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File: 561-34-731

Citation: 2017 FPSLREB 16

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Public Service Alliance of Canada v. Canada Revenue Agency

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Michael F. McNamara, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Amanda Montague-Reinholdt, counsel

For the Respondent: Christine Langill, counsel

Heard at Halifax, Nova Scotia,
July 5 to 7, 2016.

I. Complaint before the Board

[1] On December 15, 2014, the Public Service Alliance of Canada ("the complainant") filed with the Public Service Labour Relations and Employment Board ("the Board") an unfair labour practice complaint against the Canada Revenue Agency ("the respondent") under ss. 190(b) and (c) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). It alleged that the respondent violated the duty to bargain in good faith pursuant to s. 106 of the *Act* by unilaterally implementing a policy changing the hours of work for Taxpayer Services and Debt Management (TSDM) employees working in its Atlantic Region ("the policy") and by denying requests for both variable and flexible hours of work on the basis of the policy. The complainant also alleged that that implementation and those denials violated s. 107 of the *Act* ("the statutory freeze provision").

[2] The applicable collective agreement is between the respondent and the complainant for the Program Delivery and Administrative Services bargaining unit, which includes employees working in the respondent's TSDM branch in its Atlantic Region. It expired on October 31, 2012 ("the collective agreement"). Notice to bargain was given in July 2012.

[3] For the following reasons, I find that the respondent did not breach its duty to bargain in good faith. However, I find that it contravened the statutory freeze provision when it implemented the policy.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* and the *Federal Public Sector Labour Relations Regulations* ("the Regulations").

II. Preliminary objections

[5] The respondent requests that the complaint be dismissed on the grounds that it is untimely or was filed in the wrong forum.

A. Timeliness of the complaint

[6] The respondent alleges that the complaint is untimely because it was filed outside the 90-day time limit. It submits that the complainant knew or ought to have known of the action or circumstances giving rise to the complaint at least as of May 3, 2014, or otherwise as of June 12, 2014, both of which were beyond the 90-day window of the December 15, 2014, complaint.

[7] The complainant maintains that the complaint was filed within the time limit provided in the *Act*. It submits that the date from which the timelines run in a complaint of this nature is the date on which the terms and conditions of employment were altered, not the date on which the respondent announces an intention to alter them. In this case, the policy was not implemented until September 15, 2014. Consequently, the complainant's view is that its complaint was filed within the statutory time limits.

[8] According to s. 190(2) of the *Act*, "… a complaint … must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion, ought to have known, of the action or circumstances giving rise to the complaint."

[9] The relevant dates are as follows:

- May 3, 2014: The respondent advised the complainant that it planned to implement a policy changing the start of the hours of work of TSDM employees in its Atlantic Region to 8:30 a.m. ADT or 9:00 a.m. NDT (Newfoundland daylight savings time), which was later revised to 8:00 a.m. ADT or 8:30 a.m. NDT.

- June 12, 2014: An official announcement of the policy was sent via a notice to all employees that stated that it would take effect on September 15, 2014.

- August 20, 2014: The respondent advised the complainant that certain employees in the Nova Scotia Tax Services Office (TSO) who had European workloads or who did not contact taxpayers as part of their regular workloads would be permitted to start work at 7:30 a.m. ADT.

- September 15, 2014: The policy took effect.

[10] I conclude that the triggering event in this case was the implementation of the new hours of work on September 15, 2014. The complainant and the employees did receive notice that the policy was coming. However, I find that the decision was not final until the implementation actually took place. As indicated in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46, the date from which the timelines run in a complaint of this nature is the date on which the terms and conditions of employment were altered, not the date on which the respondent announced its intention to alter them.

[11] Consequently, I find that the complaint is timely.

B. The forum

[12] The respondent's view is that individual grievances should have been referred to adjudication under Part 2 of the *Act* instead of under s. 190. It submits that under s. 191(2), the Board may refuse to determine a complaint made under s. 190(1) in respect of a matter that in its opinion, the complainant could have referred to adjudication under Part 2. The respondent submits that if individual employees alleged that they were somehow denied their preferred flexible or variable hours, there are avenues for that under Part 2. As such, the respondent states that this matter should not be permitted to proceed under the guise of an unfair labour practice complaint.

[13] The complainant states that while the facts of this matter may overlap with facts that could have given rise to grievances, the harm to be addressed through a statutory freeze complaint under the statutory freeze provision or a bad-faith-bargaining complaint under s. 106 is entirely different from that of the grievance process. The complainant explains that the harm at issue is the damage to the collective bargaining process and to the complainant's ability to represent its membership in collective bargaining with the respondent. It believes that these matters clearly fall within the Board's mandate.

[14] In addition, the complainant submits that these harms would not be addressed within the grievance process if the Board declined jurisdiction. It also states that the respondent provided no basis for the Board to depart from its past jurisprudence in this regard.

[15] I find that I have jurisdiction to hear the unfair labour practice complaint as it is within the Board's mandate. As indicated in *Gignac v. Fradette*, 2009 PSLRB 18, such an allegation is very serious, and the Board must ensure that the union freedoms set out in the *Act* can be exercised with impunity.

[16] Based on the foregoing, the respondent's preliminary objections are denied.

III. Summary of the evidence

[17] The relevant provisions of the collective agreement pertaining to hours of work are the following:

> …
>
> ***Day Work***
>
> ***25.06*** *Except as provided for in clauses 25.09, 25.10, and 25.11:*
>
> *(a) the normal work week shall be thirty-seven and one-half (37 ½) hours from Monday to Friday inclusive, and*
>
> *(b) the normal work day shall be seven and one-half (7 ½) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m.*
>
> …
>
> ***25.08 Flexible Hours***
>
> *Subject to operational requirements, an employee on day work shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. and such request shall not be unreasonably denied.*
>
> ***25.09 Variable Hours***
>
> *(a) Notwithstanding the provisions of clause 25.06, upon request of an employee and the concurrence of the Employer, an employee may complete the weekly hours of employment in a period of other than five (5) full days provided that over a period of fourteen (14), twenty-one (21), or twenty-eight (28) calendar days, the employee works an average of thirty-seven and one-half (37 ½) hours per week.*

…

Terms and Conditions Governing the Administration of Variable Hours or Work

…

25.25 *Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation of hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.*

25.26

(a) The scheduled hours of work of any day as set forth in a variable schedule specified in clause 25.24, may exceed or be less than seven and one-half (7 ½) hours; starting and finishing times, meal breaks, and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.

…

[18] On March 6, 2014, the respondent filed a request for the establishment of a Public Interest Commission (PIC) pursuant to s. 161 of the *Act*. On March 13, 2014, the complainant filed its reply, containing proposals for consideration by the PIC. According to the complainant, it had specifically proposed that clauses 25.06, 25.08, and 25.09, on hours of work, should be renewed, with only one amendment, to clause 25.08(a), which was to set the earliest available start time for flexible hours to 6:00 a.m., subject to operational requirements. The PIC did not accept the proposal and recommended that the current provision be renewed since it was consistent with the provisions in comparable core public service collective agreements.

[19] Wade Hiscock, the director of the Newfoundland TSO, testified that in 2009 and 2010, the respondent considered moving to a national concept and that in 2012 and 2013, it spoke of implementing a "National Workload", such as a "Trust Compliance National Inventory". This meant that a computer would assign the most important file from anywhere in the country to any employee in the country, based on a risk assessment. Consequently, the 8:00 a.m. start time was tied to the start of business. The respondent wanted to match the business community's operating hours.

[20] Mr. Hiscock indicated that in 2010-2011, requests to work flexible hours and compressed weeks were generally approved. They were for three- or four-month periods and were reviewed only if issues arose. They were rarely denied. Some employees requested "super-compressed" work schedules, in which they worked more than 8.5 or even 9 hours per day. During that fiscal year, he approved an employee's request to work from 7:30 a.m. to 5:00 p.m. He remembers receiving one request for a 7:00 a.m. start, but the employee ended up moving out of his section.

[21] According to him, in 2013, employees who started at 7:30 a.m. were not really productive, since they just stood there. There was not enough work available to justify starting at 7:30 a.m. In June 2013, a management roundtable meeting was held at which a plan was made to change hours of work, to increase production. The most productive area would receive a budget increase. Therefore, management wanted 60% of inventory available within the hours of work. More calls meant more budget money.

[22] As indicated in the respondent's June 2014 bulletin entitled *Hours of Work 2014*, which was sent to TSDM employees in its Atlantic Region, the operational considerations and requirements of starting at 8:30 a.m. ADT or 9:00 a.m. NDT were summarized as follows:

- the amount of National Workloads;
- better ways of delivering the respondent's programs;
- aligning hours of work to improve service delivery to taxpayers in other regions, such as west of the Atlantic Region, which would position the respondent to take on additional national work;
- the improved service delivery to taxpayers in other regions;
- maintaining the same hours of work across programs would ensure equality for employees, coverage for health and safety, and continued cohesiveness of teams within the respondent's programs; and
- more efficient and effective ways to run programs.

[23] Peter Estey was an assistant commissioner with the respondent and was responsible for approximately 4500 employees in its Atlantic Region. He stated that in 2013, a mismatch was identified between the hours of work in the respondent's British Columbia (BC) and Atlantic Regions. For example, if an Atlantic Region employee picked up a BC file, he or she would not be able to do anything about it until noon, Atlantic time. Ninety-two percent of taxpayers cannot be contacted before 9:00 a.m. Therefore, one set of working hours would be best. Aligning the hours of work with the potential workload was a regional decision. Discussions took place with, and agreement was obtained from, headquarters of TSDM and human resources branches.

[24] Mr. Estey talked about the rollout of the respondent's Debt Management Program and indicated that they had had to do more with less during the last eight years. Therefore, many reviews were held. In 2007-2008, they deliberately looked at all collections. In 2009-2010, some files were moved to a national inventory, which continued as of the hearing. He referred to the *2010-2011 Report on Plans and Priorities*, which states the following at page 27:

> *Another key activity that we will undertake is the implementation of our National workload allocation project for our non face-to-face workload. This will facilitate effective inventory management and prioritization to optimize debt management resources and maximize tax debt collections.…*

[25] Jennifer Walker, President of Local 800004, of the Union of Taxation Employees (UTE) in Nova Scotia, indicated that approximately five years before the work hours were changed, she had requested a work schedule of 7:30 a.m. to 3:30 p.m. for two consecutive summers. She did not provide a reason, and her requests were approved. She indicated that having variable hours of work helped with childcare and promoted good work-life balance. Other employees had also requested compressed work schedules with start times of 7:00 a.m. or 7:30 a.m. According to Ms. Walker, such schedules were also important to the members of her local, for similar reasons.

[26] On June 2, 2014, she learned about the policy and that it would come into effect on September 15, 2014. The reason provided was to better align hours of work for business opportunities and to meet the needs of taxpayers. When the policy took effect, it impeded her ability to request changes to her hours of work.

[27] On June 24, 2014, Ms. Walker held a special general meeting for the members of her local to discuss both formal and informal approaches to address frustrations with the recent announcement of the policy. Her members did not react positively to the news.

[28] According to the minutes of that special general meeting, Ms. Walker "… explained to the members that during this process the consultation requested from the Union was in regards to accepting the change and providing input with respect to how this information would be shared with the employees". Those minutes also indicate that management did not request the complainant's input before deciding to change the hours of work.

[29] On July 6, 2014, Ms. Walker emailed Mr. Estey, sharing the local's members' concerns and frustrations with respect to the policy. She questioned the respondent's rationale of "missed opportunities", stating that the members were frustrated and angered by that rationale given that they had been told that the team's production was exceptional and that taxpayers' needs were being adequately met. She also stated that the Sydney, N.S., TSO has effectively managed 7:00 a.m. start times for employees with respect to supervisory coverage; providing technical assistance; and health, safety, and security concerns for a significantly long time.

[30] She also voiced how she was disheartened that the bargaining agent had not been consulted at an earlier point in the decision-making process as the impact on some employees was drastic since their work-life balances were affected. Others were impacted by the restrictions and limitations under their collective agreement. In general, the major impact on morale could have been avoided had a consultative approach been used while considering and then making that decision.

[31] On July 7, 2014, Mr. Estey replied to Ms. Walker's email. He indicated that given that management was carrying out a regional analysis, it did consult with regional representatives of both bargaining agents. Consultations did take place, potential employee concerns were effectively represented, and the respondent reacted to the consultation and representation. Therefore, he stated that it was incorrect to assert that no consultation with or input from bargaining agents took place.

[32] When Mr. Estey was asked when the complainant had been contacted, he explained that no formal meeting with it took place in 2013. He spoke with Doug Gaetz, the regional vice-president, Atlantic (UTE), in late March or early April 2014. Mr. Gaetz indicated his displeasure with the policy.

[33] Mr. Estey stated that when they spoke, Mr. Gaetz understood management's authority to set hours of work, but he did not say he supported that position.

[34] Stacey MacNeil, a collections officer in TSDM, testified that in October 2008, she requested a compressed work schedule, and it was granted. She did not recall the respondent asking for a reason for her request. She worked from 7:00 a.m. to 4:00 p.m. As of 2014, she had been working a compressed schedule for six years. She made other similar requests after that, which were granted. Her schedule varied from 7:30 a.m. to 4:30 p.m. Working a compressed schedule was very important to her for work-life balance, since she had to travel one hour to and from work and often had to take family members to appointments.

[35] After the new hours of work were implemented, she requested a start time of 7:00 a.m. or 7:30 a.m., but her request was denied because of the restriction that work hours could start only at 8:00 a.m. This was very difficult for her as she had to rearrange transportation and appointments. As a result, she filed a grievance.

[36] Wade Denny is an officer in the TSDM's Non-Filer Unit in the Halifax, N.S., TSO, and has worked for the respondent for more than 20 years. He indicated that he had worked variable hours for a couple of years, with a work schedule of 7:00 a.m. to 4:00 p.m. He indicated that he had no problems having his requests approved and that the respondent did not ask him for any reasons. He stated that the flexible start time was very important to him because he travelled with his spouse to work. She works from 7:00 a.m. to 4:00 p.m. in the respondent's Audit Division, and her hours would not be changed. And having the extra day was convenient for scheduling appointments for his children.

[37] When he became aware of the policy, he became angry and did not understand the need for it; it did not make any sense to him. His job consists almost entirely of compiling information. Only a small part of his work (5 to 10%) consists of contacting taxpayers. Under the new policy, he had to go to work one hour earlier or commute via a second car or public transit, both of which would have been inconvenient and would

have added an expense. Consequently, he filed a grievance. In the letter accompanying it, he indicated that he and his co-workers had had the ability to work flexible hours for as long as any of them had worked for the respondent. Furthermore, his request for a 7:00 a.m. to 4:00 p.m. schedule was denied on September 15, 2014, without any reasons. He was no longer able to work a compressed schedule and had to use sick leave or vacation leave to accommodate his children's appointments. He filed a subsequent grievance on September 16, 2014.

[38] Some other examples of requests being denied are the following:

- An employee requested a compressed schedule to accommodate an ongoing course. She received the following response: "Start time is 8 a.m. No exceptions unfortunately."

- Another employee requested a compressed schedule of 7:00 a.m. to 4:30 p.m., but it was also denied, for the following reason: "Due to the change in our core hours of work to optimize our program goals, I am rejecting your hours of work from 7:00 a. [*sic*] to 4:30 pm Atlantic time. Your hours will have to be scheduled between 8:00 am and 5:00 pm Atlantic time."

- Another employee requested a work schedule of 8:00 to 5:30, to accommodate childcare, but her request was also denied, as follows: "Maximum hours per day 8.50. Sorry, that isn't permitted."

[39] Tod Burke is a negotiator for the respondent. He testified that management had provided the appropriate written notice about the policy to employees pursuant to clause 25.07(a) of the collective agreement. Furthermore, he indicated that the new schedule met management's requirement of flexible hours between the hours of 7:00 a.m. and 6:00 p.m. pursuant to clause 25.08 of the collective agreement. Therefore, between 8:00 a.m. and 5:30 p.m., a flexible schedule could be worked. An employee could not apply for a schedule that was outside the 8:00 a.m. to 5:00 p.m. window. It was permitted before September 15, 2014, but not after.

[40] Mr. Burke testified that it was his understanding that if something is not covered by the collective agreement, the employer can change it. If a term or condition is covered by the collective agreement, it cannot be changed.

[41] Derrick Simm, director of programs, has been with the respondent since June 1992. He referred to a presentation prepared by his team and entitled *Debt Management Hours of Work in TSOs June 2014*, in which the background behind implementing the policy is set out at page 3 as follows:

> - *Program delivery changes including the creation of national inventories means [sic] that Atlantic is in a position to take on additional national work.*
> - *Recent restructuring of TSO workloads in Atlantic prompted a discussion regarding hours of work, innovation and efficiencies.*
> - *Remote management due to recent restructuring highlighted inconsistencies in practices between offices.*
>
> *As a result of the changes, the AD's began to explore service delivery and hours of work.*

[42] Mr. Simm also referred to the *TSDM Hours of Work Suggested Communication Plan and Implementation Timeline*, which contains the timelines of briefings and communications with respect to the implementation of the hours of work policy.

[43] In a June 12, 2014, email, Mr. Simms indicated that a review of the Debt Management Program had been done in July 2013. It had been noted that there were differences in hours of work between TSOs. Consequently, it was decided that hours of work should be aligned, to improve service delivery to taxpayers in other regions.

[44] It was further indicated that the allowable contact hours, generally for debt collectors, for Newfoundland, Nova Scotia, and New Brunswick all started at 8:00 a.m. However, the end times differed slightly. They were 10:00 p.m. for Newfoundland, 9:00 p.m. for Nova Scotia, and 8:00 p.m. for New Brunswick.

[45] On December 11, 2014, Mr. Gaetz wrote to Mr. Estey to advise him that the complainant's view was that the respondent's refusal to consider flexible and compressed hours of work because of the new policy for TSDM employees in the Atlantic Region violated the statutory freeze provision and that if the policy were not rescinded, an unfair labour complaint would be filed with the Board. Mr. Estey responded as follows in an email dated December 16, 2014:

…

> *I must admit to [sic] surprise that you would characterize the establishment of parameters for start and end times as a "refusal to consider flexible hours of work and compressed hours of work". Since my first consultation with you in mid-May, and since the original proposal was amended as [sic] result of your interventions, I have been quite clear that there is flexibility within the new parameters, and that any legitimate request for accommodation will be considered. (Not to mention the assurances that I gave you with respect to your concern about Trust Exam workers and early meetings at taxpayers' request.)*
>
> *The new parameters are within the existing collective agreement parameters – and the only de facto "refusal" embedded in this decision is that a "super-compressed" schedule is not possible… but I don't see any collective agreement clause that states a "super compressed" schedule as a right.*

[46] Ainslea Cardinal, assistant commissioner of the respondent's Atlantic Region, replaced Mr. Estey in January 2015. She explained that each office was different, that each opened at different times, starting at 7:00 a.m., and that some could be open until 6:00 p.m.

[47] On May 27, 2016, she emailed the directors of the tax offices and advised them that a decision had been made to remove restrictions on the hours of work of employees who worked in the following positions: trust accounts examiners, employer compliance auditors, trust account examination compliance officers, and team leaders of trust exam teams. The reason was that "… the majority of these workloads involve face-to-face contact with the client and based on further review it was felt that they are sufficiently or substantially different from the other workloads in TSDM to warrant this change."

[48] Ms. Cardinal indicated that the issue was reviewed following several grievance hearings. Effective May 2016, start times could be as early as proposed and could be approved. Flexible and compressed work schedules were available to all those employees.

IV. Summary of the arguments

A. For the complainant

[49] The complainant submits that the respondent violated the statutory freeze provision. It instituted the policy in a manner that denied requests for flexible and

variable hours of work, both of which are explicitly provided for in the collective agreement. Instead, the respondent issued a general assertion that the power to change hours of work fell within its management rights and a general denial that it contravened the *Act*.

[50] Before September 15, 2014, a significant number of employees requested flexible and compressed work schedules, which were routinely approved. The respondent's witnesses confirmed that the new hours of work were, in fact, a change.

[51] The respondent refused requests for flexible hours on the basis that a compressed scheduled could not exceed 8.5 hours per day. It relied on its policy to refuse requests even when a given request was a continuation of the requesting employee's current hours of work or when a request was made for accommodation reasons.

[52] According to the complainant, the respondent had to continue with the pattern, maintaining "business as before". Employees had reasonable expectations that their flexible and compressed work hours would continue to be approved, as they had been in the past. There was no failure in productivity levels before or after. Furthermore, the National Workloads were in place well before the freeze period began.

[53] The complainant also maintains that even though the respondent provided notice of the policy, that did not relieve it from its obligation to address changes to the collective agreement through the bargaining process; nor did it excuse the respondent's bad-faith conduct when it then circumvented this process by introducing changes unilaterally.

B. <u>For the respondent</u>

[54] The respondent submits that on the day notice to bargain was served, it had the right to determine its hours of operation and to schedule hours of work. It retains those management rights. The rights are preserved and continue (see *UCCO-SACC-CSN v. Treasury Board*, 2004 PSSRB 38; and *Cloutier v. Canada Revenue Agency*, 2009 PSLRB 3).

[55] Operational considerations and requirements were considered when the policy was implemented, such as the amount of National Workloads, aligning hours of work to improve service delivery to taxpayers in other regions, better ways of delivering the

respondent's programs, and maintaining the same hours of work across programs to ensure equality for employees, coverage for health and safety, and the continued cohesiveness of teams.

[56] The respondent argues that it did provide the employees with 60-days' written notice on June 12, 2014, when it stated that the new hours were scheduled to start on September 15, 2014. As such, it went beyond the required seven-day notice.

[57] It submits that a process was underway that it had been working on for some time. It had to manage its operations. Furthermore, it maintains that it is not sure that a real pattern or practice was demonstrated. It has always been able to deny requests.

[58] The respondent refers to the *Canada Revenue Agency Act* (S.C. 1999, c. 17; *CRAA*), specifically s. 6, with respect to the powers, duties, and functions of the minister; s. 30(1)(d), which states that the respondent has authority over all matters relating to "… human resources management, including the determination of the terms and conditions of employment of persons employed by the Agency …"; and s. 51(1)(a), concerning human resources management, which states that the respondent may "… determine its requirements with respect to human resources and provide for the allocation and effective utilization of human resources …". In addition, the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.); *ITA*), also indicates that the respondent collects debt and serves the public.

[59] According to the respondent, in exercising its management rights and its statutory authority, it determined the hours for the TSOs in its Atlantic Region. The hours of work implemented on September 15, 2014, still reflected those set out in clause 25.06 of the collective agreement, which are between 7:00 a.m. and 6:00 p.m., and still provided for 7.5 hours of work.

[60] In addition, the operational decisions did not infringe any term or condition of employment, because the respondent retained its authority to manage and to operate on a business-as-usual basis. Its view is that even though notice to bargain has been given, business continues and should not be required to come to a complete standstill. To interpret the statutory freeze provision as requested by the complainant would be unreasonable and unfair to the respondent if it could not continue to direct its operations in a manner in which to effectively serve the public and to operate its business.

[61] With respect to the bad-faith bargaining allegation, the respondent submits that it went over and above the requirement to provide notice of the policy. Even though the issue did not fall under clause 25.11 of the collective agreement for matters that require consultation, the respondent still discussed the issue with the complainant as early as May 2014 and even amended an initial contemplated policy following that discussion.

V. Reasons

[62] There are two issues to address: 1) whether the respondent breached its duty to bargain in good faith and 2) whether it violated the statutory freeze provision.

A. The duty to bargain in good faith

[63] Having heard the parties and considered the evidence, my view is that the bad-faith bargaining allegation is tied to the violation of the statutory freeze provision. Sections 106 and 107 of the *Act* are distinct and serve different purposes.

[64] Section 106 of the *Act* specifically states as follows that the bargaining agent and employer must commence to bargain and make every reasonable effort to enter into a collective agreement:

> ***106*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> > ***(a)*** *meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
> >
> > ***(b)*** *make every reasonable effort to enter into a collective agreement.*

[65] In *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1. S.C.R. 369 (QL) at paras. 41 to 43, the Supreme Court of Canada indicated that the duty to bargain in good faith has a subjective component and an objective component. Commencing to bargain is considered subjective, and making every reasonable effort to enter into a collective agreement is objective, as follows:

> ***41*** *… In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both*

> *parties must approach the bargaining table with good intentions.*
>
> ***42*** *Section 50(a) of the* Canada Labour Code *has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*
>
> ***43*** *Section 50(a)(ii) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith….*

[66] The parties have commenced to bargain but have not yet reached an impasse. The complainant alleges that by implementing the policy, the respondent engaged in bad-faith bargaining. However, I believe that the evidence is directly dealt with by the statutory freeze provision. The *Act* prohibits modifying terms and conditions of employment that may be embodied in a collective agreement.

[67] The complainant has not met its burden. There is no evidence before me to suggest that bad-faith bargaining occurred. Consequently, I find that the respondent has not breached s. 106 of the *Act*.

B. <u>The violation of the statutory freeze provision</u>

[68] According to the statutory freeze provision, after notice to bargain is given, the respondent cannot unilaterally change a term or condition of employment in the following cases:

- it applied to the employees in the bargaining unit to which the notice relates;
- it may be included in a collective agreement; and
- it was in force on the day on which notice to bargain was given (see *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107).

[69] The statutory freeze provision stipulates that the statutory freeze is in place from the time notice to bargain is given until a collective agreement is entered into in respect of that term or condition, an arbitral award is rendered, or a strike could be declared or authorized. That section captures not only terms and conditions already included in the collective agreement but also those that "may" be included.

[70] As indicated in *The Queen v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.), the purpose of the statutory freeze provision is to maintain the status quo. This means that once notice to bargain is given, the employment relationship with respect to the terms and condition of employment that existed before the notice was given must be preserved. Consequently, the freeze provision stipulates that if there are established patterns in the employment relationship, the respondent must not alter them after notice to bargain is given. As such, the respondent is governed by the "business as before" approach (see *Public Service Alliance of Canada v. Treasury Board*, 2013 PSLRB 46).

[71] The Ontario Labour Relations Board (OLRB) described the "business as before" approach in *Spar Aerospace Products Limited v. Spar Professional and Allied Technical Employees' Association*, [1979] 1 Can LRBR 61 at 68, as follows:

> *The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred,*

> *providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before….*

[72] The "reasonable expectation" approach must also be considered. As indicated in *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68, "… employees would expect the employer to maintain normal practices during a statutory freeze… The employer's business as usual when determining work hours includes the [employees'] expectations." The fact that a practice is not included in a clause in a collective agreement is irrelevant.

[73] In the present case, notice to bargain was given in July 2012, and the policy was implemented on September 15, 2014.

[74] Employees testified that between 2008 and 2012, approximately, they had been able to work compressed, variable, and super-compressed work schedules for many years, before September 15, 2014. Furthermore, their requests had always been approved without them having to provide any reasons. Such flexible work hours contributed to work-life balance for many employees. When the policy came into effect on September 15, 2014, their requests were denied, without justification. They had to make new arrangements with respect to commuting, childcare, taking children to appointments, etc.

[75] The respondent explained that it had been in the process of moving towards a National Workload since at least 2009 or 2011. To increase productivity, it had to change its hours of work to an 8:00 a.m. start time, to match the opening time of the business community. Its view was that doing so was within its management rights, pursuant to the collective agreement, the *CRAA*, and the *ITA*. Therefore, it believed that a breach of the statutory freeze provision could not occur.

[76] The evidence shows that the complainant was made aware of the decision to implement the policy only in May 2014, which was that work schedules had to be between 8:00 a.m. and 5:30 p.m. It had managed to secure an earlier start time than the respondent's original proposal, but it still was not pleased about the decision.

[77] It was demonstrated that before September 2014, employees had been able to request flexible and super-compressed work schedules for years and that their requests had been approved. Thus, a pattern had been established. Once notice to bargain was given, it was reasonable for the employees to expect that it would continue.

[78] This case differs from *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107, in which the employer's decision resulted from a review of emergency services that had begun before notice to bargain was served. A study had been conducted before notice was served, and the employees were advised that the "… ships' crew shift schedules were to remain unchanged 'until further notice' …".

[79] Given that the study had started before notice had been served and the fact that the employees had been advised that their hours of work would change at one point, which was "until further notice", the union and the employees could not have reasonably believed that their duties and shift schedules would not change. As indicated at paragraph 52 of that decision, "… by the time notice to bargain was given, any pattern that had existed with respect to CFAV *Firebird*'s operations was already destabilized and could not be counted on to continue."

[80] There is no evidence before me to suggest that as a result of moving towards a National Workload, the respondent would change hours of work. It would seem that only in 2013 did Mr. Estey indicate that hours of work should be aligned to improve service delivery to taxpayers in other regions. Mr. Simm's email of June 12, 2014, also confirmed that a review had been undertaken in July 2013, which was well after notice to bargain had been served. Therefore, the respondent did not continue with "business as usual" when it implemented the policy.

[81] The fact that super-compressed and flexible hours of work are not specifically set out in the collective agreement is irrelevant. It remains that when notice to bargain was given, a term or condition of employment was in force that might have been included in the collective agreement.

[82] Furthermore, as the Board stated as follows in *Canadian Association of Professional Employees*, at paras. 136 and 137, the employer cannot argue that it had the right to modify hours of work pursuant to legislation because it would render the protection conferred under the statutory freeze provision meaningless and it could

lead to an absurd interpretation of the *Act*:

> ***136*** *The employer's argument that it had the right to modify work hours under the principles outlined in the* Financial Administration Act *and that that authority continued into the freeze period cannot be accepted to justify its decision to force parliamentary translators to work evenings to receive their pay supplement.*
>
> ***137*** *Accepting that argument would render the protection conferred under s. 107 of the* Act *meaningless and could lead to an absurd interpretation of the* Act. *Therefore, it would mean that there could never be a violation of the freeze provided for under the* Act *by virtue of the very existence of the employer's residual powers. As established by case law, that was not Parliament's intent. The purpose of the protection is to ensure orderly and equal bargaining between the parties and peaceful labour relations during the statutory freeze. Such an interpretation would allow the employer to take action that could destabilize this relationship and, consequently, violate what s. 107 seeks to protect.*

[83] Based on the evidence, I conclude that the hours of work were changed after notice to bargain was given.

[84] For all of the above reasons, I find that the respondent has breached the statutory freeze provision. The Board makes the following order:

(The Order appears on the next page)

VI. Order

[85] The complaint is allowed in part.

[86] The Board finds that no violation of s. 106 of the *Act* occurred.

[87] The Board finds that the respondent breached s. 107 of the *Act* (the statutory freeze provision).

[88] I order the respondent to cease infringing the collective agreement.

[89] The Board orders the respondent to post this decision on its main intranet page and in conspicuous places in all the workplaces where it is most likely to come to the attention of the employees in the bargaining unit for a period of 60 days beginning no later than two weeks after the date of this decision.

[90] The respondent must file with the Board, as soon as feasible, a statement to the effect that it complied with the order in this decision.

July 26, 2017.

Michael McNamara,
a panel of the Federal Public Sector
Labour Relations and Employment Board