office, re-establish those arrangements.*
>
> *f. any other relief that the Board may deem appropriate.*

[8] The CRA alleges that it did not violate section 107 of the *PSLRA*. The possibility of telework resulted from consultations with the PIPSC to create a National Policy, which came into effect on July 22, 2003. The National Policy allowed either party to a telework arrangement the right to cancel telework as long as reasonable notice was provided in writing. The Policy was not incorporated into the collective agreement.

[9] Counsel for the CRA stated that 14 employees were affected by its decision to cancel telework. Of that number, nine employees represented by the PIPSC grieved; one employee represented by the Public Service Alliance of Canada (PSAC) grieved; and one other employee represented by the PIPSC was allowed to resume telework due to a personal accommodation. The other 3 employees did not avail themselves of the grievance procedure.

[10] The CRA stated that it adhered to the Policy; however, there was never a guarantee or absolute right that employees performing telework would be permitted to do so until they retired. The employees whose telework arrangements were cancelled grieved. At a hearing at the second level of the grievance procedure, the grievances were upheld in part and telework reinstated. The grievances were allowed further to a review of the Policy and not because of the statutory freeze provisions.

[11] The CRA argued that in terms of damages or out-of-pocket expenses as a result of the cancellation of telework, the Board should not award any damages.

Summary of the Evidence

[12] Eldon Pratt has been employed at the CRA and its predecessors for approximately 32 years. At present, he works in Penticton, B.C., as a Technical Advisor (Audit) in the Verification and Enforcement (V&E) Branch. Since 2001, he has been the BC/Yukon representative for the AFS Group.

[13] The witness identified Exhibit G-2, tab 6, as the bargaining proposal submitted by the PIPSC in July 2001 for telework. It reads as follows:

(NEW) TELEWORK

XX.01 A Telework arrangement is a situation where an employee performs assigned duties in an alternate location separate and distinct from an official workplace of the employer for some portion, or all of the employee's hours of work.

XX.02 The terms and conditions of a Telework arrangement shall be agreed in writing by the employer, the employee and the Institute. No provision of a Telework arrangement shall be inconsistent with the terms and conditions of the Collective Agreement.

XX.03 No employee shall be required to participate in a Telework arrangement without the employee's consent.

XX.04 (a) Where an employee requests a Telework arrangement, the employer may deny such a request only where it demonstrates that the arrangement is inconsistent with operational requirements.

(b) Where the employer denies an employee's request for a Telework arrangement pursuant to (a) above, it shall provide to the employee a full and complete statement in writing of the reasons for such denial.

XX.05 On provision to the employer of ten (10) working days' notice in writing, an employee shall have the right to terminate a Telework arrangement.

XX.06 Sufficient and appropriate office space shall be maintained at the official work place for use on

> *occasion by an employee who works under a Telework arrangement.*
>
> *XX.07 An employee under a Telework arrangement shall be provided with the information that is posted on the employer's bulletin board. The employee shall have access to the employer's electronic mail system. Reasonable space on the employer's electronic mail system/bulletin board shall be made available to the bargaining agent for the posting of official notices.*
>
> *XX.08 Any request for telework by the employee shall not be unreasonably denied by the Employer.*

[14] As a result of becoming a separate employer under Part II of Schedule I of the *Public Service Staff Relations* Act (*PSSRA*; now the *PSLRA*) effective November 1999, the Board determined that the AFS Group was an appropriate bargaining unit and certified the PIPSC as bargaining agent (2001 PSSRB 127). The witness testified that the telework bargaining proposal submitted in July 2001 for the AV Group was later amended to an AFS Group proposal. He noted that the PIPSC was unsuccessful in negotiating telework into the current AFS Group collective agreement that was ratified on August 19, 2005.

[15] The witness identified Exhibit G-2, tab 9, as CCRA's (as it then was) request in November 2001 to national union presidents for comments or suggestions on a new telework policy.

[16] Andrew Adolph is an Auditor with 15 years of service. He is a steward and as of March 2005 he sits as a Union Executive member of the AFS local subgroup. The witness identified Exhibit G-3, tab 1, as the Telework Policy that was revised on July 22, 2003. The revised telework Policy replaced a Treasury Board Policy dated December 9, 1999, a CCRA Pacific Region Directive dated July 2001, and a V&E Branch, BFTSO Directive dated January 2002.

[17] The witness identified Exhibit G-4 as the nine grievances that were filed by PIPSC members alleging a violation of clauses 1.01 and 1.02 and Article 36 of the collective agreement following the unilateral termination of the telework arrangements specific to the grievors. The witness stated that he represented the grievors during the grievance procedure and identified the first and second level responses as Exhibit G-3, tab 25. He stated that Michael Quebec, the Director of the BFTSO, had upheld the grievances in part at the second level of the grievance procedure.

[18] Jaspal Gill, an Income Tax Auditor with 14 years of service, who was a PIPSC steward at the relevant time, identified the minutes of a March 2, 2005, PIPSC Union Management Consultation meeting (Exhibit G-3, tab 18) that he co-chaired with Mr. Quebec. He testified that Mr. Quebec never mentioned that the employer was going to cancel the telework arrangements of employees at the BFTSO. It was the witness' opinion that Article 36 ("Joint Consultation") of the collective agreement was not adhered to. He first found out about the cancellation of telework through the affected employees.

[19] Article 36 of the collective agreement states the following:

> ***JOINT CONSULTATION***
>
> ***36.01*** *The parties acknowledge the mutual benefits to be derived from joint consultation and will consult meaningfully on matters of common interest.*
>
> ***36.02*** *The subjects that may be determined as appropriate for joint consultation will be by mutual agreement of the parties and shall include consultation regarding career development. Consultation may be at the local, regional or national level as determined by the parties.*
>
> ***36.03*** *Wherever possible, the Employer shall consult with representatives of the Institute at the appropriate level about contemplated changes in conditions of employment or working conditions not governed by this Agreement.*
>
> . . .

[20] In cross-examination, the witness stated that he was first advised by the affected employees of the employer's decision to cancel telework. It was only on March 17, 2005, that he received official written notification from the employer of its decision to cancel telework, effective April 30, 2005.

[21] The witness stated that, although he is not an expert in interpreting telework policies and/or directives, he was not aware of any other employee having his/her telework arrangements cancelled. To his recollection, only the employees in the V&E Branch at the BFTSO had their telework arrangements cancelled. When asked what steps the PIPSC took when employees were informed that telework would be cancelled, the witness replied that he was not advised at the March 2, 2005, meeting of the employer's decision and that Mr. Quebec did not consult with him prior to making the decision. He agreed that the grievances were successful in part and telework

reinstated, but stated that it was the end of December 2005 before employees resumed telework.

[22] In reply, the witness recalled seeing the draft of an e-mail (Exhibit G-3, tab 21) from Paul Skinner, an Income Tax Auditor, dated March 24, 2005, to Mr. Quebec concerning the cancellation of telework.

[23] Paul Skinner has worked as an Income Tax Auditor at the CRA for approximately 25 years. He has held a number of positions within the PIPSC and now serves on the National Executive for the BC/Yukon AFS Group. He started telework in the summer of 1995 while at the Vancouver Tax Office. At that time, the process for an employee to be considered for telework was complicated. The employee had to submit an application to his/her manager, bearing in mind that certain conditions had to be met. The supervisor would then have the final say on whether or not telework would be approved. Some of the conditions were:

- good performance
- experience
- being a self-starter
- being able to work independently with little or no supervision
- having a separate office in your residence
- a number of security criteria: locks on windows and doors and a fenced-in property

[24] The witness identified a letter he sent on January 12, 2001, (Exhibit G-3, tab 8) to Kathleen Keenlyside, a manager at the CCRA, commenting on the proposed Regional Telework Policy. On September 28, 2001, recommendations from the Joint Union Management Telework Committee were sent to Narrin Gill, the Assistant Director of the V&E Branch.

[25] The witness stated that he was advised by e-mail from his Team Leader, Pal Gulati, on March 16, 2003, that his telework arrangements would be cancelled as of April 30, 2005. He stated that Mr. Gulati did not provide him with a reason other than that he had been given that direction by the Assistant Director of the V&E Branch, Joanne Ralla. In response, the witness sent an e-mail (Exhibit G-3, tab 21) on March 24, 2005, to Mr. Quebec stating that no reason had been provided to him as to why his telework arrangements were being cancelled. As no response was received from Mr. Quebec, Harinder Mahil, an Employment Relations Officer with the PIPSC,

sent a letter to Mr. Quebec on April 29, 2005, requesting that he defer his decision to cancel telework.

[26] On April 6, 2005, the witness grieved Mr. Quebec's decision to cancel telework (Exhibit G-3, tab 23). On April 13, 2005, he received an e-mail from Len Lindberg, the Audit Manager of the V&E Branch (Exhibit G-3, tab 23), stating that:

> *Telework Agreements must be operationally feasible and cost effective (no net cost to CRA). Your arrangement does result in ongoing net costs to the Agency.*
>
> . . .

[27] The witness stated that he filed his grievance because of the CRA's decision to cancel telework, which, he felt, was a violation of clauses 1.01 and 1.02 and Article 36 of the collective agreement. He stated that, although the reply at the second level of the grievance procedure restored telework at the BFTSO in September 2005, he was not immediately able to resume telework. As a result of a strike by Telus employees he could not have his business telephone (which had been disconnected by the CCRA at the end of April 2005) reconnected until December 2005.

[28] The witness testified that he had been performing telework for 10 years and it became a way of life for him and his family. As a result, he incurred costs by the addition of extra security for his home and he bought a dog. When his telework arrangements were cancelled, he incurred approximately $200 in extra costs for expenses such as parking and automobile insurance. He also stated that in his years with the CRA he never heard of telework being cancelled. His Team Leader would meet with him once per year to ensure offsite security protocols were in place and that he was meeting the CRA's performance expectations.

[29] In cross-examination, the witness agreed that his grievance was allowed on August 25, 2005. However, he noted that it was not until the end of December 2005 that he resumed telework.

[30] The witness recalled a meeting in May 2004 where the Assistant Director of the V&E Branch mentioned that telework was not cost-effective. He recalled her stating that the telework arrangements would continue to the end of the fiscal year (March 31, 2005) and a decision whether or not to continue those arrangements would be made on a case-by-case basis. He did agree that a decision by senior management

was made sometime in 2004 not to approve telework requests from other employees. When counsel stated that notice to cancel telework was given on March 16, 2005, with an effective date of April 30, 2005, the witness acknowledged the statement and stated: "I knew it was vulnerable."

[31] The witness did not recall that either he or the other grievors met with the Assistant Director of the V&E Branch in August 2004 to discuss the cost-effectiveness of telework. He acknowledged that Mr. Quebec upheld the grievances in part at the second level of the grievance procedure; however, he did not believe that Mr. Quebec's response addressed the lack of consultation. He agreed that he did not pursue his grievance any further within the grievance procedure.

[32] The witness stated that his e-mail of March 24, 2005 (Exhibit G-3, tab 21), to Mr. Quebec raised his concerns that the Assistant Director of the V&E Branch had not consulted with the affected employees before cancelling telework. As well, the e-mail stated that there had been no mention of cancelling telework at the March 10, 2005, Regional Union Management Committee meeting.

[33] Tom Stasiewski has worked as an Auditor for approximately 30 years. He is a PIPSC steward and secretary of the BFTSO AFS Group. He began telework in 1995 while at the Vancouver Tax Office.

[34] The witness testified that, on October 22, 2003, he prepared a letter to Vince Timm, Manager of the BFTSO, on behalf of Mr. Skinner and Linda White, the President of the Union of Taxation Employees, Local 2007 (Exhibit G-3, tab 16). The letter contained comments on the draft telework guidelines for managers and staff that were to be implemented in conjunction with the new Telework Policy. He stated that he never saw any response to this letter.

[35] He stated that he attended the March 2, 2005, PIPSC Union Management Consultation meeting and at no time was telework discussed. When asked by his representative how he defined consultation, he responded: "When people meet to discuss issues, there are discussions with input before decisions are made."

[36] On March 16, 2005, the same day his Team Leader, Scott Bannerman, informed him that his telework arrangements were cancelled, the witness sent an e-mail (Exhibit G-3, tab 25) to Les Lindberg, Manager, Audit Speciality, objecting to what he

characterized as the summary termination of his telework arrangement. Mr. Lindberg replied by return e-mail: "Sorry Tom. As discussed your telework agreement has been terminated." The witness testified that he grieved the cancellation of his telework arrangements (Exhibit G-3, tab 26) and his grievance was allowed in part. He did not recall any meeting in 2004 where senior management discussed cancelling telework.

[37] The witness noted that as a result of the cancellation of telework he incurred extra costs for parking, lunches and coffee.

[38] In cross-examination, the witness was referred to a number of minutes of PIPSC Union Management Consultation meetings (Exhibit E-1), which he attended. He agreed that the minutes of the June 8, 2003, meeting recorded that a National Telework Policy was being drafted.

[39] The witness agreed that, at the meeting held on September 18, 2003, Mr. Quebec announced that a new National Telework Policy had been issued and that management had to demonstrate that telework was cost-neutral and operationally feasible. As well, at that same meeting, Mr. Quebec stated that there was no longer a space shortage at the BFTSO for offices, desks, etc. The witness also agreed that telework was discussed at the December 17, 2003, March 23, 2004, and September 13, 2004, meetings. The witness agreed as well that most of the minutes were signed by Mr. Skinner as co-Chair.

[40] In reply, the witness stated that a number of the minutes did not refer to the cost-effectiveness issue. As well, there were differences of opinion between the PIPSC and the CRA as to the costs of telework, particularly the square-footage costs.

[41] Michael Quebec, presently the Director of the BFTSO, has been employed at the CRA for approximately 30 years. He oversees 650 to 700 employees working in the Fraser Valley, Delta and Lillooet offices. He became the Director in May 2003 prior to the implementation of the National Telework Policy. He was aware upon his arrival that there were local and regional directives and that an internal audit was being conducted on the productivity and benefits of telework. He was also aware that those directives and the audit were put in abeyance as national consultations were being held regarding a new Telework Policy. The new policy was released in July 2003. The witness stated that he met with the PIPSC and other affected unions in September to discuss framing guidelines. He noted that, although he is not a Telework Policy expert,

the difference between the policies is that the new policy states that telework has to be absolutely cost-neutral. The witness was asked by counsel to read the following excerpt from the National Policy: "It is the policy of CCRA to facilitate an employee's telework arrangement when it is operationally feasible and cost-effective to do so."

[42] The witness noted that under the Policy Requirements section it states that telework is voluntary and should not be viewed as a right or obligation. As well, Part 6 states:

> *The Telework Agreement will end upon its termination date; or earlier;*
>
> . . .
>
> *(b) if the employee or the delegated manager had provided reasonable written notice; . . ..*
>
> . . .

[43] Mr. Quebec stated that the telework arrangements in the V&E Branch and other locations were subject to a business case analysis, with cost-neutrality being the most important factor. Mr. Timm reported to him that, in discussions with the PIPSC, no further productivity gains could be made to offset the CRA's cost-neutral requirements. In a meeting with his senior management team, it was agreed to apply the National Policy at the BFTSO. He stated that they did not want to cancel telework but the CRA could not offset the costs to ensure that it was cost-neutral.

[44] Mr. Quebec referred to the March 23, 2003, PIPSC Union Management Consultation meeting (Exhibit E-1) where he advised the PIPSC that there was a new National Telework Policy and that all telework arrangements would be reviewed on a case-by-case basis. He also sent an e-mail on July 12, 2004, (Exhibit G-3, tab 14) to all employees under his supervision stating that, in order to determine the potential impact of the new Telework Policy, a review of telework arrangements was required to ensure it was operationally feasible and cost-effective (no net cost to the CRA).

[45] The witness testified that he informed his five assistant directors that a review of telework arrangements would be conducted by the end of the fiscal year. The PIPSC was advised in the spring of 2005 that telework could be cancelled or revoked. He recalled the PIPSC's being very concerned. He stated that the employees are accountants; therefore, they understand the concern about cost-neutrality. The V&E

Branch reviewed the costs and concerns for security with the International Audit Branch. The witness stated that the V&E Branch's work was not cost-neutral; therefore, a decision was made to cancel telework at the BFTSO. The witness explained that the decision to cancel telework did not affect all of the 40 employees under his supervision; it only affected the 14 employees of the V&E Branch. The decision to cancel telework had nothing to do with ongoing collective bargaining.

[46] The witness stated that he heard the grievances at the second level of the grievance procedure. His decision to allow the grievances in part was based on his belief that the Telework Policy, which states that a case-by-case review shall be conducted on telework arrangements, was not followed. As well, he stated that employees who had been doing telework for as long as 10 years would need additional time to adjust. Reinstatement of telework was not his objective. He looked at the facts and reached the conclusion that the Telework Policy had not been followed.

[47] The witness reaffirmed that telework is not a right an employee has until he or she retires. There is an annual review and it is possible that it can be cancelled again. As well, he stated that he is not convinced that telework is a term and condition of employment.

[48] As far as national and local consultations, he agreed with the overall concept; however, when it comes to the implementation of an action or decision, he stated that he may or may not consult with the unions. He stated that out of courtesy he might do so, but again he might not.

[49] When referred to the letter from Mr. Skinner (Exhibit 3, tab 21), he indicated that after consulting with human resources it was decided that there was no need to reply to the letter, as it was viewed as inflammatory statements that served no positive purpose.

[50] The witness stated that the grievors never argued or submitted costs during the grievance procedure hearing.

[51] In cross-examination, the witness stated that upon his arrival at the BFTSO the issue of most concern to union and management was "hotelling". ("Hotelling" was the term used to define employees who shared a desk.) According to the witness, there was not enough space for staff to have their own offices or desks. At the time, the

issue of cost-effectiveness was not the priority that it later became as a result of the new National Telework Policy.

[52] He stated that, although the National Policy came into effect on July 22, 2003, it was not within the employer's capacity to immediately implement it for a number of reasons.

[53] The witness reiterated that his decision to allow the grievance in part at the second level of the grievance procedure was based on two reasons: (1) he was not convinced that a case-by-case review had been conducted; and (2) employees who had been doing telework over a long period of time should receive more notice of cancellation.

[54] He explained that the guidelines for the Telework Policy were not completed until January 2004, because the employer was unable to change the procedures for the agreement and new security issues before the end of the 2004 fiscal year.

[55] He also stated that Mr. Timm verbally reported to him that it was not possible to offset costs with increased productivity from employees to make telework cost-neutral. He reiterated that he sent an e-mail to all staff highlighting that telework had to be cost-neutral and cost-effective. He stated that it was his responsibility to look at the organization's objectives and that telework was not meeting those objectives.

[56] The witness noted that telework is not a condition of employment; it is voluntary and therefore not a right or an obligation.

[57] The witness agreed that during consultations there is an obligation to consult in a meaningful way. However, consultation is not co-management. In terms of informing the PIPSC about the decision to cancel telework, he stated: "If it were me, out of courtesy I might have called PIPSC. However, it is not an obligation."

Arguments for the PIPSC

[58] The PIPSC stated that, following notice to bargain served on the CCRA on September 22, 2003 (Exhibit G-2, tab 1), the terms and conditions of employment for the AFS Group were frozen by virtue of section 107 of the *PSLRA*.

[59] In this case, the employees whose telework arrangements were cancelled were covered by the employer's National Policy, which was instituted after consultations with the PIPSC. Under the Policy, a number of conditions had to be met prior to an employee receiving approval to perform telework. Approval was on a case-by-case basis; similarly, telework could be cancelled on a case-by-case basis. The PIPSC argued that there is not a shred of evidence that the employer consulted with the affected employees as to the impact the cancellation of telework would have on their lives.

[60] The PIPSC submitted that, even if the Telework Policy allows the CRA absolute discretion to cancel telework, it was prohibited from doing so during collective bargaining. The Telework Policy requires the manager and the employee to review telework arrangements together at least once per year for conformity with the Policy.

[61] The PIPSC stated that the issue before the Board is whether the CRA changed the terms and conditions of employment during collective bargaining. There is no difference between cancelling a policy and violating a policy.

[62] In conclusion, the PIPSC cited the following case in support of its argument: *The Queen in Right of Canada as represented by the Treasury Board v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80.

For the CRA

[63] The CRA agreed that the Telework Policy was in force at the relevant time and it was a term and condition of employment when the PIPSC served notice to bargain. Counsel stated that, if the policy was not properly applied, it would not be a breach but rather a misapplication of the policy and subject to the grievance procedure. The purpose of the statutory freeze provisions is nothing more than the required observance of a policy in force at the time collective bargaining commences.

[64] In the third paragraph of the complaint the PIPSC alleges that the CRA violated the statutory freeze provisions by cancelling alternate work arrangements (telework). The PIPSC is not claiming that there was failure to consult or that the consultation process was a term and condition of employment that was not observed pursuant to Article 36 ("Joint Consultation") of the collective agreement. The lack of consultation is irrelevant to the complaint, as evidence of a number of discussions and consultations regarding the Telework Policy was presented.

[65] The affected employees' privilege of working from home was not cast in stone, as the Telework Policy provided for re-evaluation and the cancellation of telework agreements by either party on reasonable written notice. If reasonable notice was not given by the CRA, the opportunity existed for an employee to grieve. The PIPSC argued that the manager and the employee had to review the agreement at least once per year. However, nowhere does it state that termination of the agreement could not occur before then. The cancellation of telework was within the framework of the Telework Policy. The onus was on the PIPSC to show that there was a breach of section 107 of the *PSLRA* and it failed to show this.

[66] In conclusion, the CRA cited the following cases: *United Food & Commercial Workers Union Local 1973 v. Staff of the Non-Public Funds, Canadian Forces*, PSSRB File No. 148-18-114 (1986) (QL); *Canadian Air Traffic Control Association v. Treasury Board (Transport Canada)*, PSSRB File No. 148-2-149 (1989) (QL); *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-2-186 (1991) (QL); and *UCCO-SACC-CSN v. Treasury Board*, 2004 PSSRB 38.

Reply

[67] The terms and conditions of employment for the AFS Group changed. The affected employees were working from home and, by cancelling their telework arrangements, the CRA changed their terms and conditions of employment. Since the implementation of the National Policy a review process was in place. However, in 2004 there was no evidence of a review having been performed.

[68] The CRA does not have the absolute right to revoke or cancel telework.

Reasons

[69] After consultations between the PIPSC and the CCRA (as it then was), a National Telework Policy came into effect on July 22, 2003. This new Telework Policy superseded previous regional and local directives/policies (Exhibit G-3, tabs 6 and 7).

[70] The AFS Group collective agreement was to expire on December 21, 2003. On September 23, 2003, the PIPSC served notice on the CCRA of its intention to commence collective bargaining. The CCRA and the PIPSC subsequently signed a new collective agreement on August 22, 2005.

[71] On May 2, 2005, the PIPSC filed a complaint with the Board alleging that the CCRA had violated section 107 of the *PSLRA*. According to the PIPSC, the violation occurred between March 10 and 16, 2005, when 14 of its members working at the BFTSO were advised that telework would be cancelled as of April 30, 2005, thus violating a term and condition of employment that existed at the time notice to bargain was served.

[72] At this hearing, counsel for the CRA agreed that telework was a term and condition of employment that was in force at the relevant time.

[73] The question to be decided is whether the CRA violated section 107 of the *PSLRA* by cancelling the telework arrangements of the employees at the BFTSO.

[74] After a review of the telework policies entered into evidence, I note the following. Both the regional and local directives in force prior to the National Telework Policy had identical language concerning the termination of telework: "Whenever possible a minimum of two weeks notice is necessary before either party terminates or modifies a telework arrangement." These directives were replaced by the National Telework Policy on July 22, 2003, (Exhibit G-3, tab 1) and under the section entitled Policy Requirements it states:

> *1. Participation by an employee in a telework arrangement is voluntary and should not be viewed as a right or obligation. The approval of a telework arrangement shall be made on a case-by-case basis.*
>
> . . .
>
> *6. The* Telework Agreement *will end upon its termination date; or earlier:*
>
> . . .
>
> *(b) if the employee or the delegated manager had provided reasonable written notice; . . .*
>
> . . .
>
> ***Review***
>
> *8. The manager (supervisor) and the employee shall review the telework arrangements together at least once every twelve months for conformity to the* Telework Agreement.

. . .

[75] Within the National Telework Policy there is a Telework Agreement that outlines the conditions to be met. It states, in part:

. . .

> *25. The* Telework Agreement *may be terminated by the employee or the delegated manager in writing with reasonable notice. An exception to this requirement may be made in an urgent situation at the discretion of the delegated manager.*
>
> *26. This* Agreement *terminates automatically at its end date or earlier, when:*
>
> > *a) the employee's duties or responsibilities change, e.g. due to a promotion, transfer, developmental assignment, reorganization, etc.;*
> >
> > *b) the employee fails to fully meet job performance expectations;*
> >
> > *c) the employee fails to adhere to this* Telework Agreement *or to CCRA policies, rules and procedures;*
> >
> > *d) there is a breach in security; or*
> >
> > *e) the employee's employment with the CCRA terminates.*

. . .

[76] This Agreement has to be signed and dated by the employee, the supervisor and the manager.

[77] It is clear that within both the National Telework Policy and the Telework Agreement there is an "out clause" for either party, as long as certain criteria are met.

[78] In Part 6 of the Telework Policy it states: "The Telework Agreement will end upon its termination date or earlier . . . if the employee or the delegated manager had provided reasonable written notice" (Emphasis added).

[79] In the Telework Agreement, at paragraph 25, it states as well that the employee or the delegated manager can terminate the agreement as long as it is done in writing

with reasonable notice. Thus, the right of either party to terminate the Telework Agreement existed prior to notice to bargain being served.

[80] In *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1983] F.C.J. No. 700, when referring to section 51 of the *PSSRA* (now section 107 of the *PSLRA*), the Federal Court of Appeal stated: "Its purpose is to preserve and continue the effect of the agreement between the parties, not to qualify or restrict that effect." In essence, section 107 of the *PSLRA* freezes whatever rights are embodied in the collective agreement or whatever terms and conditions of employment are in force on the date notice to bargain is served. The Board has recently had the opportunity to consider the application of the freeze provision under the *PSSRA* in *PIPSC v. Treasury Board*, 2005 PSLRB 36 and, in paragraph 39, came to the same conclusion.

[81] I have concluded that both the employee and the CRA had the right to terminate the Telework Agreement, with reasonable written notice, prior to the PIPSC's serving notice to bargain. The evidence shows that the National Telework Policy was in effect on June 22, 2003, and notice to bargain was served on September 22, 2003. Therefore, that term and condition of employment was preserved and remained in force pursuant to the provisions of section 107 of the *PSLRA*.

[82] In *The Queen in right of Canada as represented by the Treasury Board v. Canadian Air Traffic Control Association* (*supra*), the employer altered the voluntary overtime condition that was in force at the time notice to bargain was served and imposed compulsory overtime. Such is not the case in this complaint. As stated previously, in this case the terms and conditions of employment were in effect prior to the notice to bargain being served.

[83] I would point out to the parties that the freeze provision embodied in first section 51 then section 52 of the *PSSRA* provided an opportunity for the parties to agree to modify/change a term and condition in force despite the fact that notice to bargain had been given. In other words, the section provides an "out clause" for the employer and the bargaining agent if they so choose. As well, during the collective bargaining process, the parties could have agreed to a change in terms and conditions of employment or could have included the Telework Policy in the collective agreement. The evidence shows that the telework bargaining proposal submitted by the PIPSC was not included in the collective agreement during that round of collective bargaining.

[84] I therefore conclude that there was no violation by the CRA of section 107 of the *PSLRA*, as the right to cancel telework was available to either party prior to the notice to bargain being served. As well, I was not provided with any evidence of bad faith or of interference with collective bargaining. Therefore, the complaint must be dismissed.

[85] I would note that the appropriate forum for the alleged misapplication of the Telework Policy to individual employees by virtue of the employer's failure to consult is the grievance procedure and some of the affected employees availed themselves of that process. Mr. Quebec's reply at the second level of the grievance procedure seemed to satisfy the grievors, as they did not pursue their grievances any further. Certainly, as with any claim for damages, the grievors had the burden of proving, on a balance of probabilities, that the CRA was at fault and acted negligently or in bad faith. During the grievance procedure, the grievors did not raise or argue costs. Therefore, I see no reason to address this issue.

[86] It is important to note that in the instant case this is a complaint by PIPSC and in order to receive damages PIPSC would have to prove that it, not the grievors, suffered damages. No evidence was brought forward during this hearing that PIPSC suffered any damages or loss of reputation.

[87] The evidence of Mr. Stasiewski confirms that telework was discussed at a number of PIPSC Union Management Consultation meetings and that Mr. Skinner was aware of this, either through attending the meetings or by signing the minutes thereof. I would note that it was Mr. Quebec's uncontested testimony that he e-mailed all staff advising them that there was going to be a review of telework with respect to its operational feasibility and cost-neutrality. It should have been clear that telework was subject to a different scrutiny under the new policy.

[88] Although I respect Mr. Quebec's right to be the decision-maker once the consultation process ends, I do not agree that a controversial decision taken on a "may or may not" model to inform the bargaining agent or its representatives is appropriate if harmonious working relationships are to be maintained between the parties.

[89] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[90] The complaint is dismissed.

March 17, 2006

Dan Quigley,
Board Member