Date: 20200520

File: 560-02-127

Citation: 2020 FPSLREB 55

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

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

BETWEEN

RONALD HARRIS

Complainant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Harris v. Treasury Board (Canada Border Services Agency)

In the matter of a complaint made under section 133 of the *Canada Labour Code*

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Morgan Rowe, counsel

For the Respondent: Richard Fader, counsel

Heard at Toronto, Ontario,
June 25 to 27, 2019.

REASONS FOR DECISION

I. Complaint before the Board

[1] On September 7, 2016, Ronald Harris ("the complainant") filed a complaint with the Public Service Labour Relations and Employment Board (PSLREB) against the Canada Border Services Agency (CBSA) under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). The complainant alleged that the respondent took action against him because he appealed a decision of an occupational health and safety officer (HSO) dated October 7, 2014, which found no danger with respect to a work refusal he made on September 11, 2014. He attended an Occupational Health and Safety Tribunal Canada ("OHS Tribunal") hearing between May 30 and June 2, 2016. He stated as follows:

> *I was scheduled to attend the Occupational Health and Safety Tribunal on May 30-June 2, 2016 in Toronto as I appealed an HSO's decision in 2014. I was scheduled to work 1155-2200 on May 30 and 31. The Tribunal was approximately 70 Km from my home. I requested a shift change to attend, which was denied. I was told that attending the tribunal was a personal matter. I took public transit to and from the tribunal. I went home to get ready for work as I wear a uniform and arrived at work at 2010. I was made to take unauthorized leave without pay and suspended for 7.5 hours without pay for insubordination, on July 29th, 2016, for arriving at work late following the tribunal. I believe the employer not changing my shift and the suspension are retribution for appealing the HSO's decision and exercising my rights under the CLC Part II.*

[2] The complainant requested corrective action as follows:

> *I would like the discipline removed from my employee file. That I be reimbursed for the unauthorized leave without pay and the 7.5 hour suspension. I would like my employer to be counselled and trained on their responsibilities and obligations under the CLC Part II to ensure this doesn't occur again. I would like the employer to respect the CLC Part II in the future, showing their commitment to Health and Safety by authorizing shift changes for tribunals as not to deter employees from participating or exercising their rights in the future. That management take the allegations I made against them as seriously as they took the allegations they made against me and some form of reprimand (corrective action) is imposed on the managers involved and the Agency, fitting of this type of infraction. Any and all other corrective action deemed appropriate in this circumstance.*

[3] Section 133 of the *Code* states as follows:

> ***Complaint to Board***
>
> ***133 (1)*** *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

[4] Section 147 of the *Code* states as follows:

> ***General prohibition re employer***
>
> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> ***(a)*** *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> ***(b)*** *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> ***(c)*** *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[5] One of the employer actions that the complainant alleged was a reprisal against him was a 7.5-hour suspension, which was imposed on him and set out in a letter dated July 29, 2016, from Superintendent Greg Glazebrook which states as follows:

> . . .
>
> *On May 27, 2016, in the presence of Superintendent Mahon and Glazebrook you were advised that you were granted leave for May 30th and 31st from 1155-1600 hours to attend an OSH Tribunal at 1 Front Street to hear your appeal of a previous Labour Canada decision. You were also granted a reasonable amount of time (16:00 hours – 17:25 hours) to allow time to travel back to the workplace to finish your scheduled shift. During consultation on June 14th you denied being told this despite the fact that you had previously advised management that this was not enough time each day. This is supported by the fact that Superintendent Salerno, Glazebrook and Mahon were present at the time and the leave was entered into Shift Planning.*
>
> *On both May 30th and May 31st you failed to report for work at 17:25 hours as expected following your attendance at the OSH Tribunal and instead you reported in at 20:10 and 20:12 on each day respectively. On each of these days you did not call the non-report line as is the standard reporting procedure to report*

absences/lateness. Furthermore, on May 30th when you did arrive at work you did not report your return to an on duty Superintendent either in person or via radio but instead sent an email to a group of off duty Superintendents. It wasn't until 20:56 hours that you sent your first email advising that you had arrived. You admitted that you received and were aware of the Non-Report line email reminder sent to all staff on May 2nd.

When Superintendent Salerno informed you of your expected return time you mentioned that you were planning to take the GO Train from Hamilton and wouldn't be able to make it back in time. He advised you to consider using an alternative mode of transportation on both days to allow for you to arrive to the workplace by 17:25 hours. Although you deny being told this, Superintendent Glazebrook was present at the time and confirmed you had been informed. Despite being advised of this, you decided to take GO Transit from 1 Front St to your place of residence in Hamilton, Ontario before attempting to return to work.

On May 30th, Superintendent Mahon informed you that Management would not accept over 3 hours to travel from the tribunal however on May 31st you chose to take the same action. You did however report to the on duty Superintendent at approximately 20:12 hours upon your return that day.

It is clear based on the evidence, you were aware of the requirement to return to work at 17:25 hours but chose to use a transportation method to take you home prior to attempting to report to work, resulting in an unacceptable delay in reporting to work. It is also clear that you were aware of the proper reporting procedures for reporting in.

I have taken into account the following aggravating factors:

When informed by Superintendent Mahon via email on May 30th that the travel time of over three hours would not be acceptable, you chose to take the same actions on May 31st.

You state that you were fully aware of the direction to report your absences provided by management that was reiterated in the May 2nd email regarding the Non Report Line. You also state that the direction for reporting absences is irrelevant because you notified management on May 27th that you were going to take longer blatantly ignoring more reasonable alternatives and arbitrarily deciding the policies and procedures clearly identified to all employees did not apply to you.

As someone who has previously acted in a management capacity within the organization it is reasonable to believe that you are fully aware of the reporting procedures for absences and that officers are required to report to a Superintendent upon returning to work after an absence.

The serious nature of the unfounded allegations you make towards management regarding attempts to subvert the tribunal process show a complete lack of respect for management and the Agency.

> *I have considered the following mitigating factors:*
>
> *The tribunal ended later than management had initially taken into account when granting leave and therefore the initial travel time of 1.50 hour may have been considered until 18:30 to account for the extra hours the tribunal and lawyer meetings took each day. However, because you did not notify management as per normal procedure that the tribunal ran late this factor has not been considered further in the final decision.*
>
> *Your perception that it would be a health and safety risk due to the long day and driving to 1 Front St.*
>
> *The above noted actions or lack thereof constitute insubordinate behavior [sic] and are a violation of the Values and Ethics Code for the Public Service and the CBSA Code of Conduct.*
>
> . . .

[6] 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 name of the PSLREB and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act*.

II. Summary of the evidence

A. Background

[7] The complainant is employed by the Treasury Board (TB or "the employer") at the CBSA as a border services officer (BSO) in its commercial operations division operating out of facilities known as "Cargo 3" at Pearson International Airport ("Pearson") in Toronto, Ontario. He joined the CBSA as a student in 2005, became a BSO in 2008, and became indeterminate in 2016. That year, he worked in the Low Value Shipment (LVS) unit, which was responsible for CBSA services provided to courier shipments at Pearson (i.e., from FedEx, UPS, Purolator, etc.). Cargo 3 operations employ about 100 to 120 BSOs, while at the time relevant to the complaint, about 18 to 20 BSOs worked in the LVS unit.

[8] As of the hearing and as of the matters giving rise to the complaint, Greg Glazebrook, Robert Salerno, and Thomas Mohan were CBSA superintendents in commercial operations at Cargo 3. As of the matters giving rise to the complaint, they all worked in the LVS unit. Each testified. Mr. Glazebrook joined the CBSA's

predecessor in 2004 as a customs inspector at Pearson. In 2012, he was appointed as an indeterminate superintendent. Mr. Salerno testified that he joined the CBSA's predecessor in 2002 as a BSO and that in 2007, he was appointed as a superintendent. He has worked in commercial operations his entire career. Mr. Mahon joined the CBSA's predecessor in 1997 as a customs inspector. He started working at Cargo 3 in 2001. In 2002 and 2003, he was a union steward. In 2004 and 2005, he was an acting superintendent, and in 2011 he was appointed indeterminately to that position.

[9] As of the hearing, Lucido Fauceglia was a BSO employed at Cargo 3 in the Business Services Management unit. At the time relevant to the matters in the complaint, he was working in the LVS unit. As of the hearing, Brian Donohue was a BSO at Pearson, at Terminal 1. He joined the CBSA's predecessor in 1998 as a customs inspector. As of the hearing, he was a vice-president of finance with the Customs and Immigration Union (CIU). Before that, he was the third vice-president of his local, and before that, a union steward. As of the hearing, he had held positions in the CIU for about 9 or 10 years.

[10] The complainant's terms and conditions of employment are governed, in part, by an agreement signed on March 17, 2014, which expired on June 20, 2014, between the TB and the Public Service Alliance of Canada for all employees of the Border Services group ("the collective agreement").

[11] Clause 2.01 of the collective agreement is the definition section. It defines "leave" as an employee's authorized absence from duty during his or her regular or normal hours of work.

[12] Article 25 of the collective agreement is entitled "Hours of Work". The clauses relevant to this matter are as follows:

…

Day Work

25.06 *Except as provided for in clauses 25.09, 25.10 and 25.11:*

a. the normal workweek shall be thirty-seven decimal five (37.5) hours from Monday to Friday inclusive;

and

b. the normal workday shall be seven decimal five (7.5) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m.

> ***25.07*** *Employees shall be informed by written notice of their scheduled hours of work. Any changes to the scheduled hours shall be by written notice to the employee(s) concerned.*
>
> …
>
> ***25.09 Variable Hours***
>
> *a. Notwithstanding the provisions of clause 25.06, upon request of an employee and with 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 decimal five (37.5) hours per week.*
>
> *b. In every fourteen (14), twenty-one (21) or twenty-eight (28) day period, the employee shall be granted days of rest on such days as are not scheduled as a normal workday for the employee.*
>
> *c. Employees covered by this clause shall be subject to the variable hours of work provisions established in clauses 25.25 to 25.28.*
>
> …
>
> ***25.22*** *Provided sufficient advance notice is given, the Employer may:*
>
> *a. authorize employees to exchange shifts if there is no increase in cost to the Employer;*
>
> *and*
>
> *b. notwithstanding the provisions of paragraph 25.13(d), authorize employees to exchange shifts for days of rest if there is no increase in cost to the Employer.*

[13] Article 47 of the collective agreement is entitled, “Court Leave”. Clause 47.01 states as follows:

> ***47.01*** *The Employer shall grant leave with pay to an employee for the period of time he or she is compelled:*
>
> *a. to be available for jury selection;*
>
> *b. to serve on a jury;*
>
> *c. by subpoena, summons or other legal instrument, to attend as a witness in any proceeding held:*
>
> *i. in or under the authority of a court of justice or before a jury;*
>
> *ii. before a court, judge, justice, magistrate or coroner;*
>
> *iii. before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons otherwise*

> *than in the performance of the duties of the employee's position;*
>
> *iv. before a legislative council, legislative assembly or house of assembly or any committee thereof that is authorized by law to compel the attendance of witnesses before it;*
>
> *or*
>
> *v. before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.*

[14] The collective agreement provides for several other types of leave that employees may use, the following of which may be relevant to this complaint:

- article 34, "Vacation Leave with Pay";
- article 44, "Leave Without Pay for Personal Needs"; and
- article 52, "Leave With or Without Pay for Other Reasons".

[15] The evidence disclosed that the BSOs in the LVS unit were not day workers but shift workers who worked 7 days a week on 1 of 2 shifts, the first from 05:55 to 16:00, and the second from 11:55 to 22:00. The shift system was such that the BSOs worked a 63-day shift cycle of 5 days on and 4 days off. Over that cycle, each BSO would work an average of 37.5 hours per week. The master schedule, which was posted on an internal CBSA system and to which all supervisors and BSOs had access, was called the "Y106". It was published a minimum of 14 days in advance of its start, typically a Sunday. According to the evidence, the employer provided the Y106 a minimum of 17 days before its start.

[16] The genesis of this complaint was an initial work refusal that took place on September 11, 2014 ("the September 11 work refusal"). At that time, the complainant worked in the CBSA's commercial cargo operations, also based out of Cargo 3, which was responsible for inspecting marine cargo shipments.

[17] Marine cargo is shipped via large steel shipping containers, which are sealed and not ventilated. Enclosed in them are chemical fumigants used to kill invasive species, preserve the cargo, and maximize shipping techniques. The containers are transported from ships to any number of authorized warehouses in or around the Toronto area, where they are subsequently opened, and BSOs may inspect them. The evidence disclosed that the time between a container's arrival and its opening at a warehouse can range from hours to days. When one is opened, the chemical fumigants disperse

into the air. The refusal arose due to the venting of chemical fumigants from shipping containers in warehouses and the related question of the BSOs' safety when inspecting the cargo inside the containers.

[18] In the September 11 work refusal, the complainant and other CBSA employees refused to work under s. 128 of the *Code* due to concerns about potential fumigants in the warehouse within which they were to inspect cargo shipments. Before that refusal, on May 1, 2014, the complainant, along with Mr. Fauceglia and 21 other CBSA employees, had exercised another one ("the May 1 work refusal") over the same issue. On May 2, 2014, HSO Chris Wells launched an investigation into that one. He issued his report on May 22, 2014, which made a finding of danger.

[19] HSO Greg Garron investigated the September 11 work refusal under s. 129 of the *Code*. He was already investigating a similar work refusal that other BSOs made, including Mr. Fauceglia, with respect to chemical fumigants and shipping containers, on August 20, 2014 ("the August 20 work refusal").

[20] After the May 1 work refusal, the evidence disclosed that the CBSA instituted new safety operating procedures to be followed by employees when inspecting cargo shipments at warehouses involving marine shipping containers and fumigants.

[21] The relevant portions of ss. 128 and 129 of the *Code* state as follows:

> ***Refusal to work if danger***
>
> ***128 (1)*** *Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*
>
> ***(a)*** *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
>
> ***(b)*** *a condition exists in the place that constitutes a danger to the employee; or*
>
> ***(c)*** *the performance of the activity constitutes a danger to the employee or to another employee.*
>
> …
>
> ***Investigation by employer***
>
> ***(7.1)*** *The employer shall, immediately after being informed of a refusal under subsection (6), investigate the matter in the presence of the employee who reported it. Immediately after concluding the*

investigation, the employer shall prepare a written report setting out the results of the investigation.

Employer to take immediate action

(8) *If, following its investigation, the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.*

Continued refusal

(9) *If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.*

…

Decision of employer

(13) *After receiving a report under subsection (10.1) or (10.2) and taking into account any recommendations in it, the employer, if it does not intend to provide additional information under subsection (10.2), shall make one of the following decisions:*

(a) *agree that a danger exists;*

(b) *agree that a danger exists but consider that the circumstances provided for in paragraph (2)(a) or (b) apply;*

(c) *determine that a danger does not exist.*

Decision — paragraph (13)(a)

(14) *If the employer agrees that a danger exists under paragraph (13)(a), the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.*

Decision — paragraph (13)(b) or (c)

(15) *If the employer makes a decision under paragraph (13)(b) or (c), the employer shall notify the employee in writing. If the employee disagrees with the employer's decision, the employee is entitled to continue the refusal, subject to subsections 129(1.2), (1.3), (6) and (7).*

Information to Minister

(16) *If the employee continues the refusal under subsection (15), the employer shall immediately inform the Minister and the work place committee or the health and safety representative of its decision and the continued refusal. The employer shall also provide a copy of the report on the matter prepared under subsection (7.1) to the Minister along with a copy of any report referred to in subsection (10.1) or (10.2).*

…

Minister's investigation

129 (1) *If the Minister is informed of the employer's decision and the continued refusal under subsection 128(16), the Minister shall investigate the matter unless the Minister is of the opinion that*

(a) *the matter is one that could more appropriately be dealt with, initially or completely, by means of a procedure provided for under Part I or III or under another Act of Parliament;*

(b) *the matter is trivial, frivolous or vexatious; or*

(c) *the continued refusal by the employee under 128(15) is in bad faith.*

…

Decision of Minister

(4) *The Minister shall, on completion of an investigation made under subsection (1), make one of the decisions referred to in paragraphs 128(13)(a) to (c) and shall immediately give written notification of the decision to the employer and the employee.*

…

Directions by Minister

(6) *If the Minister makes a decision referred to in paragraph 128(13)(a), the Minister shall issue the directions under subsection 145(2) that the Minister considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.*

Appeal

(7) *If the Minister makes a decision referred to in paragraph 128(13)(b) or (c), the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by that employee for the purpose, may appeal the decision, in writing, to an appeals officer within 10 days after receiving notice of the decision.*

[22] On October 1, 2014, HSO Garron delivered his investigation report of the August 20 and September 11 work refusals ("the October 1 decision"), which found that there had been no danger. On October 7, 2014, the complainant and Mr. Fauceglia appealed the decision to the OHS Tribunal. None of the other CBSA employees who were part of the August 20 work and the September 11 work refusals appealed it.

[23] The OHS Tribunal scheduled the appeal hearing for February 8 to 12, 2016. For reasons not disclosed and not germane to this matter, the hearing was postponed and rescheduled for the week of May 30 to June 3, 2016 ("the OHS hearing"). On

April 5, 2016, the OHS Tribunal provided the parties' representatives with a notice of the OHS hearing dates, location, and start time.

[24] On April 21, 2016, Mr. Fauceglia emailed ("the April 21 email") Messrs. Salerno, Mahon, and Glazebrook, and copied the complainant and Chief Siegfried Funk, about the OHS hearing, stating as follows:

> *We have confirmed the dates for the OHSTC to be held at 1 Front Street from Monday May 30 through Friday June 3, 2016 starting at 9:00am (see attachment).*
>
> *Ron and I will have to be at the tribunal for those dates.*
>
> *I don't know if you'll have to Y107 or how it works.*
>
> *Currently we don't even have a schedule beyond the end of May so I don't know what you have to do on your end.*
>
> …

[25] "Y107" is the term used to refer to a shift-change request into the electronic scheduling system.

[26] The evidence disclosed that attached to the April 21 email was a copy of the April 5, 2016, letter from the OHS Tribunal to the parties' representatives advising of the OHS hearing dates, start time, and location.

[27] Mr. Salerno testified that he received the April 21 email and the attached letter and stated that as of that time, the Y106 for the period covering the OHS hearing had not been issued beyond the end of May. When he was asked if the complainant made any requests separate from the April 21 email, Mr. Salerno said that he did not. When Mr. Salerno was asked what he did in response to the email, he said that he did nothing, as he was not sure that he was on shift. He said that he likely left it for one of the other superintendents to deal with.

[28] On May 2, 2016, Mr. Salerno emailed all members of the LVS unit, copying Messrs. Mahon and Glazebrook, to remind them of the reporting requirements when they would be either not at work or late. The relevant portion of the email states as follows:

> *Just wanted to send out a quick reminder that if you are calling in Sick or Family Related (or other leave that needs to be pre-approved) then you need to be calling the Non-Report Line, 905-612-5320, and speak with the On Duty Supt. or leave a message.*

> *In the instances that you are on your way to work and you know that you will be late (10-15 mins) then you can call the LVS Superintendents office, 905-612-7978, and speak with one of the LVS Supts or leave a message.*
>
> *When leaving a message on the Non-Report line please ensure that you leave a clear message and include the following:*
>
> - Name
> - Shift
> - Unit
> - Reason for Non-Report
> - Type of leave being requested
> - A contact number where you can be reached
>
> *If your message does not have enough details, then you may receive a call from a Supt for further clarification.*
>
> *When leaving a message with the LVS Supts for being late please ensure you leave a clear message and include the following:*
>
> - Name
> - Shift
> - Approx. time you will arrive/commence your shift
> - Reason for being late
> - Type of leave being requested (VAC, CT or Lieu)
> - A contact number where you can be reached
>
> *If you have called in to advise of being late, then please ensure that you find an LVS Supt when you arrive to let us know that you are here; if one is not available then send an email to all LVS Supts to indicate when you have arrived.*
>
> …

[29] The OHS hearing took place in Toronto at Canada Industrial Relations Board (CIRB) hearing rooms on the 5th floor of 1 Front Street, the same address at which this hearing was held, between May 30 and June 2, 2016. It is in the heart of downtown Toronto between Yonge and Bay Streets and is just across Bay Street from Union Station, where GO and Union Pearson Express (UP) trains arrive and depart.

[30] The UP train travels to Pearson, and it stops adjacent to Terminal 1. It runs every 15 minutes and takes 25 minutes to travel from Union Station to Terminal 1. GO Transit is a regional transit system that serves the greater Toronto area and municipalities in its vicinity using both buses and trains ("GO trains").

[31] Mr. Glazebrook testified that Cargo 3 is located at 2720 Britannia Road, which is right in the centre of the Pearson complex. The evidence disclosed that the BSOs working at Cargo 3 received free parking. It is well known that there is general public

parking at Terminal 1 at Pearson, where the UP train station is located, and at Terminal 3, from where a shuttle tram runs to the UP station.

[32] As of the OHS hearing, the complainant lived somewhere in central Hamilton, Ontario, which he said was about a 10-minute walk from the Hamilton GO Transit station. Also, as of both this hearing and the OHS hearing, a GO train station was in the vicinity of both Pearson and Cargo 3.

[33] During the OHS hearing, the complainant was scheduled to work the 11:55-22:00 shift on Monday and Tuesday, May 30 and 31, and was to be on rest days for the balance (June 1 and 2, 2016).

[34] Mr. Salerno testified that on Thursday, May 26, 2016, Mr. Fauceglia approached him about a shift change due to the OHS hearing that was scheduled to start the next Monday, May 30, at 09:00. In his evidence, Mr. Fauceglia did not recall the meeting. Mr. Salerno said that he told Mr. Fauceglia that he had to speak to Labour Relations (LR).

[35] Mr. Salerno said that he spoke with Pnina Ptasznik of LR, who he said told him that for the OHS hearing, the employees were to be paid for their time there but were not to be given shift changes. He stated that he also discussed the complainant's situation with her and that he was advised that for part of the OHS hearing, the complainant would be on his own time, but that he would be paid for the hearing time that overlapped his shift. And he was to be paid for a reasonable amount of travel time to return to work. That reasonable travel time was to be 1.5 hours, starting from 16:00, as it was believed that the OHS hearing would end at that time.

[36] Mr. Fauceglia testified that on May 26, 2016, he spoke with Mr. Salerno. He was trying to figure out what he was supposed to do about the OHS hearing the next week. He said that he showed Mr. Salerno the summons and that Mr. Salerno acknowledged that Mr. Fauceglia had to attend. A copy of the summons was not entered into evidence, and Mr. Fauceglia could not recall the date on it.

[37] He said that Mr. Salerno did speak to him a second time on May 26, 2016. He said that then, Mr. Salerno told him that he could go to the OHS hearing directly from his home. He said that Mr. Salerno also told him how to account on his time sheet for the time spent at the OHS hearing. He said that he thought that Mr. Salerno told him to

enter it as per article 47 of the collective agreement. He also said that he believed he was told, "No Y107."

[38] He said that for the first day of the OHS hearing, he was on shift, but that the next four days were his days of rest. He alluded to the fact that because it was a personal matter, there would be no Y107. He said that he was not required to report for work on Monday, May 30, 2016, before going to the OHS hearing.

[39] Mr. Fauceglia was asked if his discussion with Mr. Salerno was just about his circumstances or if it included those of the complainant. He stated that he thought that it had just been about his, although he said that he could have asked about the complainant.

[40] Mr. Fauceglia testified that he lived in the vicinity of the Keele Street and St. Clair Avenue West intersection in Toronto, about 10 km north and west of 1 Front Street and quite central in Toronto. Pearson is approximately 20 km north and west of that intersection.

[41] Mr. Salerno testified that after his May 26, 2016, discussion with Ms. Ptasznik, he entered information into the shift scheduling system with respect to the complainant's shifts for the first two days of the OHS hearing. Entered into evidence was a copy of a "Shift Change Audit Report" showing entries into the system with respect to the complainant. According to Mr. Salerno, all BSOs have access to shift schedule information, including shift changes as reflected in the Shift Change Audit Report. However, only authorized superintendents can input changes into the shift scheduling system.

[42] The Shift Change Audit Report entered into evidence disclosed that on May 26, 2016, at 14:51, Mr. Salerno entered a change into the shift schedule for the complainant showing that on May 30 and 31, he would be at the OHS hearing. The time shown was from 11:55 until 17:25, indicating that it was 5.5 hours of paid leave (clause 47.01).

[43] The complainant stated that he did not work on May 26, 2016, but that he received a text message from Mr. Fauceglia about his discussion with Mr. Salerno that day. The complainant said that Mr. Fauceglia's text said that Mr. Fauceglia had spoken to Mr. Salerno, who had told him that the complainant would receive leave to attend

the OHS hearing but that he would have to return to work after it and that no CBSA vehicle would be provided.

[44] In cross-examination, Mr. Fauceglia said that he could not recall if he spoke with the complainant after his discussion with Mr. Salerno on May 26, 2016. It was also put to him that the complainant had said that Mr. Fauceglia had texted him after his discussion with Mr. Salerno, to which Mr. Fauceglia said that it did not ring a bell but that it was probable. When he was asked if he made a note of his discussion with Mr. Salerno of his discussion of May 26, 2016, he said that he did, although not contemporaneously with the discussion. He made it in his officer's notebook sometime on May 30, 2016, between 05:55 and 16:00, as follows:

> *2016-05-30 5:55-16:00 OHSTC today. I informed Supt. SALERNO that I had to attend an Occupational Health & Safety Tribunal of Canada tribunal [sic] as both a witness and appellant. Supt. SALERNO reviewed my paperwork and acknowledged that I had to attend. He told me to code my timesheet as a regular 9:55 hr day because this situation meets the definition of 47.01(c)(v) under the collective agreement. As such I went directly to the tribunal from my home and returned home at the end of the day. Summons to appear before an appeals officer: 891-01-594 2014-45*

[45] No text message was entered into evidence.

[46] A copy of the "Summons to Appear" before the OHS hearing, issued to the complainant and dated May 27, 2016, was entered into evidence. The evidence disclosed that the Public Service Alliance of Canada emailed it to the complainant's personal address on May 27, 2016, at 14:58. Mr. Salerno testified that the first time he saw the summons was the week before appearing at the hearing before me. There is no evidence that it was provided to any of the three superintendents who testified before me before August 11, 2016, which is the date of two emails the complainant sent, the first at 15:30 from his personal email to his work email, and the second at 15:34 from his work email to Mr. Glazebrook.

B. The May 27, 2016, meeting

[47] On May 27, 2016, a meeting took place in the superintendents' office ("the May 27 meeting"). The complainant's rendition in his examination-in-chief of what occurred was as follows:

- he arrived on shift at 11:55 that day and checked his emails;

- he then went to the superintendents' office, and both Messrs. Mahon and Glazebrook were there;
- a discussion ensued in which he said that he told them that he was scheduled to be at the OHS hearing on the Monday, that it started at 09:00, and that he was scheduled to work from 11:55 to 22:00;
- he said that he told them that he had heard that he would not receive a shift change and that they confirmed that that was correct;
- he said that at that point, Mr. Salerno entered the office and said that the superintendents were not allowed to switch his shift and that he was to report for work after the OHS hearing;
- he said that he asked for a CBSA vehicle and was refused and that he was informed that he was responsible for travelling to the OHS hearing on his own because it was a personal matter;
- he told the three superintendents that it was not a personal matter, that it was an OHS concern for all employees in the office, and that it was a CBSA matter;
- he said that Mr. Salerno disagreed;
- the three superintendents said that they would give him time to attend the OHS hearing, that he would be required to report back to work, and that he would not be given a CBSA vehicle;
- he said that he told them that he would travel from Hamilton and that he would take GO Transit because of traffic; and
- he said that Mr. Salerno said that that was the complainant's choice and that they could not direct him to do any specific thing.

[48] When his representative asked the complainant if it was mentioned that he was given 1.5 hours of travel time or that he had to be back from the OHS hearing by 17:25, he said that it was not discussed. His representative then asked him why he felt so certain about it, and he replied, "If it was raised — that time frame — I would have had an issue with it, and I would have said I didn't know the end time."

[49] Mr. Glazebrook testified that Mr. Mahon and he were sitting in his office when the complainant came to the door and spoke to them about a shift change for the OHS hearing. He said that once Mr. Mahon began to respond that he would investigate it, Mr. Glazebrook saw Mr. Salerno coming towards the office, and he knew that Mr. Salerno had already spoken to LR about it. He said that Mr. Salerno came in and that he updated Mr. Salerno on his discussion with Mr. Mahon and the complainant to that point. He also said that Mr. Salerno updated the three others on his discussion with LR.

[50] Mr. Glazebrook said that the complainant was not entitled to a shift change. However, he was entitled to pay for his time at the OHS hearing, and he would be compensated for 1.5 hours of travel time. Mr. Glazebrook said that the complainant told them that he would take the GO train there. He said that Mr. Salerno told the

complainant that the superintendents could not dictate to him how he travelled but that he should think about taking a car. He said that the superintendents understood that the OHS hearing would end at 16:00. He said that they suggested no other options but that driving would have ensured that he returned to work on time.

[51] Mr. Glazebrook said that the complainant was visibly upset at the May 27 meeting. With respect to the OHS hearing days of Wednesday through Friday, June 1 to 3, 2016, Mr. Glazebrook said that the complainant had asked for a shift change for those days because he was on rest days and wanted to be paid for them. When he was asked about the shift change for the Monday and the Tuesday (May 30 and 31, 2016) he said that the complainant wanted a change from the 11:55-22:00 to the 05:55 -16:00 shift and therefore to be fully paid for his time at the OHS hearing.

[52] In cross-examination, it was put to Mr. Glazebrook that the complainant would state that he recalled being told at the May 27 meeting that he would be allowed reasonable travel time. It was suggested to Mr. Glazebrook that perhaps that was said and not that he would be given 1.5 hours of travel time. Mr. Glazebrook reiterated that the complainant was told that he had 1.5 hours to return to Cargo 3.

[53] Mr. Mahon said that he and Mr. Glazebrook were in the superintendents' office when the complainant arrived, to speak to them. He said that he was aware that there could be an issue with respect to shift changes. He confirmed that Mr. Salerno had spoken to LR the previous day. Shortly after the complainant arrived, Mr. Salerno entered the room and told them what LR had advised him. Mr. Salerno told those assembled that there would be no shift change for the OHS hearing. However, the complainant would receive time off with pay for the OHS hearing time that overlapped his work hours, along with travel time.

[54] Mr. Mahon stated that the complainant was not happy with that and said that he would take the GO train from Hamilton. He said that Mr. Salerno told the complainant that he would not tell the complainant what to do and suggested that he look at alternatives and that he should probably drive.

[55] When Mr. Mahon was asked where the 1.5 hours had come from, he said that Mr. Salerno had said that they had to give the complainant 1.5 hours, which was a reasonable time. He said that the complainant had to be back for 17:25, which stuck in

Mr. Mahon's mind. When he was asked about the rationale for the 17:25 return time, Mr. Mahon said that the shifts ran that way.

[56] In cross-examination, it was put to Mr. Mahon that the complainant would testify that before the end of the day on May 27, 2016, he reiterated his request for a shift change and that Mr. Mahon was following up on it. Mr. Mahon said that he did not agree and that it did not seem likely because they had received definitive advice from LR.

[57] Entered into evidence was an email exchange between several individuals with respect to the complainant's shifts on May 30 and 31, 2016, and his attendance at the OHS hearing. The first email is from Jean-Rodrigue Yoboua, the bargaining agent representative acting for the complainant on the OHS appeal, and Christine Langill, legal counsel for the employer. The relevant portions of this email exchange are as follows:

> [Mr. Yoboua to Ms. Langill, May 27, 2016, at 15:25:]
>
> *Ron Harris has been told by his employer that he will be required to work his 12pm to 10 pm shift on Monday and Tuesday. We have obtained subpoena's [sic] for both appellant [sic] but the employer still wants him to work. Can we discuss giving him leave for the duration of the hearing and not requiring him to work after the hearing? He will be looking at a long day if he has to work and commute to Toronto from Hamilton every day.*
>
> [Ms. Langill to Mr. Yoboua, May 27, 2016, at 15:29:]
>
> *I have passed your message onto my client and I will let you know should I receive any update or instruction in response to your question.*

[58] Mr. Yoboua's email was forwarded to Mr. Mahon on May 27, 2016, at 16:46, who emailed several people, including Mr. Salerno and Ms. Ptasznik at 17:24 that day, stating as follows:

> *Rob Salerno spoke to local Labour Relations person Pnina Ptasznik on Thursday, May 26th with respect to this matter. Ms. Ptasznik advised Rob that the employer was obligated to afford the employees paid leave for any time they needed to take off their scheduled shifts to attend the hearing, as well as reasonable travel time. But that we were not required, nor should we in fact, change their shifts or put them on shift to attend the hearing.*
>
> *Ms. Ptasznik said she would inquire further and call Rob if she got any different direction. We have not heard back from Ms. Ptasznik since. I emailed Ms. Ptasznik and her colleague, Vidyia Boodhoo,*

> *this afternoon at 15:36 to follow up, and have not received a response. I also phoned Ms. Ptasznik at that time as well, but got voice mail.*
>
> *Ron Harris is scheduled to work Monday and Tuesday of that week, from 1155-2200 hours. He is off Wednesday to Friday. To our knowledge, we do not believe there is any problem with Ron submitting a vacation leave request for the remainder of his shifts if he does not wish to come back to work after the hearing.*
>
> *Lou Fauceglia is scheduled to work Monday only that week. And rob [sic] has given him permission to utilize the entire shift to attend the hearing that day as Lou is scheduled from 0555-1600 hours.*
>
> *As previously stated, at this time this is the direction we have received from Labour Relations, so we have nothing to add barring further direction from Labour Relations or senior management.*

[59] The email chain continued through May 30 and June 1, 2016. Ms. Ptasznik emailed several people, including Messrs. Mahon and Salerno, as follows:

> [May 30, 2016, at 16:42:]
>
> *I had spoken to Robert* [Salerno] *last week about leave, etc. and have since tried to confirm all the answers. I have yet to get confirmation. It is clear employees are not to be penalized for attending the tribunal. However, when I read the Act and the collective agreement I don't see any $ [sic] for travel. I have not forgotten you and we will get the answer confirmed and nailed down.*
>
> [June 1, 2016, at 10:25:]
>
> *Good morning all, just wanted to confirm that there is no obligation to pay travel or overtime for that matter to employees attending a tribunal. If an employee is scheduled to be at work, there is no question that he/she will not be penalized to attend the hearing. However, the manner in which he/she gets there is not the employer's responsibility.*

[60] Mr. Mahon testified that about a week to 10 days after the May 27 meeting, he wrote a summary of it that stated as follows:

> …
>
> *On Friday, May 27th at approximately 1430hours Ron Harris came into the superintendent's office to speak to the LVS managers about his attendance at an OSH [sic] tribunal the following week. Rob Salerno, Greg Glazebrook and I were in the office. Ron had asked if he could be switched from afternoons to day shifts on Monday and Tuesday of the following week, May 30th and 31st. Rob informed Ron that we had contacted Labour Relations and had been told that we could not switch Ron's shifts to align with the time of the tribunal. That we could allow him paid leave to*

> *attend the tribunal when it was in session while he was scheduled to work, and that we could also grant him reasonable travel time to return to the workplace from the tribunal as, in this case, he was scheduled to work 1155-2200 hours on the days in question. Rob told Ron that he was allotted approximately 1.50 hours of leave to return to the workplace at the conclusion of the tribunal each day. Rob told Ron this meant that if the tribunal ended at 1600 hours as scheduled that he should be back in the workplace by approximately 1725 hours and input that information in the infotext box in MSS as well as telling Ron* [*sic*; should be Rob] *in person. Ron stated that he was planning on taking the GO train to the tribunal from his home in Hamilton, and that he didn't think he could make it to work in the allotted time. Rob reiterated that the allotted time was a reasonable amount and suggested that Ron investigate other options to attend the tribunal and come to work in the allotted time, such as driving directly to the tribunal in his car, for example. The conversation concluded at that point and Ron left the office. Shortly after that Rob and Greg left the workplace at the end of their shifts.*
>
> …

[61] Mr. Glazebrook testified that after he was tasked with carrying out a disciplinary investigation, he also wrote a summary of the May 27 meeting, which stated as follows:

> …
>
> *At approximately 14:30 hours I was in my office with Superintendent Mahon. BSO Harris came to the door and asked Superintendent Mahon about switching his shifts as he was scheduled to attend an OSH tribunal at 1 Front St. in Toronto. To my knowledge this was the first request the employee had made regarding shift changes to attend the tribunal.*
>
> *Superintendent Mahon responded by saying he wasn't sure if the shifts could be switched. At this point in the conversation I interrupted because I was aware that earlier in the day Superintendent Salerno had been in contact with Labour Relations. BSO Fauceglia who was also attending the tribunal had made a similar request to Superintendent Salerno who had reached out to labour Relations for clarification. I suggested we wait and confirm with Superintendent Salerno who was approaching my office as we were speaking.*
>
> *When Superintendent Salerno arrived he was apprised of BSO Harris' request. He informed BSO Harris that he had spoken to Labour Relations and that the employer would be granted paid leave for the time the tribunal coincided with BSO Harris' shift but that he was not entitled to have his shift changed to attend.*
>
> *Superintendent Salerno then advised BSO Harris' that since he was scheduled to work afternoon shift (11:55 to 22:00) on both May 30th and May 31st leave would be granted from 11:55 to 16:00 to attend the tribunal plus a reasonable amount of travel time to*

> *return to the office from 1 Front Street in Toronto. He advised BSO Harris that travel time of approximately 1.50 hours would be granted from 16:00 -17:25 hours. He also advised BSO Harris that from June 1st to June 3rd, his days of rest, that he would be required to attend the tribunal on his own time.*
>
> *BSO Harris responded by saying that he was planning to take the GO Train from Hamilton to attend and that he did not think he could make it back to the office in the time allotted.*
>
> *Superintendent Salerno replied that management would not dictate how to he should travel, but that his leave was only approved until 17:25. He suggested BSO Harris consider an alternate method of transportation if he didn't feel he could make it back to the office in time. He further advised that BSO Harris consider driving to the tribunal as an alternative 1.50 hours would be sufficient time to return to work.*
>
> *It is my observation, BSO Harris was becoming more agitated and upset at response he was receiving to his shift change request. I believe BSO Harris clearly left the discussion dissatisfied with Management's position but fully understood what had been discussed and what leave had been granted for him to attend the tribunal.*
>
> [*Sic* throughout]

…

[62] Mr. Salerno testified that he was asked to provide a written summary of what he recalled of the May 27 meeting, which he did in an email dated June 25, 2016, the relevant portions of which state as follows:

…

> *At approximately 14:30 hours I was in the Superintendent's office with Supt. Mahon, Supt. Glazebrook and BSO Ron Harris. We were discussion [sic] BSO Ron Harris' request for shift changes to attend a OHS Tribunal the week of May 30th – June 3rd.*
>
> *In the presence of Supt Mahon and Supt Glazebrook, I advised BSO R Harris that, as per my discussion with Labour Relations, he was not entitled to any shift changes to attend this tribunal. I advised BSO R Harris that he would be given paid leave (under the collective agreement) to attend the tribunal during the time that he would have been on shift. I informed BSO R Harris he would be given paid leave (under the collective agreement) to attend the tribunal during the time that he would have been on shift. I informed BSO R Harris that as he was on the afternoon shift, that he would get paid leave from 1155-1600 each day to attend the tribunal as well as reasonable travel time to travel from 1 Front Street to Cargo 3 each day when the tribunal was finished for the day; I advised him that we would approve approx.. 1.50 hours of travel time (1600-1725) each day as reasonable travel time. I advised him that he would be expected to be at work for 1725*

> *hours. I also advised him that for his Days of Rest on June 1-3 that he would be attending on his own time and there would be no compensation from the employer.*
>
> *At this time BSO Ron Harris mentioned that he wanted to take the Go Train from Hamilton to 1 Front Street and that he did not think that he could be at Cargo 3 for 1725 hours. I then advised BSO R Harris that CBSA Management would not dictate to him how he should travel, however I did advise him that he was only granted paid leave until 1725 hours and that perhaps he should look into the use of other means of transportation to 1 Front Street such as driving downtown and paying for parking. I advised him that if he drove directly downtown that the 1.5 hours of travel time would be more than sufficient for him to arrive at work each day (May 30th and 31st) at or before 1725 hours.*

…

[63] In his evidence, Mr. Salerno recounted the following about the lead-up to the meeting and the meeting itself:

- on May 26, the complainant approached him about a shift change for the OHS hearing, and he said that he told the complainant that he would have to check with Human Resources (HR);
- he spoke with Ms. Ptasznik, who later called him back and advised him that she had spoken to HR at the CBSA's National Headquarters, which had told her that the time for the OHS hearing would be paid but that there would be no shift change;
- he was told that the complainant would have his time paid while he was supposed to be on shift as well as reasonable travel time, which was said to be 1.5 hours from 16:00;
- the complainant and Messrs. Glazebrook and Mahon were already in the superintendent's office when he arrived to what became the May 27 meeting;
- on May 27, the complainant again asked about the shift change, to which he as well as Messrs. Mahon and Glazebrook were told that he would receive paid leave for the time between 11:55 and 17:25, which would account for the time at the OHS hearing and reasonable travel time; and
- the complainant told those at the meeting that he wanted to take the GO train from Hamilton, and the superintendents told him that he was an adult and that they could not tell him how to travel but that doing it the way he suggested was not feasible in terms of returning to work on time.

[64] When he was cross-examined, Mr. Salerno stated that he told those at the meeting that the complainant was on his own time and that he would be paid for his time at the OHS hearing and reasonable travel time. When it was suggested to him that he did not offer any other reasonable travel options, he stated that he recalled telling the complainant that he should drive and pay for parking and that he recalled the complainant saying that parking costs were exorbitant. He did agree that driving from

downtown Toronto to Pearson could take 1.5 hours, or even more, depending on the circumstances.

[65] In cross-examination, when it was put to Mr. Salerno that LR said that a reasonable time was required with respect to the time to travel from downtown Toronto to Pearson, and he suggested 1.5 hours, he agreed adding that LR felt that 1.5 hours was generous. He said that it was impossible to at once be in downtown Toronto and then immediately at Pearson; hence, the complainant received travel time.

C. The OHS hearing (May 30 and 31, 2016)

[66] The OHS hearing proceeded on May 30 and 31, 2016. The complainant testified that he travelled from his home in Hamilton by GO train to Union Station in downtown Toronto. He did not wear or bring his CBSA uniform. He said that at the end of the OHS hearing on both days, he stayed for a while to discuss things with his bargaining agent representative and then took GO Transit home. In cross-examination, he could not say how long he stayed after the end of the OHS hearing before he departed; however, he said that he left the hearing at 17:00.

[67] However, the GO train did not always run all the way to Hamilton; sometimes, it went only as far as Aldershot, which is a stop between Union Station and the Hamilton GO station. From Aldershot, commuters going on to Hamilton must take a GO bus. According to the Go Transit schedule for the Union Station-Hamilton route, trains bound for Hamilton or Aldershot left Union Station at 17:00, 17:10, 17:15, 17:30, and 17:40. Only the 17:00 and 17:30 trains reached Hamilton. The complainant confirmed in his evidence that he was required to switch to a bus at Aldershot. If the trains and buses were on schedule, they would have reached the Hamilton GO Station at 18:15 (the 17:00 train), 18:48, or 18:45, depending on what train (or train-bus combination) was taken.

[68] The complainant said that after arriving at the Hamilton GO station, he then walked home, where he changed into his uniform and drove to Cargo 3. He arrived at work on May 30 at 20:10 and on May 31 at 20:13. He confirmed that on neither day did he call in to report that he would be late or that he was on his way.

[69] Mr. Mahon was the superintendent in charge of the LVS unit on the evening of May 30, 2016. He worked from 10:00 to 20:00 that day. He testified that when the

complainant did not appear at work that day near the end of his shift, he checked for messages on the numbers that employees would phone; finding none, he phoned the complainant and left the following voicemail on his cell phone:

> *Hello Ron, it's Tom Mahon calling. Monday May 30 at 19:51. I've checked the sick line and our phone lines here, there are no calls from you, ah, I'm just trying to find out where you are and, well, why you are,nt here basically. O.K. Alright, Thanks. You can call the sick line or call, I'm here for another ten minutes and then there will be nobody at this number. O.K. Bye.*
>
> [*Sic* throughout]

[70] Mr. Mahon said that he left work at 20:00 and that he had not heard from the complainant by then.

[71] Entered into evidence was an email exchange of May 30 and 31, 2016, between Mr. Mahon and several others, including Patricia Blake, an employer representative, who was at the OHS hearing. The relevant portions of the exchange are as follows:

> [Mr. Mahon to several recipients, May 30, 2016, at 20:07:]
>
> *As of this time Ron Harris has not returned to the workplace from his tribunal. Shana and I checked the sick line and there are no calls on there from him. There are no calls on the LVS supers line either. I called his number at 1950 and got voicemail. I left a message asking him where he was and why was he not at work. It is my understanding that the tribunal was scheduled to end today at 1600 hours and that Ron was to be afforded reasonable time to return to the workplace afters [sic]. Bearing that in mind I would think he should have been here by 1800 or 1830 at the latest. Certainly a call would have been in order if he was having difficulty getting here. I called Patti Blake to see if she had been at the tribunal this afternoon but I got voicemail. So perhaps Patti has some information that may shed some light on it. But as of now Ron appears to be AWOL unless there is some other explanation that I am unaware of.*
>
> …
>
> [Ms. Blake to Mr. Mahon and others, May 31, 2016, at 07:16:]
>
> *The hearing wrapped up at about 1630 yesterday and I did see Ron there but I don't have any other information to offer.*
>
> …

[72] On May 30, 2016, at 20:56, the complainant emailed Mr. Salerno and copied Mr. Mahon and others. The relevant portions of it are as follows:

> …

> *As you are aware I am attending the Health and Safety tribunal this week as it relates to our appeal (that Lou and I have) regarding fumigants in marine container shipments. I received a summons from the PSAC lawyer to attend the tribunal this week. As such, I finished at 17:00 hrs and did not arrive at work until 20:10 hrs today due to the fact that I live in Hamilton and had to take the GO Train to front street today, return home, change into my uniform, get my car and head to work. I did not even have time to sit down and eat dinner during all of this. When I arrived at work I found no Superintendents on duty in the LVS unit so I proceeded downstairs to search for a Primary Supt or an Enforcement Supt (none were found and I was advised by a BSO that they were out a lunch) so I proceeded back upstairs to the LVS unit and wrote this email. Upon sitting down at my desk, I realized that there was a voicemail message on my cell phone from 19:51 hrs from Tom stating that there were no messages on the sick line or the LVS line and he was wondering where I was. He advised me on the message that he would be leaving in 10 mins so there would be no Supt aft that point.*
>
> *On Friday I had talked to Rob, Tom and Greg in an attempt to get my shift changed to days so that I could attend the tribunal and so that I wouldn't have difficulty reporting to work afterwards. Rob advised me that Management was not required to switch my shift since the tribunal was a "personal" issue that we chose to pursue. I advised him that it was not personal and it was work related. I also advised them of the difficulty in getting to work afterwards since I live in Hamilton, but Management was still unwilling to switch my shift. As such, I got to work as soon as I was able to do so. Please be aware that the situation is likely to be much the same tomorrow since we are scheduled to end at the same time and I am scheduled to work afternoons.*
>
> …
>
> [*Sic* throughout]

[73] Mr. Mahon responded to the complainant's email on May 30 at 21:39, stating as follows:

> …
>
> *I am not certain that over 3 hours to get from downtown Toronto to the airport will be accepted as "reasonable" travel time given that you chose to take the GO Train to the tribunal. You did not have to as you state in your email. You could have driven to the tribunal and taken your uniform with you to come to work directly after the tribunal. Once again you chose to go home after the tribunal. You did not have to.*
>
> *I have forwarded your email to Chief Tam for her review.*
>
> …

[74] Still on May 30, at 22:35, the complainant replied to that email, stating as follows:

> …
>
> *As it happens taking the GO Train minimized my personal costs and times. Had I taken my vehicle I could not have been in Toronto at a reasonable time for the hearings and would have been much longer coming out of Toronto, plus incurred further parking costs. At the moment this entire matter is incurring unconscionable costs in time on my part. In fact, it would seem to me that given that the tribunal is a quasi-judicial matter related to the performance of my duties and requires my presence, I am entitled to travel costs, meals, travel time and overtime. I further believe that for management not to have switched my shifts, gives [sic] the appearance of directly attempting to subvert the tribunal process. By not being willing to change my shifts you are further subjecting me to personal health and safety concerns in that given I have to report tomorrow, by the time I arrive home, I will only have a total of 6.5 hrs in which to sleep, perform ablutions, arrive at the go [sic] terminal to travel to the tribunal etc. This is unreasonable given that I have been summoned to testify and been available for cross examination by our own CBSA lawyers. In effect, your decision has created a health and safety issue in and of itself. Management was made aware of this matter several months ago. It should be noted that management only advised me that my shift would not be changed on Friday, 27, May in the afternoon when the matter could not be forwarded up the management hierarchy. All of this is entirely unreasonable and unnecessary. A simple shift change would have averted the entire problem. Finally, as a result of having to respond to your email I am now leaving the office over a half an hour late past the end of my shift, which reduces my sleep time prior to tomorrow even further.*
>
> …

[75] Entered into evidence was an email exchange between Mr. Salerno and several people, including John Dawson (another superintendent at Cargo 3), on May 31, 2016. The relevant portions of the exchange are as follows:

> [Mr. Salerno to several recipients, at 12:57:]
>
> *As you are all scheduled to be here this evening can you please reply all to this email to let us know when you see BSO Ron Harris arrive.*
>
> *Ron is currently at a Tribunal and was given paid leave from 1155-1725 to attend. The tribunal is at 1 Front and should be done by 1600 hours and we afforded him 1.50 hours to travel back to cargo 3.*
>
> *Yesterday he did not arrive until 2015; so we need to know what time he shows up today. Thanks.*

> [Mr. Dawson to Mr. Salerno and others, at 20:27:]
>
> *He reported in at 2015 hours today.*
>
> *I discovered that he takes the GO Train downtown from his residence. Then returns to his residence in Hamilton on the train, gets his personal vehicle and drives to Cargo 3 to report for duty.*

[76] Entered into evidence was an email exchange between the complainant and Mr. Glazebrook on May 31, 2016. The relevant portions of it are as follows:

> [Mr. Glazebrook to the complainant, at 12:58:]
>
> *As there will not be an afternoon Superintendent in LVS tonight you are required to report to any on duty Superintendent in Enforcement or Primary upon your arrival. In addition you will need to send an email to Rob, Tom and myself upon your arrival in the office.*
>
> [The complainant to Messrs. Glazebrook, Mahon, Salerno, and others, at 20:30:]
>
> *I arrived at work at 20:12 hrs today and found there was no LVS Supt upstairs so I found John Dawson in Primary instead. I reported into him. I sent a response to this email once I saw it.*
>
> …

D. After the OHS hearing: the disciplinary investigation and the discipline

[77] At some point after May 31, 2016, Mr. Glazebrook said that he was tasked with carrying out a disciplinary investigation into the complainant's failure to be at work after the OHS hearing. Mr. Mahon testified that he was the co-chair of the investigation. The exact date of the investigation and who tasked it were not disclosed to me.

[78] On June 5, 2016, at 14:37, Mr. Mahon emailed a corrected version of an email that had been sent in response to the complainant's email of May 30, 2016, at 22:35. The date and time of the uncorrected email were not provided to me. The relevant portions of the email are as follows:

> *I have considered the information you have sent me and while a meeting will be arranged to further discuss management's concerns, I would like to clarify a few points at this time. I appreciate that you are of the view that management had an obligation to change your shift schedule, pay travel associated costs, meals, etc. However, upon review of the Labour Code, I note that Management's obligation is to ensure that you are afforded the required time to attend the appeal hearing, if scheduled during working hours. A y [sic] additional provisions as suggested by you do not appear to be considered or required under the Labour Code. In this respect you were granted leave to attend the meeting*

> *during your regularly scheduled shift and afforded 1.5 hours to travel to the office following the completion of this hearing. This notwithstanding, you failed to contact management to receive authorization for the additional time you took to travel home and then return.*
>
> *Of further concern is the fact that while you were notified of management's concerns in this respect on May 30th, 2016, you engaged in the same conduct on May 31st, 2016 when you returned to the workplace at 8:12 pm. Moreover, on May 2, 2016, an email was sent to all staff reminding them of their obligation to obtain authorization where they are unable to report for duty as directed. I note that you were copied on this email and accordingly this matter will require further review.*
>
> *While you have stated that you believe that management was required to change your scheduled hours of work, this too is not described as a requirement under the Canada Labour Code. This notwithstanding, had you made a formal request in this regard well in advance of the hearing, consideration could have been given to such an arrangement and operational requirements could have been addressed.*
>
> …

[79] On June 9, 2016, at 19:12, the complainant emailed Lisa Costanzo, another superintendent. As of that date, he had begun reporting to her. He copied his bargaining agent representative, and Ms. Costanzo forwarded it to Messrs. Glazebrook, Mahon, and Salerno. Its relevant portions are as follows:

> *Since you are now my direct report, I am sending this email to you. I have now submitted my time sheet for the days listed about [sic] and have accounted for all regular time during that week (I was attending the Health and safety appeal tribunal that week with Lou). However* [words unclear] *not sure how to account for the remaining time to attend the work related tribunal which didn't fall during my regular shift for that day. The following hrs are in excess to my scheduled afternoon shifts that week and need to be accounted for:*
>
> *-May 30 I attended the tribunal prior to my scheduled shift from 09:00 to 11:55 (2.92 hrs)*
>
> *-May 31 I attended the tribunal prior to my scheduled shift from 09:00 to 11:55 (2.92 hrs)*
>
> *-Jun 1 I attended the tribunal on a schedule DR from 09:00 to 17:00 hrs (8 hrs)*
>
> *-Jun 2 I attended the tribunal on a schedule DR from 09:00 to 11:30 hrs (2.5 hrs)*
>
> *Can you please advise?*
>
> …

[80] On June 14, 2016, Mr. Mahon replied to that email, copying Messrs. Glazebrook and Salerno and Ms. Costanzo. He stated as follows:

> *As previously stated in the email I sent you on June 4th, 2016, and which I have appended at the bottom of this string [sic], the employer is not obligated to do anything beyond grant you leave to attend the tribunal while on regularly scheduled shifts and grant you reasonable travel time to attend the tribunal and return to the workplace.*

[81] The complainant was invited to a meeting on June 14, 2016, with Mr. Glazebrook to discuss his absences from the workplace on May 30 and 31, 2016. The meeting was held, and the complainant attended with his bargaining agent representative, Douglas Venier, a CIU union steward for CBSA commercial operations. Also present was Mr. Mahon.

[82] Mr. Mahon's handwritten and typewritten notes from the June 14, 2016, meeting were entered into evidence, as was the discipline report. Also entered into evidence was an email dated June 15, 2016, from Mr. Salerno to Mr. Glazebrook, which he stated stood as his account of the events that took place at the May 27 meeting. The relevant portion of the email states as follows:

> *At approximately 1430 hours I was in the Superintendent's office with Supt. Mahon, Supt. Glazebrook and BSO Ron Harris. We were discussing BSO Ron Harris' request for shift changes to attend a OHS Tribunal the week of May 30th -Jun 3rd.*
>
> *In the presence of Supt Mahon and Supt Glazebrook, I advised BSO R Harris that, as per my discussion with Labour Relations, he was not entitled to any shift changes to attend this tribunal. I advised BSO R Harris that he would be given paid leave (under the collective agreement) to attend the tribunal during the time that he would have been on shift. I informed BSO R Harris that as he was on the afternoon shift, that he would get paid leave from 1155-1600 each day to attend the tribunal as well as reasonable travel time to travel from 1 Front Street to Cargo 3 each day when the tribunal was finished for the day; I advised him that we would approve approx.. 1.50 hours of travel time (1600-1725) each day as reasonable travel time. I advised him that he would be expected to be at work for 1725 hours. I also advised him that for his Days of Rest on June 1-3 that he would be attending on his own time and there would be no compensation from the employer.*
>
> *At this time BSO Ron Harris mentioned that he wanted to take the Go train from Hamilton to 1 Front Street and that he did not think that he would be at Cargo 3 for 1725 hours. I then advised BSO R Harris that CBSA Management would not dictate to him how he should travel, however I did advise him that he was only granted*

> *paid leave until 1725 hours and that perhaps he should look into the use of other means of transportation to 1 front Street such as driving downtown and paying for parking. I advised him that if he drove directly downtown that the 1.5 hours of travel time would be more than sufficient for him to arrive at work each day (May 30th and 31st) at or before 1725 hours.*
>
> …

[83] On July 29, 2016, Mr. Glazebrook disciplined the complainant, the details of which are set out at the outset of the reasons in this decision.

[84] Mr. Donahue, a BSO at Pearson, testified that he was not involved in the matter that gave rise to the hearing before me. However, he had been involved in a work refusal in the past, which went to the OHS Tribunal for a hearing in March or April of 2016. At the time, he was employed by the TB with the CBSA as a BSO working at Pearson in passenger operations. Mr. Donahue stated that he had no difficulty obtaining a shift change for his attendance at that hearing, and the email exchange disclosing his request and the shift change was introduced into evidence.

[85] Entered into evidence was an email exchange dated January 9 and 11, 2016, between Mr. Funk, and Mr. Venier. The exchange was about the attendance of the complainant and Mr. Fauceglia at a pre-hearing teleconference for the original dates for the OHS hearing, which was in February of 2016. Mr. Funk's email reply to Mr. Venier on January 11, 2016, was also sent to several others, including the complainant, as well as Messrs. Fauceglia, Mahon, and Glazebrook (the exchange will be collectively referred to as "the January 9-11 exchange"). The relevant portions of these emails are as follows:

> [Mr. Venier to Mr. Funk, January 9, 2016:]
>
> …
>
> *I am writing to you two today to make you both aware that two BSO's [sic] at Commercial Operations will be tasked to attend the Occupational Health and Safety Tribunal to deal with the following appeals:*
>
> *The appeals have been scheduled for hearing on February 8 to 12,2016. Prior to the appeals they will be required to attend a pre-hearing teleconference which has been scheduled either January 20,21 or 22,2016 (date should be solidified by Monday January 11th, 2016). The teleconference will entail both of those BSO's [sic] being available approximately 60-90 minutes prior to the teleconference. I would ask that arrangements be made to allow*

> *these officers to be relieved of their normal LVS duties prior to the teleconference.*
>
> …
>
> [Mr. Funk to Mr. Venier and others, January 11, 2016:]
>
> …
>
> *I checked with HR about how employees are to account for their time when attending a tribunal and am given to understand that it is standard practice to shift change to days and allow use of a port car. It is also likely that they will not be required for the full hearing. Ron and Lou should find out when they are expected to attend and arrange the specific times with their Superintendents. They should attempt to provide that information far enough in advance to allow for sufficient notice for the shift change. I have no issue with them attending the teleconference, bit [sic] would like clarification of what the extra 60-90 minutes is for.*
>
> …

[86] Neither Messrs. Funk nor Venier testified before me, nor did anyone from HR or LR.

[87] In cross-examination, the January 9-11 exchange was put to both Messrs. Mahon and Glazebrook. Mr. Mahon stated that he did not recall seeing it, but he did not dispute that he received it. When he was asked if he recalled Mr. Funk's response at the time, he said, "Yes."

[88] Also entered into evidence was an email chain dated December 29, 2015, with respect to the OHS hearing. Susan Lake, a CBSA LR advisor, either authored or received all the emails. She sent the last email in the chain at 10:11 to Mr. Funk, copying Mr. Mahon. The email chain is as follows:

> [Ms. Lake to Teresa Jancsurak and another person, copying Messrs. Funk and Mahon, at 09:22:]
>
> *Can you please advise on how these employees would account for their time to attend. The CA speaks to time when an employee is called as a witness to Adjudication/Arbitration Board hearings PIC and ADR process.*
>
> [Ms. Jancsurak to Ms. Lake and another person, at 10:04:]
>
> *I believe we shift change to days and allow a port car.*
>
> [Ms. Lake to Mr. Funk, copying Mr. Mahon, at 10:11:]
>
> *Please see Teresa's response. It is likely that they would not be required for the full hearing. They should find out when they would be expected to attend when they have their pre-hearing conference. They should attempt to get that information to you far*

> *enough in advance to allow for sufficient notice for the shift change.*

[89] Ms. Jancsurak's position at the CBSA was not identified to me.

[90] Neither of Mses. Lake or Jancsurak testified.

[91] In cross-examination, Mr. Mahon was shown the emails of December 29, 2015, and confirmed that he had seen them.

III. Summary of the arguments

A. For the respondent

[92] The respondent submitted that there are two elements to the complainant's allegation that the employer committed a reprisal against him, as follows:

(i) the shift-change denial for all the days of the OHS hearing; and
(ii) the discipline in the form of the one-day suspension for insubordination.

[93] The respondent referred me to *White v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 63, and *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40, for the tests that I must consider to determine if the respondent met its burden of proving that no reprisal took place. The complainant could not hide behind exercising rights under the *Code* to avoid disciplinary action, which might have resulted from actions that violated the employer's rules. There is a need for more than a proximate link.

[94] In *Patrick R. Ridge* (1992), 88 di 20, the complainant filed a complaint suggesting that the employer had disciplined him for exercising his right to refuse work that could have exposed him to PCBs. The Canada Labour Relations Board (CLRB) held that in fact he was disciplined for refusing to shave, which did not allow him to be properly fitted with a respirator. The respondent pointed out that the CLRB held that there was little question that the discipline levied against Mr. Ridge was remotely connected to his refusal to work in that it was a consequential part of the events that flowed from it. The CIRB also expressed that principle in *A. Patrick Gilmore* (1994), 96 di 61. The employer must have an intent to discipline or make a reprisal against the employee; it is not enough if there is just a connection. In this respect, the respondent also referred me to *Ouimet v. VIA Rail Canada Inc.*, [2002] C.I.R.B.D. No. 14 (QL).

[95] *Ridge*, *Gilmore*, and *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4, stand for the proposition that the tribunal (in this case, the Board) is not to review and determine the merits of a grievance and whether the discipline levied was appropriate, but only whether the employer's action was taken against the employee because the employee acted in accordance with ss. 128 or 129 of the *Code*.

[96] In *Paquet v. Air Canada*, [2013] C.I.R.B.D. No. 32 (QL), the CIRB set out the following at paragraph 78:

> *[78] To justify a finding of the violation of the* Code*, it is not enough to show that discipline occurred within the overall context of an ongoing Part II Process. The* Code *protects employees from discipline imposed because of their participation in a Part II Process. However, if the discipline arose for other reasons, then the essential nexus will not exist.*

[97] *Nash* reiterates what is set out in *Paquet*: determining that a disciplinary reprisal occurred requires a link between the exercise of the grievor's rights under Part II of the *Code* and the employer's disciplinary action. At paragraph 81, the PSLREB quotes Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, as follows:

> *[81] … When deciding whether an employee has been disciplined, an arbitrator or adjudicator must consider both the purpose and the effect of the employer's actions. The essential characteristic of disciplinary action is the intention to correct bad behaviour. An employer's assurance that it did not intend its actions to be disciplinary often, but not always, settles that question.…*

[98] The search is a subjective assessment of intent, with the backdrop being objective evidence.

[99] All three superintendents stated that they believed that the work refusals with respect to the chemical fumigants and the marine shipping containers were important and legitimate. Before being in management, Mr. Mahon had been a union steward. The superintendents were not involved in the work refusals, and Mr. Glazebrook's evidence was that the work refusals benefitted all employees.

[100] The complainant was disciplined for insubordination. The evidence disclosed that he wanted to work the 05:55- 16:00 shift as opposed to the 11:55-22:00 shift. Management refused and said that he would remain on the later shift and that he would be paid for his time at the OHS hearing that overlapped with his shifts, as well as 1.5 hours to travel from it to Cargo 3.

[101] Clause 47.01(c)(v) of the collective agreement sets out the leave that employees summoned to attend a hearing (which includes an OHS Tribunal hearing) are entitled to receive. It states that the employee is to receive leave with pay for any period in which he or she is compelled to appear before an arbitrator or adjudicator. "Leave" is defined in the collective agreement as the authorized absence from duty by an employee during his or her regular or normal hours of work.

[102] Clause 47.01(c)(v) of the collective agreement is similar to s. 146.5 of the *Code*, which stated as follows at the relevant times:

> ***146.5*** *An employee who is a party to a proceeding under subsection 146.1(1) and who attends at the proceeding, or any employee who has been summoned by an appeals officer to attend at such a proceeding and who attends, is entitled to be paid by the employer at the employee's regular rate of wages for the time spent at the proceeding that would otherwise have been time at work.*

[103] While there was evidence that in some circumstances, the employer gave employees more than what was set out in the collective agreement or perhaps s. 146.5 of the *Code*, the parties negotiated the collective agreement, and there can be nothing abhorrent about management following it. In fact, in this case, it gave more. The complainant was not entitled to be paid for travel time.

[104] The complainant's evidence was evasive, and it changed.

[105] The superintendents made contemporaneous notes of the May 27 meeting.

[106] The complainant was given 1.5 hours to return to work. He should have returned in that time and grieved the instruction later. He took more than 3 hours to return and failed to call in, which he knew he had to do.

[107] The complainant could have taken the UP train to and from Pearson; he also could have taken GO Transit to the station by Pearson. He did not.

[108] This is a clear case of insubordination. The issue is not the grievances that the complainant has also filed but only the complaint. The respondent's position is that it met its burden under the *Code*. There is no nexus between the shift change refusal and the discipline and the reprisal allegation.

[109] The respondent requested that the complaint be dismissed.

B. For the complainant

[110] The respondent's following two actions amounted to a reprisal:

(i) the shift-change denial; and
(ii) the 1-day (7.5-hour) suspension without pay.

[111] There is no evidence as to why the complainant's shift-change request was denied. There is no question that it was discussed and requested. It even appears that in addition to the complainant and Mr. Fauceglia, all three superintendents, Messrs. Glazebrook, Mahon, and Salerno, diligently pursed the request.

[112] In addition, documents indicate that there was evidence that the complainant and Mr. Fauceglia would obtain a shift change. Only at the last minute was the complainant told that there would not be one. Mr. Salerno's evidence was at the last minute and that he had been advised that there would not be one. His evidence was also that he had no idea how that decision was reached; nor was he a party to the discussions that led to the decision. Superintendents Salerno, Mahon, and Glazebrook did not make the decision.

[113] There is evidence that as of May 30, 2016, at 16:42, after the first day of the OHS hearing, Ms. Ptasznik, the LR officer with whom Mr. Salerno was discussing the matter, was still waiting for answers with respect to leave. The employer had the burden of proof, yet on May 30, Ms. Ptasznik, the LR officer, said that she was still having discussions on the issue.

[114] Mr. Donahue testified that when he once had to attend an OHS hearing, he requested and received a shift change. This cannot be explained away by saying that Mr. Donahue worked in passenger operations versus commercial operations, as there was no evidence of any differences between his request and the complainant's or why one was granted and the other refused.

[115] Under s. 133 of the *Code*, silence is not good enough. No one has any idea what was discussed with respect to the shift change. The respondent had to prove that it was not a reprisal. To do that, it had to lead evidence; there is none.

[116] Had a shift change been made, the situation of the complainant reporting for work allegedly late would not have arisen; hence, there would be no complaint. The

fact that the shift change was denied created an onerous situation for him, and when he could not comply with the set arrival time to work, they disciplined him.

[117] The complainant did not know when the OHS hearing would end, so he would never have agreed to a 17:25 return-to-work deadline. He has been consistent that he never knew that he had 1.5 hours to get to work or that he had to be there by 17:25. Mr. Mahon had the opportunity to so inform the complainant as he emailed the complainant on May 30 and 31, but he never mentioned 17:25 or 1.5 hours. The term he used was "reasonable travel time". If management had really said 17:25 or 1.5 hours, it would have been reasonable to put it in writing.

[118] Mr. Salerno said that 1.5 hours was a reasonable and perhaps typical commute time. But it is not plausible for someone to pack up his or her things, meet with his or her representative, go to a parking lot, pay for parking, and then drive to work at Pearson in that amount of time. It certainly also cannot be reasonable because Mr. Fauceglia obtained 3 hours for the same commute. The complainant was put under conditions that were largely impossible for him to meet.

[119] Had the commute time of 1.5 hours or the 17:25 arrival time been conveyed at the May 27 meeting, it would have shown up in writing somewhere. It is likely that the term "reasonable amount of time" was used. It might even have been that Mr. Salerno expected the commute time of 1.5 hours or the 17:25 arrival time, but neither was conveyed at the meeting.

[120] The superintendents' notes of the May 27 meeting were not contemporaneous with that meeting but were made afterwards, upwards of 5 to 10 days later.

[121] The complainant also had an understandable concern about driving in downtown Toronto.

[122] Like the respondent, the complainant referred me to the *Code*, *White*, and *Martin-Ivie*. He also referred me to *Chaney v. Auto Haulaway Inc.*, 2000 CIRB 47, *Pruyn v. Canada Customs and Revenue Agency*, 2002 PSSRB 17, *Ferrusi v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 1, *Lequesne v. Canadian National Railway Company*, 2004 CIRB 276, and *Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local 352 v. Lembo Corporation of Canada Ltd.*, [1969] O.L.R.B. Rep. 893.

IV. Reasons

[123] The Board has jurisdiction to hear and determine complaints made to it under s. 133 of the *Code* by virtue of s. 240 of the *Federal Public Sector Laboure Relations Ac*t, S.C. 2002, c. 22, s. 2.

[124] Section 133 of the *Code* sets out the process for making complaints, and the portions of it relevant to this matter state as follows:

> ***Complaint to Board***
>
> ***133 (1)*** *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*
>
> ***Time for making complaint***
>
> ***(2)*** *The complaint shall be made to the Board not later than ninety 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.*
>
> …
>
> ***Burden of proof***
>
> ***(6)*** *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*

[125] Section 128 of the *Code* sets out the process for employees to refuse to work if they believe that a danger exists. It also sets out the steps that an employer is required to take if such a work refusal occurs, which culminate in it issuing a report and making a finding of whether there was a danger. At all material times pertaining to this complaint, section 129 permitted an employee who had filed a work refusal under s. 128 and to which a finding of no danger had been made after an investigation to appeal that decision to the OHS Tribunal.

[126] Section 147 of the *Code* prohibits an employer from taking reprisal actions against an employee and states as follows:

> ***General prohibition re employer***
>
> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period*

> *that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> ***(a)*** *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> ***(b)*** *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> ***(c)*** *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[127] Pursuant to s. 133(6) of the *Code*, once filed, the complaint itself is evidence that the contravention of s. 147 has occurred, and if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party. The initial burden of proof lies with the complainant, who must prove only that he or she has filed a complaint under s. 133(1) of the *Code* and that the complaint arose in respect of a right being exercised under either ss. 128 or 129.

[128] The complaint was filed with the PSLREB on September 7, 2016, and set out at paragraph 3 the following concise statement of the matter complained of:

> *I was scheduled to attend the Occupational Health and Safety Tribunal on May 30-June 2, 2016 in Toronto as I appealed an HSO's decision in 2014. I was scheduled to work 1155-2200 on May 30 and 31. The Tribunal was approximately 70 Km from my home. I requested a shift change to attend, which was denied. I was told that attending the tribunal was a personal matter. I took public transit to and from the tribunal. I went home to get ready for work as I wear a uniform and arrived at work at 2010. I was made to take unauthorized leave without pay and suspended for 7.5 hours without pay for insubordination, on July 29th, 2016, for arriving at work late following the tribunal. I believe the employer not changing my shift and the suspension are retribution for appealing the HSO's decision and exercising my rights under the CLC Part II.*

[129] Copies of the October 1 decision that found that there had been no danger and the complainant's appeal dated October 7, 2014, were entered into evidence. As such, the complainant's initial burden was met. Because of that, the burden shifted to the respondent under s. 133(6) of the *Code* to prove that a contravention of s. 147 did not occur.

[130] The complainant set out the following two separate reprisal allegations in his complaint:

- the shift-change refusal; and
- the discipline in the form of a 1-day (7.5-hour) suspension without pay.

A. Refusal to allow the complainant a shift change

[131] Section 147 of the *Code* refers to an employer dismissing, suspending, laying off, demoting, imposing a financial or other penalty on an employee, or refusing to pay the employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under Part II of the *Code*, have worked, or taking disciplinary action against or threatening to take any such action against an employee.

[132] "Penalty" is defined in *Webster's New World Dictionary*, Second College Edition, as follows:

> ***1.*** *a punishment fixed by law, as for a crime or breach of contract*
>
> ***2.*** *the disadvantage, suffering, handicap, etc. imposed upon an offender or one who does not fulfill a contract or obligation, as a fine or forfeit*
>
> ***3.*** *any unfortunate consequence or result of an act or condition.*

[133] The wording of s. 147 does not limit a penalty to being only financial as it uses the word "financial" and the phrase "**other penalty**" [emphasis added]. It is well known that an employer can penalize its employees for misconduct by oral or written reprimand, both of which typically do not necessarily have a financial impact; yet they are, nonetheless, penalties and are used to discipline employees.

[134] In interpreting the definition of "penalty" as "… any unfortunate consequence or result of an act or condition", an employer can do things to an employee in the course of the employment relationship that could be considered a penalty, even if such a thing is not a termination, suspension, or demotion and does not have a financial impact.

[135] An example is a leave denial in any given circumstances, which could be more devastating to an employee than a financial penalty, such as a denial that would prevent an employee from attending an important family event, like a wedding or a graduation. In addition, if an employee requests a shift change for such an event that is also denied when there is no reason for denying it, it too could be viewed as a

penalty to an employee. It is the loss of being at or attending the event that is an unfortunate consequence of the employer's action (denying the leave or shift change).

[136] The complainant was denied a shift change. The employer provided no evidence for the denial. The evidence disclosed that the complainant's co-worker, Mr. Fauceglia, was scheduled for the 05:55-16:00 shift. He was not required to attend work that day and was under summons to attend the same OHS hearing. Therefore, he would have received court leave under clause 47.01(c)(v) of the collective agreement.

[137] Based on the evidence before me, Mr. Fauceglia would have left his home and travelled to and attended the OHS hearing and returned home, and he would have been paid under clause 47.01(c)(v) of the collective agreement for the period between 09:00 and 16:30 (7.5 hours) on May 30, 2016, the time he required to be at the OHS hearing. After the OHS hearing and whatever post-hearing discussion with the representative ended, he was able to go home. On the other hand, the complainant would have had to leave his home early in the morning, travel to Toronto for the OHS hearing, work until 22:00, return home, and then do the same thing the following day.

[138] The evidence disclosed that whether the complainant drove into Toronto or took transit, his days on May 30 and 31, 2016, would have been 17 to 18 hours long and would have included not only travelling to and attending the OHS hearing but also working about a half-shift. On the other hand, Mr. Fauceglia, a co-worker of the complainant, by virtue only of being on the earlier shift, essentially would have put in about a 10-hour day and would not have had to go to work.

[139] Clause 25.22 of the collective agreement allows employees to exchange shifts. A shift-change denial, which the agreement permits, can certainly be a penalty, as that term is defined.

[140] As I have found that the denial of a shift change can be a penalty, therefore, it is captured by s. 147 of the *Code*. By virtue of s. 133(6), the respondent was required to demonstrate on the balance of probabilities that the shift-change denial was not a contravention of s. 147.

[141] The evidence of the complainant and Messrs. Mahon, Salerno, and Glazebrook was that Mr. Salerno arrived late to the May 27 meeting and told everyone that he had been told that there would be no shift changes. In his evidence before me, he stated

that he spoke to Ms. Ptasznik in LR, who he said told him that she had spoken to the CBSA's National Headquarters, which had said that time would be paid but that there would be no shift change. Other than this, no reason was stated that there was allegedly no shift change. I say "allegedly" because nothing was introduced into evidence showing any written advice from LR stating this, and the best evidence about it suggests otherwise.

[142] The employer could have called Ms. Ptasznik as a witness; it did not. However, entered into evidence was an email chain that she was a party to and within which she sent the following email on May 30, 2016, at 16:42:

> *I had spoken to Robert* [Salerno] *last week about leave, etc. and have since tried to confirm all the answers. I have yet to get confirmation. It is clear employees are not to be penalized for attending the tribunal. However, when I read the Act and the collective agreement I don't see any $ [sic] for travel. I have not forgotten you and we will get the answer confirmed and nailed down.*

[143] The email was time stamped after the first full day of the OHS hearing. So, after the OHS hearing had already started, Ms. Ptasznik stated that she had yet to confirm the answers. If she did not have the answers, and she was the LR person that Mr. Salerno spoke to, how could he have had the answers on Friday, May 27, 2016, if she did not have them on Monday, May 30, 2016? He could not have had them.

[144] In addition, in the April 21 email, Mr. Fauceglia alerted all three superintendents and the Chief that the OHS hearing was scheduled for May 30 through June 2, 2016 and attached a copy of the OHS Tribunal's notification of the hearing date, time, and location. This was 40 days before the first OHS hearing day of May 30. The evidence disclosed that the Y106 was released 17 days before its start.

[145] From the evidence before me, April 21 was well in advance of the shift schedule that was to cover the period encompassing the OHS hearing, and the three superintendents, Messrs. Mahon, Salerno, and Glazebrook, could have arranged the schedule in a manner that would have accommodated the two employees attending the OHS hearing.

[146] Mr. Fauceglia's April 21 email echoes Ms. Lake's instruction in her December 29, 2015, email at 10:12, in which she stated to Messrs. Funk and Mahon that the complainant and Mr. Fauceglia should find out when they were expected to

attend the OHS hearing and provide that information far enough in advance to allow for the shift change.

[147] In addition, I heard direct evidence from Mr. Donahue, a BSO who also worked for the CBSA at Pearson, albeit in passenger operations. He was once required to attend an OHS Tribunal hearing. He requested and received a shift change. It is curious that LR for the CBSA responsible for Pearson would have one set of rules with respect to shift changes for certain BSOs that is different from others.

[148] An abundance of evidence suggests that the process that CBSA management and LR had implemented with respect to BSOs who were required to attend quasi-judicial hearings (specifically OHS Tribunal hearings, and specifically the OHS hearing that the complainant and Mr. Fauceglia were to attend) was to allow them a shift change.

[149] Therefore, the respondent failed to establish that on a balance of probabilities, its action of denying the complainant a shift change for the OHS hearing days of May 30 and 31 was not a reprisal.

B. Discipline

[150] The second reprisal allegation was about the discipline imposed on the complainant of the 1-day (7.5-hour) suspension without pay, rendered on July 29, 2016. The stated reasons for the discipline were that he knew that he was required to return to work at 17:25, he chose a transportation method that resulted in an unacceptable delay reporting to work, and he was aware of the proper procedures for reporting absences and lateness and did not follow them.

[151] The evidence of the three superintendents was that at the May 27 meeting, the complainant was told that he would receive 1.5 hours of paid travel time to return to work after the OHS hearing ended, that the 1.5 hours were to run from 16:00, and that he was to be back at work by 17:25.

[152] There are several problems with the superintendents' evidence with respect to the 1.5 hours for travel time and the alleged requirement for the complainant to return to work by 17:25.

[153] According to the superintendents' evidence, their information came from LR, and, in particular, Ms. Ptasznik. If they had another source of LR advice, it was not identified.

[154] First and foremost, as Ms. Ptasznik set out in her May 30, 2016, email, there is nothing in the collective agreement about paying an employee for the time required to travel to and from a hearing when under summons. In fact, the only thing the relevant clause, 47.01(c)(v), requires is that the employer grant leave with pay to an employee for the period he or she is compelled by subpoena or summons to attend as a witness. Ms. Ptasznik confirmed that fact in an email on June 1, 2016, at 10:25 (the third day of the OHS hearing) that she sent to several people, including both Messrs. Mahon and Salerno. She stated that there was no requirement to pay travel time.

[155] In addition, the evidence of the superintendents was that the OHS hearing was to end at 16:00. Where did this come from? It does not appear on any document, and it is not set out in the summons given to the complainant (not that it would have helped the superintendents, as the evidence disclosed that they did not have the summons until long after the OHS hearing had completed). Therefore, the 16:00 end time was either an assumption made by persons unknown or one of the superintendents just made it up. In any event, it was and is wrong because of the following:

- judicial and quasi-judicial hearings start and end at the times the presiding tribunal decides; and
- the complainant's evidence was that the OHS hearing ended at 16:30, which was corroborated by an email that an employer representative (Ms. Blake), who was at the hearing, sent to Mr. Mahon.

[156] The Shift Change Audit Report entered into evidence disclosed that on May 26, 2016, at 14:51, Mr. Salerno entered a change to the complainant's shift schedule showing that on May 30 and 31, he would be at the OHS hearing, and the time shown was from 11:55 until 17:25. While this might certainly have been entered into the system, it does not make any sense, because there was no requirement to pay for the 1.5 hours of travel time, and there was no basis for the 17:25 end time.

[157] The 1.5 hours dedicated to travel time could certainly have been perceived by LR or Mr. Salerno as a reasonable amount of time to travel between the OHS hearing location at 1 Front Street and Cargo 3. I suspect that had the complainant driven from

his home to the hearing and parked in downtown Toronto, he could have returned to Cargo 3 in the 1.5 hours that Mr. Salerno said the employer had allowed him.

[158] The complainant had several options to travel to and from the OHS hearing that could have returned him to Cargo 3. He took what was likely the longest, most circuitous route possible. He took the GO train to Aldershot, then a GO bus to the Hamilton GO station. He then walked home, changed, and drove to work. His evidence was that he left the OHS hearing around 17:00 and that he arrived at work at Cargo 3 at 20:10 on May 30 and at 20:12 on May 31.

[159] Had the complainant been serious about not driving into downtown Toronto, he could have brought his uniform, driven to Pearson, parked at Cargo 3 or Terminal 1 or 3, and then taken the UP train to Union Station. The UP train runs every 15 minutes and takes 25 minutes to travel from Pearson Terminal 1 to Union Station. It is also well known that there is a GO train station in the vicinity of Pearson, which he could also have accessed. These transportation modes would certainly have brought him from downtown Toronto to Pearson well within the 1.5 hours that someone thought it would take. Those 1.5 hours could certainly be considered reasonable, all things considered.

[160] I have no doubt that the complainant could have made it to Cargo 3 in much less time than he chose to take. In fact, it would appear that by acting in the manner he did and choosing the route he chose, he thumbed his nose at his supervisors for requiring him to come to work after the OHS hearing completed.

[161] That said, the discipline was not imposed because the complainant did not show up for work within 1.5 hours of the OHS hearing ending but first because he did not show up for work at 17:25 and second because he did not follow the procedures for calling in to say he would be late.

[162] It is trite to state that if I accept that the complainant was not told that he was required to be at work by 17:25, he could not be penalized for not being there by 17:25 or for not calling in to report his status, as he certainly did show up for work. If he did not know that he had to show up by 17:25, he certainly did not need to call in to say that he would be late. His supervisors knew where he was.

[163] Based on the evidence, I am not prepared to accept that the complainant was told that he had to be back at work at Cargo 3 by 17:25. As stated earlier, judicial and

quasi-judicial hearings start and finish when the presiding tribunal decides they will. Unless one or all of Messrs. Salerno, Mahon, and Glazebrook are psychic, they could not have known that the OHS hearing would end at such a time to allow the complainant, in whatever might have been a reasonable time, to exit the hearing, travel to Cargo 3, and start work at 17:25. For all anyone knew, as of the May 27 meeting, the OHS hearing could have proceeded until or past 17:25. The complainant was required by summons to attend and was required to remain until the OHS Tribunal dismissed him.

[164] However, even if I accept that the complainant was told about the requirement to be back at work at 17:25, it is irrelevant, as it is purely arbitrary, and it cannot be maintained as a legitimate basis upon which to base discipline for the same reasons that I just set out. The respondent's imposition of the 17:25 return-to-work time, which the complainant had no control over because he was required by law to attend and remain at the quasi-judicial hearing by summons, was bad faith, and it cannot stand. Therefore, he could not be penalized for arriving after 17:25.

[165] Therefore, I find that the respondent has not convinced me on a balance of probabilities that its action of disciplining the complainant was not a contravention of s. 147 of the *Code*, and as such, the complaint is allowed.

[166] While it is a minor point, it does strike as somewhat curious that the three superintendents maintained that the complainant was told that he had 1.5 hours to return to Cargo 3 after the OHS hearing but they were to run from 16:00 to 17:25. Simple math reveals that 1.5 hours after 16:00 is 17:30, yet the superintendents remained steadfast in their position that the start time was 17:25.

[167] However, more curious is that the powers that be, who were not disclosed to the Board, somehow determined that it would be a good idea to investigate the complainant and that two of the three superintendents who were key witnesses to what happened at the May 27 meeting would carry out the investigation. This was not only inappropriate but also a clear conflict of interest.

C. Relief sought

[168] In his closing submissions, the complainant requested the following, were the complaint allowed:

- that a declaration be issued that the respondent contravened the *Code*;
- that an order be made that the respondent cease breaching the *Code*;
- that all discipline rendered against him be rescinded; and
- that he be compensated for all losses.

[169] I am prepared to issue a declaration that the respondent has breached s. 147 of the *Code*.

[170] As the respondent is by law required to abide by the *Code*, I do not see any benefit for me to issue an order that it cease doing something it is required by law not to do.

[171] With respect to the request to rescind the discipline, as it was rendered in 2016, by virtue of clause 17.05 of the collective agreement, any record of it should no longer be on the complainant's file. If it is still there, as it was a reprisal as against him, it cannot stand, and as such, I order it set aside and all references to it removed.

[172] The complainant shall be reimbursed the total amount of the salary lost due to the 1-day (7.5-hour) suspension, with all the usual deductions, including union dues.

[173] The complainant shall be paid salary equal to the total amount of the salary he would have earned on May 30 and May 31, less the amount already paid to him for the remuneration he received for between 11:55 and 17:25 on both days. As he was required to work until 22:00 on both days, the difference is 4.5 hours for each day. This difference represents the pay for the time he would otherwise have received had he received his requested shift change. This amount shall be paid despite the fact that he returned to work on both May 30 and 31, 2016, as had the respondent not penalized him by not granting his shift change, he would have otherwise worked those hours at some other time.

[174] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[175] I declare that the respondent breached s. 147 of the *Code* by acting in a manner that penalized the complainant for exercising rights under s. 128 and 129.

[176] The discipline rendered by the respondent against the complainant on July 29, 2016, if it is still on his record, shall be removed immediately.

[177] The complainant shall be reimbursed his lost salary of 7.5 hours, including and subject to all statutory and other deductions that would normally be made and remitted in the normal course of being paid.

[178] The complainant shall be paid salary equal to 9.0 hours, including and subject to all statutory and other deductions that would normally be made and remitted in the normal course of being paid.

[179] I shall remain seized for a period of 120 days after the issuance of this decision to deal with any issues that arise out of implementing the remedy.

May 20, 2020.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board