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File: 486-HC-41635

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

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

BETWEEN

HOUSE OF COMMONS

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
House of Commons v. Public Service Alliance of Canada

In the matter of an application for an extension of time to implement an arbitral award

Before: Dan Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Carolyn LeCheminant-Chandy, counsel

For the Respondent: Amy Kishek, counsel

Heard by videoconference,
February 1 and 2 and March 10 and 11, 2021.

REASONS FOR DECISION

I. Introduction and history

[1] A Barracuda lurks in this case. Not the ferocious ocean predator that comes to mind but, instead, a man-made creation inhabiting the digital depths. Whether a menace or an aide, the presence of that Barracuda is a central feature of the story that the evidence will tell.

[2] The Federal Public Sector Labour Relations and Employment Board ("the Board") issued an arbitral award on December 10, 2019, resolving a collective bargaining dispute between the House of Commons (or "the applicant") and the Public Service Alliance of Canada ("the respondent") in respect of the bargaining unit composed of all employees of the applicant in the Operational Group, except for part-time cleaners classified OP A, and of the bargaining unit composed of all employees of the applicant in the postal services subgroup in the Administrative Support Group; see *Public Service Alliance of Canada v. House of Commons*, 2019 FPSLREB 121 ("the Award"). In its evidence, the applicant refers to the units as the OSG Group.

[3] The *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); "*PESRA*") normally requires implementing the terms of an arbitral award within 90 days of the date on which the award becomes binding on the parties, as set out in s. 59 as follows:

> ***Implementation of awards***
>
> ***59*** *The terms and conditions of employment that are the subject of an arbitral award shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required therefor, be implemented by the parties within a period of ninety days from the date on and after which it becomes binding on the parties or within such longer period as, on application to the Board by either party, appears reasonable to the Board.*

[4] Under s. 59, a party may apply to the Board for an extension of the implementation period for such longer period as "appears reasonable to the Board."

[5] The date by which the terms of the Award were to be implemented was March 9, 2020.

[6] On February 28, 2020, the applicant applied under s. 59 of the *PESRA* for an extension of 180 days to implement the Award for the bargaining units ("the extension application").

[7] In a submission dated March 19, 2020, the respondent argued that the application should be dismissed.

[8] The applicant replied to the respondent's arguments on March 27, 2020.

[9] On April 3, 2020, the respondent filed a complaint under s. 70 of the *PESRA* alleging that the applicant failed to implement the terms of the Award within the period specified by s. 59 ("the complaint file"). The complaint mechanism set out in s. 70 reads as follows:

> ***70 (1)*** *Where an applicant and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the applicant or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies, either the applicant or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*
>
> ***(2)*** *Where a matter is referred to the Board pursuant to subsection (1), the Board shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.*
>
> …

[10] In its April 3, 2020, filing, the respondent requested that the Board consider the complaint file "alongside" the extension application. The Board deemed that the request was an application to consolidate the two files.

[11] On April 22, 2020, the applicant indicated to the Board that it opposed the consolidation of the files.

[12] The Board convened a teleconference on April 29, 2020, to discuss both the extension application and the complaint file. After considering the submissions of the parties, the Board ruled against consolidating the two matters. It also granted a request by the respondent to make further brief submissions with respect to the extension application, ordering that they be received no later than May 13, 2020. The Board

identified May 20, 2020, as the date by which the applicant could, if it so chose, submit a sur-reply.

[13] On May 13, 2020, the respondent made additional submissions in the extension application. Beyond its further comments on the merits of the application, it requested that the Board hear the matter by way of an oral hearing.

[14] On May 20, 2020, the applicant submitted a sur-reply to the respondent's submission of May 13, 2020. The applicant did not object to proceeding by way of an oral hearing, as requested by the respondent. It also reported that the parties had agreed to try to resolve both matters before the Board — the extension application and the complaint file — through mediation. Should mediation not succeed, the parties jointly requested that a hearing for the extension application be scheduled in October 2020.

[15] The Board endorsed the parties' decision to seek a mediation of their disputes and held in abeyance further consideration of both the extension application and the complaint file. It indicated that it would schedule an oral hearing for the extension application in October 2020, if possible, should one be necessary.

[16] On March 20 and May 5, 2020, the Chairperson of the Board issued orders that suspended regulatory time frames for matters before the Board in light of the impact of the COVID-19 pandemic ("the pandemic"). The effects of those orders and other directions issued by the Chairperson effectively suspended many Board activities, including mediation, for a number of weeks. The mediation of the extension application and complaint file was delayed until October 26 and 27, 2020. The parties were unable to resolve the matters at that time.

[17] On October 28, 2020, on behalf of the parties, the applicant requested that the Board proceed to schedule a hearing for the extension application and that it continue to hold the complaint file in abeyance.

[18] On October 28, 2020, the Board informed the parties that the complaint file would be held in abeyance pending the Board's determination with respect to the extension application. At the same time, it directed the parties to respond by November 13, 2020, to the following question: "If the terms of the arbitral award have

now been fully implemented, what specific issues remain to be decided pertaining to the requested extension of time to implement the arbitral award?"

[19] The applicant's response, dated November 13, 2020, reported that pay rates going forward for the bargaining unit were adjusted as of May 14, 2020, and that the adjustment was reflected on the pay of June 10, 2020. Retroactive payments appeared on the pay of July 8, 2020, and further pay reconciliations were processed on November 10, 2020.

[20] The applicant indicated that the request dated February 28, 2020, to extend the time to implement the Award by 180 days remained the specific issue to be decided.

[21] The respondent concurred that the outstanding issue was whether the Board would grant the applicant's extension application and "sanction the late implementation."

[22] Following the receipt of the parties' responses, the Board proceeded to schedule this hearing. The matter to be determined is the applicant's application dated February 28, 2020, for an extension of 180 days to implement the Award.

[23] I note that the respondent applied to the Federal Court of Appeal for judicial review of a provision of the Award. The application was subsequently discontinued. The matter raised in the judicial review application has no bearing on the question to be determined in this decision.

II. Summary of the evidence

[24] The applicant led evidence through two witnesses: Martine Flibotte, Senior Director, Talent Management and Effectiveness, and Noémie Boivin, Deputy Director, Employee Relations. Morgan Gay, Negotiator for the respondent, testified on its behalf.

[25] Some of the evidence led by the parties was very detailed, often relying on multiple overlapping email chains. I have considered all the evidence in reaching my decision but have chosen to summarize only those elements that I consider more helpful for understanding the contours of the dispute and more relevant to my ruling.

A. Ms. Flibotte

[26] Ms. Flibotte's position is responsible for a range of functions in the House of Commons, including classification, pay and benefits, the Human Resources (HR) service centre, HR systems and information management, business optimization, and change management.

[27] Ms. Flibotte emphasized that the House of Commons is a completely separate and autonomous entity with no linkages to the Treasury Board (TB) with respect to programs and processes. By a 2011 order-in-council, the Department of Public Works and Government Services, now known as Public Services and Procurement Canada ("PSPC"), maintains the pay system that the House of Commons is required to use.

[28] The applicant engages its own team of pay and benefit advisors. The team provides services to House of Commons employees, to members of Parliament and their staff, and to those employees of the Parliamentary Protective Service ("PPS") who were on staff at the House of Commons before the PPS was created as a separate organization. The applicant does not use the services of the Government of Canada pay centre.

[29] As a "direct pay entry organization", the House of Commons has direct access to PSPC's Phoenix pay system and is able to complete Phoenix-based transactions on its own.

[30] The applicant, like other organizations in the National Capital Region, faces a difficult recruitment and retention situation for pay and benefit advisors. Since the consolidation of Government of Canada pay services in Miramichi, New Brunswick, the pool of experienced advisors from which to recruit has been small, and turnover rates have been high. The witness recounted that approximately 30% of the applicant's advisor positions were vacant between 2018 and 2020. With few experienced advisors available, the applicant has had to train new recruits, often from outside the public sector. Ms. Flibotte indicated that it takes approximately one year to bring a new recruit up to the level of being able to conduct more common pay transactions. Accomplishing more complex pay transactions has required the applicant to rethink and reorganize how it works.

[31] Because the applicant does not rely on the Phoenix service centre for pay transactions, according to Ms. Flibotte, the House of Commons has not experienced the widely publicized problems encountered with Phoenix in the core public service. There has been no backlog in pay transactions, error rates have been very low, and emergency assistance to employees has been required in less than 0.1% of cases.

[32] PSPC is responsible to update "pay tables" in the Phoenix system based on information provided by the applicant typically requiring a few weeks to complete. The applicant's pay and benefit advisors then use the Phoenix pay tables to calculate new pay rates going forward and retroactive pay for affected employees. The applicant has complete flexibility and autonomy in verifying and administering pay rates and retroactive amounts. If employees encounter issues, they contact the applicant's pay and benefits team.

[33] Ms. Flibotte outlined that sometime in the summer of 2019, she learned about a memorandum of understanding ("MoU") between the TB and the Professional Institute of the Public Service of Canada ("PIPSC"). The MoU outlined a modified approach to the calculation and administration of retroactive payments using Phoenix known as the "mass retro process" or, colloquially, "Barracuda". The MoU provided that changes to existing and new compensation elements were to be implemented within 180 days of signing of a collective agreement. Prospective compensation increases and retroactive amounts requiring manual processing by compensation advisors — situations not picked up by Barracuda — were to be implemented within 560 days of signature.

[34] The TB and PSPC invited parliamentary employers (House of Commons, Senate, Library of Parliament, and the PPS, or "the parliamentary partners") to a meeting on July 10, 2019, to introduce the new mass retro process. Ms. Flibotte did not attend the meeting. She assigned Ms. Boivin, supported by Annick McNeil, Manager of Pay and Benefits, to take the lead on matters related to the new mass retro process.

[35] Ms. Flibotte testified that she understood that the new process mandated by the MoU did not apply to the House of Commons. She outlined that there were discussions among the parliamentary partners and that they reached an agreement that they would continue to use the existing manual process for implementing new rates of pay and retroactive payments. The partners communicated that decision to PSPC on October 18, 2019.

[36] Following a conference call with PSPC on December 4, 2019, concerning implementation of an arbitral award for a PPS bargaining unit, Ms. Flibotte received an email from Ms. McNeil reporting that PSPC required the House of Commons to use the new mass retro process and that manual processing was not possible. Ms. Flibotte determined that the team needed official written notification to that effect from PSPC and more information.

[37] Among her team's concerns, Ms. Flibotte outlined that Barracuda did not go back to past transactions to update actual salaries for retroactive payment purposes. Instead, it applied a compounded percentage to pay rates going forward. Verification of pay rates retrospectively would no longer be possible using Barracuda.

[38] Ms. Flibotte learned of the Award on December 11, 2019, the day after it was issued by the Board.

[39] During a short telephone conversation on December 20, 2019, PSPC shared a high-level description of the new mass retro process. Ms. Flibotte testified that she told PSPC that the House of Commons required more information and that it wanted an opportunity to ask questions about it. A follow-up conversation with PSPC took place on January 7, 2020. Ms. Flibotte described the information conveyed by PSPC as a good summary that would allow her team to consider how the mass retro process might work in their environment. PSPC indicated that Barracuda was running every two weeks and that PSPC could fit in a run for another House of Commons group sometime in February.

[40] Ms. Flibotte testified that many of the applicant's concerns about the new mass retro process stemmed from problems experienced with an earlier version of Barracuda, released in 2018. At that time, PSPC encouraged the House of Commons to use Barracuda, but its use was not mandatory. The pay and benefits team conducted a test run based on the previous OSG collective agreement. Almost half the pay files were immediately found in error using Barracuda. After correcting 324 problems, the team revisited all 689 active and non-active files. Over 80% contained errors, and all needed to be redone manually. Based on the 2018 OSG test, Ms. Flibotte indicated that the applicant did not use the earlier version of the mass retro process for any other bargaining unit. To ensure accuracy, which was extremely important to the applicant, it always used the manual process.

[41] In an email dated January 21, 2020, Ms. Flibotte informed PSPC that the House of Commons was continuing to analyze its options and assess the impacts of the mass retro process. She asked PSPC to identify a contact person with whom her team could work to update the pay tables so that they could process pay revisions manually as the deadline for implementing the Award approached. When PSPC provided a contact name on January 23, 2020, Ms. Flibotte said that she believed that it meant that the House of Commons could proceed with the manual process as it had done in the past. On January 24, 2020, Ms. Flibotte informed PSPC that her team hoped to proceed with manual revisions in February. She also promised to forward a summary of observations and considerations about the new mass retro process by a separate email.

[42] Three days later, Steve Dufour, a PSPC director general, emailed Ms. Flibotte to express concern that the House of Commons was still reluctant to adhere to the new process. He indicated that all organizations had to be aligned with the new process and called for further discussions with the House of Commons.

[43] On January 30, 2020, Ms. Flibotte sent a detailed summary of concerns about the new mass retro process to Mr. Dufour.

[44] Ms. Flibotte's team provided the new pay tables and the Award to PSPC on February 5, 2020.

[45] PSPC responded to the concerns about the mass retro process identified by the House of Commons during a telephone conversation on February 6, 2020, and in writing on February 9, 2020. PSPC agreed with some of the concerns but pointed out that the mass retro process had proven successful in other situations.

[46] According to the witness, the situation escalated when on February 10, 2020, PSPC informed her that new rates of pay would not be loaded into Phoenix until the issue of using the new mass retro process was resolved. She responded that the House of Commons could not adopt the process, although it might revisit that option in the future, reiterated that the House of Commons did not fall under PSPC or TB governance, and asked about the next steps required to upload the pay tables. On the same day, Ms. Flibotte briefed Pierre Parent, Chief Human Resources Officer for the House of Commons, and Michel Patrice, Deputy Clerk, Administration, about the situation.

[47] Contacts ensued at more senior levels between the House of Commons and PSPC through February 21, 2020. On that day, Ms. Flibotte briefed Mr. Parent, again indicating that the applicant could agree with PSPC to a test of the mass retro process if the rates tables were updated so that the manual process could proceed. PSPC agreed to develop test scenarios with the House of Commons but maintained its position not to update the tables. The House of Commons forwarded scenarios to PSPC on March 4, 2020, and discussed them with PSPC on March 12, 2020.

[48] On March 19, 2020, Ms. Flibotte briefed Mr. Parent and Mr. Patrice once more. She stated that the review of the scenarios with PSPC had provided some reassurance about the applicant's concerns and that she hoped that testing would provide further reassurance. She indicated that PSPC had informed her that the current manual process would be disabled once a new pay reconciliation feature was in place in the fall. Ms. Flibotte testified that she recommended that the applicant proceed with the tests and then analyze the outputs. If they could be confident about those results, she recommended running the bargaining unit through the new process.

[49] Tests were run on March 26, 2020. Ms. Flibotte testified that the House of Commons decided to proceed with the new mass retro process after the tests were run and informed PSPC to that effect on May 1, 2020.

[50] Ms. Flibotte noted that the pandemic complicated the work of her team from early March onward. It took time to arrange to transfer equipment to allow employees to work from home. Work schedules were adjusted, recognizing that many employees had children at home.

[51] On May 25, 2020, satisfied with the accuracy of the results using the new process, the applicant notified managers with respect to the implementation of pay increases for the OSG Group. Ms. Flibotte confirmed that the new pay rates were in the pay system as of May 14, 2020, and that they were reflected on the pay of June 10, 2020. Employees received their retroactive amounts on the pay of July 8, 2020. On November 6, 2020, once the reconciliation program was operational in Phoenix, further payments or recoveries occurred.

[52] In cross-examination, Ms. Flibotte outlined that approximately 400 pay files were impacted by the Award. Asked whether the pay and benefit changes to be actioned were routine, Ms. Flibotte stated that they were not routine compared to day-

to-day transactions but that her team had managed such changes before. She agreed that the Award did not involve new allowances or premiums and that there were no classification or reclassification issues.

[53] With respect to the previous round of collective bargaining for the group, Ms. Flibotte testified that the implementation timeline had been met based on an extension agreed with the respondent. In the more recent round, the applicant proposed an implementation period of 150 days, knowing that it needed more time because of staffing issues and to review the manual process.

[54] Ms. Flibotte confirmed that she recalled knowing that there were conversations in July 2019 between the Parliamentary Budget Office (PBO), the Library of Parliament, and PSPC about the new mass retro process but stated that she did not recall seeing the full email chain about those discussions. Specifically, she did not recall being aware in July 2019 that the PBO understood from PSPC that the new process was mandatory. She also did not recall seeing an email about work done by a team member outlining concerns about the mass retro process when it was sent in August.

[55] The witness allowed that she became aware of the mass retro process within a month of a September email exchange following up on meetings between the parliamentary partners, the TB, and PSPC. As part of that exchange, a TB representative stated that the TB understood that parliamentary organizations would attempt to implement pay changes using the process outlined in the MoU between the TB and PIPSC. Ms. Flibotte denied that there was an agreement to do so and stated that she did not know whether the House of Commons took up an offer from the TB to provide assistance. (Ms. Flibotte subsequently testified that her team was able to secure the tools that were available from the TB and PSPC and that the new process was a topic in regular discussion networks.)

[56] As to the suggestion that as early as August or September 2019, the House of Commons had an opportunity to enter discussions to prepare for the new process, Ms. Flibotte answered that the suggestion was not completely accurate. She maintained that her team thought that the manual process would continue to apply.

[57] Ms. Flibotte allowed that it was possible that the new mass retro process could be better for the House of Commons but that the 2018 experience of a high rate of

errors using a previous version of Barracuda drove the applicant to be extremely cautious. She noted that her team is still correcting errors from 2018 to this day.

[58] Asked whether through an email dated December 4, 2019, the House of Commons was aware that using the new process was mandatory, Ms. Flibotte replied that the PSPC representative who made that statement did so without authority. She stated that she did not follow up on the statement and that she was not sure whether any member of her staff had followed up.

[59] The notes of the meeting of February 6, 2020, with PSPC report that Ms. Flibotte asked PSPC why it was concerned about the House of Commons continuing to use the manual process. She explained that she posed that question because PSPC had never provided a clear answer as to why the new mass retro process was mandatory. Ultimately, she explained, the House of Commons had no choice but to adopt the new process when in March 2020, PSPC told it that manual processing would no longer be possible by the fall of 2020.

[60] To the question of why the applicant had not considered testing the new process before February 2020, given that it identified concerns as early as August 2019, Ms. Flibotte replied that it had remained unclear through February 2020 what roles would be required of her team under the new process. The team needed a better understanding of those roles before testing could be undertaken.

[61] Also asked why her team did not start to work on the pay tables earlier than January 2020, given that the Award was issued on December 10, 2019, Ms. Flibotte stated that the Director of Employee Relations had asked it to hold off. When testing work began in February, 5 team members were involved at any given time out of a total team complement of approximately 20, and some employees were pulled from other portfolios to assist. Later, with the outset of the pandemic, continued work was difficult for several weeks, but Ms. Flibotte could not say exactly how much time was lost due to the pandemic.

[62] Asked further why she did not escalate issues to her superiors until February, Ms. Flibotte explained that her email of February 10, 2020, was the first time that she briefed her superiors in writing but that she had previously kept them updated orally.

[63] Ms. Flibotte confirmed that she was not part of any discussion about approaching the respondent to ask for an extension.

[64] In re-examination, Ms. Flibotte recalled that in mid-February, she estimated that an extra 90 days would be needed to implement the pay provisions of the Award. By the end of February, she revised her thinking, given the need for testing, and felt that an extra 180 days would be required.

[65] Asked whether the new Barracuda was up and running in the summer of 2019, the witness stated that she thought it was not. She testified that PSPC did not notify the House of Commons in fall 2019 that the manual process was unavailable; nor did it provide formal notification that the use of Barracuda was mandatory.

B. Ms. Boivin

[66] Employed as Deputy Director of Employee Relations for just under two-and-one-half years, Ms. Boivin reports to the director, Melanie Leclair. In her role, Ms. Boivin is not responsible for pay and benefits but works closely with the pay and benefits team to implement collective agreement provisions.

[67] Ms. Boivin testified that she became aware of the new MoU between TB and PIPSC in the summer of 2019 and that she saw a copy of it. She did not attend the meeting of July 10, 2019, when TB and PSPC hosted the parliamentary partners to introduce the new mass retro process. She did attend a meeting with TB on August 21, 2019, about the process.

[68] Ms. Boivin outlined that the parliamentary partners subsequently agreed to send one common response to TB informing it that they were not entering into MoUs about the new mass retro process, would continue to use the manual process, but would respect the revised pay codes in the Phoenix system. A colleague at the Library of Parliament sent the common response on September 27, 2019. To Ms. Boivin's knowledge, there was no further communication with TB on the subject.

[69] The witness stated that her team received the Award on December 10, 2019, and that it followed the normal internal process, notifying the pay and benefits section.

[70] On December 27, 2019, Ms. McNeil of the pay and benefits team acknowledged that the team had not received a go-ahead to implement pay revisions based on a

conversation with Ms. Leclair. Ms. Leclair told Ms. Boivin that she wanted a better sense of how long it would take to implement the Award before proceeding. On January 9, 2020, Ms. Leclair told Ms. Boivin that the delay might be longer than usual.

[71] Ms. Boivin's team prepared a presentation summarizing the provisions of the new OSG collective agreement in collaboration with the president of the union local, Roger Thompson. Ms. Boivin reviewed and approved the presentation. To the best of her knowledge, in-person meetings with employees to convey the information took place in January or February 2020, before employees were sent home in early March due to the pandemic.

[72] Ms. Boivin indicated her belief that at the meetings with employees, the applicant did not provide specific dates for implementing pay revisions. Sometime in February of 2020, Monique Enright of her team told Mr. Thompson that the applicant would not be able to meet the 90-day implementation timeline but that it was working with PSPC to secure the implementation as soon as possible.

[73] Ms. Boivin confirmed sending an email, copied to Mr. Thompson, which outlined that the new pay rates would be reflected on the pay of June 10, 2020, and that retroactive payments would appear on the pay of July 8, 2020.

[74] In cross-examination, Ms. Boivin stated that she did not attend any meeting with the TB in September 2019 and that she never met with PSPC during that period. She was not on the telephone call with PSPC on August 28, 2019, but acknowledged being copied on correspondence about it.

[75] When referred to an email dated July 25, 2019, and sent by a senior colleague at the PBO, which reported that separate agencies had been told that use of the new mass retro process was mandatory, Ms. Boivin replied that the House of Commons did not receive anything official from TB to that effect. She stated her belief that the TB might not have understood the status of the House of Commons.

[76] The witness agreed with the proposition that PSPC could change the pay system without the approval of the House of Commons, but in her mind, it did not mean that the House of Commons would have to use the new mass retro process. She acknowledged that PSPC ultimately removed access to the manual process but stated

that she had not believed earlier that that would occur. Only much later did PSPC actually confirm that using Barracuda was mandatory.

[77] Ms. Boivin indicated that her team did not look at the possibility of signing MoUs with bargaining agents with respect to the mass retro process because, once more, the team did not feel that its use was mandatory for the House of Commons. It did not follow up on an offer from the TB to help the parties move forward with MoUs. While she considered the TB's September 18, 2019, email conveying the offer an official communication, she did not see it as a formal request to use the mass retro process. She noted that the email was carefully worded, stating that "… it is [the TB's] understanding that attempts will be made by your organizations implement [*sic*] collective agreements or retroactive pay in accordance with the new methodology …".

[78] Ms. Boivin testified that she was not part of discussions in 2018 that led to an agreement with the bargaining agent to extend implementation timelines but confirmed that she had an understanding of that situation. Asked why, given the situation in 2018, she had not engaged the respondent earlier with respect to implementing the Award, Ms. Boivin stated that she shared information regularly with Mr. Thompson but confirmed that to the best of her knowledge, no one followed up with the respondent before February 2020 about the mass retro process issue. She also confirmed that in July or August 2019, the applicant did not raise with the respondent the possibility of an MoU with respect to pay implementation.

[79] Ms. Boivin agreed that the applicant did not at any time indicate to the respondent that it wanted an extension of time to implement the Award. She testified that the applicant needed to know clearly how long it would take to implement pay revisions before it considered any agreement with the respondent about an extension. She acknowledged that there was a distinction between the applicant's local and the PSAC and that an agreement with the PSAC would be required if time limits were to be extended.

[80] Probing why the applicant did not approach the respondent earlier, given that it was aware that TB was trying to negotiate an MoU in all its collective agreements with respect to the mass retro process, Ms. Boivin reiterated that the applicant still believed that the process was not being imposed on the House of Commons and that it was premature to approach the union.

[81] Asked about the applicant's rationale for proposing a 150-day implementation period at the bargaining table, Ms. Boivin could not specifically recall, remembering only that the applicant needed more time.

[82] Ms. Boivin stated that she did not know very much about why the Director of Employee Relations asked the pay and benefits team to delay the implementation. She repeated her understanding that Ms. Leclair wanted more time to learn how long processing pay revisions would take. Ms. Boivin agreed that the pay elements of the Award to be implemented were not overly complex.

C. Mr. Gay

[83] Mr. Gay is employed by the respondent in the position of National Negotiator. In that role, he has been involved in collective bargaining for 14 years and has been responsible for a wide variety of groups, including all PSAC bargaining units in the parliamentary precincts. His assignment to the bargaining unit in this matter dates to 2007, spanning 5 collective agreements.

[84] Mr. Gay testified that he first became aware of the applicant's request for an extension when it submitted its application to the Board and that he was surprised by it. Between the date of the Award and the date of the application, there were no discussions with the applicant about an extension.

[85] The witness stated that in negotiations, the applicant proposed an implementation period of 150 days. He recalled that it indicated that there might be issues and that more time would be helpful so that its system could manage payments. Mr. Gay described the discussion as perfunctory.

[86] At the interest arbitration hearing held on September 12, 2019, according to Mr. Gay, the applicant explained that its proposal for a 150-day implementation period reflected experience in the TB's jurisdiction and that it would provide the applicant additional time to process new pay rates. Mr. Gay has no recollection of the applicant raising concerns about its partnership with PSPC at the hearing.

[87] The witness stated that the respondent knew nothing about the implementation process before receiving the Award.

[88] Mr. Gay maintained that he was not aware whether the applicant had approached the PSAC local about implementing the Award. He did receive contacts from Mr. Thompson and other members of the bargaining team asking when employees would receive their pay increases.

[89] Asked whether the applicant had made the bargaining agent aware of challenges with PSPC or about the implementation methodology at any time before the Award, the witness answered that he had no such recollection.

[90] Mr. Gay indicated that the only change to pay and benefits outside the Award involved a simplified acting-pay provision in the collective agreement.

[91] Mr. Gay first heard that the applicant was proceeding to implement the new pay rates in its email to him dated May 15, 2020. He could not recall any other communication before that date.

[92] The witness also could not recall that the applicant had at any time made him aware that there was a new calculation method.

[93] Mr. Gay outlined that in his experience, it was typical for an employer and bargaining agent to discuss implementation timelines. He had previously been involved in such discussions both at the House of Commons and in the public service. In negotiations with the TB and the Canada Revenue Agency (CRA), Mr. Gay reported that the employer had approached the bargaining agent to outline developments affecting implementation, although not necessarily in great detail.

[94] In the CRA case, the parties negotiated a longer time frame for the implementation of pay rates in exchange for a late-payment payout. Mr. Gay also referred to similar exchanges in PSAC settlements with the TB and in settlements involving other bargaining agents.

[95] Examination-in-chief closed with the witness confirming that he was the respondent's representative to whom the applicant should have addressed any contact about an implementation extension.

[96] In cross-examination, the applicant asked the witness whether pay advisors would require the retroactive calculation of entitlements with respect to a series of collective agreement provisions. Mr. Gay agreed that that would be the case for

seasonal certified indeterminate (SCI) employees with respect to the following: all hours worked, the 4.6% premium in lieu of designated paid holidays, overtime worked on designated paid holidays, regular overtime, and the 6.0% premium in lieu of vacation. For employees who work a regular 35-hour schedule, recalculation would be required with respect to the premium paid for acting, overtime, maternity and parental allowances, and, in some instances, severance pay.

[97] In re-examination, Mr. Gay indicated that: (1) most of the collective agreement provisions for which retroactive recalculations were required had been in place for some time; (2) SCI employees comprise approximately one quarter of the bargaining unit; and (3) local representatives are not authorized to consent to a request for an implementation extension.

III. Summary of the arguments

[98] Both parties offered very detailed final arguments over the course of a full hearing day. The following summaries substantially abbreviate their submissions, emphasizing the elements that I find more important. Nonetheless, I have considered all their submissions.

[99] The case law cited by the parties includes decisions rendered by two predecessor tribunals, the Public Service Staff Relations Board (PSSRB), and the Public Service Labour Relations Board (PSLRB). Both are referred to in the decision as "the former Board".

A. For the applicant

[100] The applicant characterized the question to be addressed by the Board as: "What longer period for implementation, if any, appears reasonable to the Board in these circumstances?" To answer that question, the applicant maintained that the Board must take into account all relevant evidence with respect to implementation up to the date of the hearing.

[101] The Board should give considerable weight to the evidence from the period between the date of the Award and the date of the application. However, it is completely proper for the Board to consider all evidence up to the date of a hearing, whenever that occurs. There is no precedent for a cut-off date for relevance.

[102] In support of its submission, the applicant cited *Treasury Board v. Federal Government Dockyard Trades and Labour Council East*, 2014 PSLRB 13 ("the *Jaworski decision*"), the only case dealing with a request for an extension of time involving an arbitral award. The decision covered evidence up to the time of the former Board's hearing (see paragraph 27).

[103] In *Treasury Board v. Public Service Alliance of Canada* (PSSRB File Nos. 148-02-367 and 151-02-13 and 14 (19991012), [1999] C.P.S.S.R.B. No. 119 (QL); ("the *1999 decision*"), the former Board considered the dates on which pay rates were implemented after an extension request was made. For one of the groups involved, the former Board granted an extension to the actual implementation date.

[104] Following the precedent of the *1999 decision*, the Board is entitled to consider the applicant's announcement of payment dates in its email to the bargaining agent on May 15, 2020. Had a hearing been held closer to the date of the application, the facts concerning the actual implementation of the pay provisions of the Award would reasonably have been known to the Board.

[105] In the same vein, the Board may also consider evidence about the effects of the pandemic, which was declared after the applicant made its application.

[106] The applicant submitted that the Board has the flexibility to order an extension period other than the requested 180 days. In *Treasury Board v. Public Service Alliance of Canada* (PSSRB File No. 151-02-12 (19890818); [1989] C.P.S.S.R.B. No. 219 (QL), the former Board set an implementation date that was approximately one month shorter than the date proposed by the applicant.

[107] The case law indicates that more than one approach or test is possible when considering an extension request, but according to the applicant, all approaches or tests support its extension request.

[108] In *Treasury Board v. Professional Institute of the Public Service of Canada* (PSSRB File No. 151-02-4 (19691118), [1969] C.P.S.S.R.B. No. 11 (QL); ("the *1969 decision*") at para. 5, the former Board describes the extension provision in the original legislation as a "safety valve" that was designed for situations "… that could not reasonably have been foreseen at the time the agreement was entered into or situations that develop subsequently and which are beyond the control of the Employer."

[109] The applicant submitted that its extension request meets the *1969 decision* test. The requirement to use the new mass retro process was an unforeseen new situation.

[110] The *Jaworski decision*, at para. 68, warns against a narrow understanding of the "safety valve" and holds that other considerations can be weighed "… even in situations where there has been good faith, transparency and due diligence …". At paragraph 79, the former Board recognized that the time required to implement an award may depend on "any number of different variables", including the availability of people to carry out the necessary tasks. Even in cases in which an employer has demonstrated due diligence in a situation that was not unforeseen, other factors may come into play (see paragraph 81).

[111] The applicant submitted that as in the *Jaworski decision*, the Board should consider the availability of pay advisors as a factor in its determination.

[112] In the *1999 decision*, the former Board emphasized the requirement that an employer diligently address unforeseen situations (at pages 4 and 5). The *Jaworski decision* also focuses on the employer's diligence (at paragraph 78).

[113] The applicant described the former Board's decision in *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 103, as indicating at paragraphs 21 and 24 that when an employer anticipates implementation issues, it should raise the matter at the bargaining table. The applicant submitted that it did in fact do so, a factor that should militate in its favour.

[114] *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139, offered by the complainant, lacks relevance because it does not involve an extension application.

[115] *Public Service Alliance of Canada v. Parliamentary Protective Service*, 2020 PSLREB 1, primarily concerns a complaint under s. 70 of the *PESRA*. The extension application in that case was not granted, having been found untimely.

[116] In *Parliamentary Protective Service v. House of Commons Security Services Employees Association*, the Board issued a letter decision dated February 6, 2020 ("the *Parliamentary Protective Service Letter Decision*"), in which it recognized as a factor "… the complexity of having to deal with other entities to implement payments".

[117] The applicant referred the Board to the "Application Record" for other comments about the decisions argued by the bargaining agent

[118] Two orders issued by the Board, on March 20 and May 5, 2020, respectively, suspended certain regulatory timelines in light of the pandemic. The applicant argued that the orders demonstrate how seriously normal operations were affected by the pandemic.

[119] Whether by the test in the *1969 decision* or under the *Jaworski decision*, the applicant maintained that an extension is justified given that it faced "unique, unprecedented and unforeseeable" circumstances beyond its control. The applicant followed up persistently with PSPC to request manual processing of the new pay rates and, later, to request testing of the new mass retro process as due diligence required before implementing with Barracuda.

[120] Ms. Flibotte's testimony showed that the applicant has consistently used the manual process to calculate new pay rates going forward and retroactive payments since the introduction of the Phoenix system. The only exception was the difficult experience in 2018 using a previous version of Barracuda.

[121] The evidence confirms that in the period leading up to the Award, the House of Commons continued to understand that it would implement pay manually. After receiving preliminary information in late summer 2019 about the TB-PIPSC MoU concerning the new mass retro process, the applicant made it clear that it would not use the new process, joining with the parliamentary partners to inform the TB to that effect on September 27, 2019. According to Ms. Boivin, the applicant did not hear back from the TB.

[122] The pay and benefits team proceeded on the basis that it would implement pay rates manually and informed PSPC in October that the House of Commons would not enter into an MoU adopting the mass retro process.

[123] The first time that the House of Commons knew that PSPC was saying that it had to use the new process was as of a conference call on December 4, 2019. However, Ms. Flibotte testified that the information was not from an official source.

[124] After the Board issued the Award, PSPC ultimately took the position that it would not upload pay tables submitted by the House of Commons until the issue of

using the new mass retro process was resolved. That position was unforeseeable, unexpected, and beyond the applicant's control.

[125] Intense meetings with PSPC began in January 2020. In an email to Mr. Dufour at PSPC, Ms. Flibotte asked for a contact to assist with uploading rate tables and stated that the House of Commons would take full responsibility for having its pay and benefits team process pay revisions. The applicant forwarded its concerns about the mass retro new process on January 30, 2020, and sent the rates tables to PSPC on February 5, 2020. Only on February 10, 2020, did the applicant receive the "red flag" information from Mr. Dufour that PSPC indicated that "… rates of pay are not to be loaded into Phoenix" until the issue of using the new mass retro process was resolved. Up to February 10, 2020, all the evidence indicates that the House of Commons could follow the normal process. In the applicant's submission, Mr. Dufour's email of that date was the "block" that compelled the applicant to realize that it would need extra time to implement the Award.

[126] The applicant submitted that "extreme and diligent" efforts continued after February 20, 2020, to resolve the situation through high-level contacts between the House of Commons and PSPC. In addition, on February 10, 2020, Ms. Flibotte proposed that the applicant and PSPC test scenarios using the new process if PSPC agreed to update the rate tables. PSPC did not agree, and the impasse continued.

[127] According to the applicant, its offer to undertake testing demonstrated the due diligence emphasized in the *Jaworski decision*. In light of its experience in 2018 with an older version of Barracuda, it would have been irresponsible to proceed without testing. The applicant submitted that it was the 2018 experience that drove its "extreme caution".

[128] On March 12, 2020, the applicant learned from PSPC for the first time that the manual process would not be available in the future, leading Ms. Flibotte to brief her superiors that it would be necessary for the House of Commons to adopt the use of Barracuda.

[129] After the testing that it sought was conducted, on May 1, 2020, the applicant informed PSPC that it had decided to adopt the new process.

[130] Beyond the diligence it consistently displayed, the applicant argued that the Board should consider these five other factors that support the extension request: (1) the complexity of the pay revisions, (2) the shortage of pay advisors, (3) the fact that it raised the issue of pay implementation at the bargaining table, (4) its communications with the PSAC local, and (5) the pandemic.

[131] The applicant submitted that pay for the bargaining unit is generally complex. Many terms and conditions in the collective agreement need to be adjusted. That complexity justifies the applicant's diligence to make sure that pay is implemented accurately.

[132] The small pool of available pay advisors from which to recruit and the fact that many of the applicant's pay advisors were new complicated its task. Its continual efforts to staff the pay and benefits team also demonstrates its diligence.

[133] Even before the applicant knew about the position that PSPC would take with respect to the requirement to adopt the new mass retro process, the applicant stated that it normally faced "huge challenges" in implementing pay. For that reason, it brought up the issue of the implementation time frame both in collective bargaining and at the interest arbitration hearing.

[134] The applicant maintained close communications with local representatives of the respondent. Ms. Boivin testified that she told the local that the applicant would not be able to meet the pay-implementation deadline. It held briefing sessions with local members, informing them that it was working closely with PSPC to implement the new pay rates as quickly as possible.

[135] The pandemic put timelines everywhere on hold, causing delays, as exemplified by the Board's orders. Ms. Flibotte testified about the difficulty setting up pay advisors to work from home and the applicant's diligence in moving operations forward despite the pandemic.

[136] The applicant closed its argument by re-emphasizing the House of Commons' autonomy and the evidence that demonstrated the reasonableness of its view that it could continue to use the manual process for implementing pay revisions. In the applicant's submission, the Board should take the complete separation of the House of

Commons from the TB, a fact that it consistently communicated to PSPC, as the factor that overrides all others.

B. For the respondent

[137] The respondent suggested that the parties do not disagree to a great extent about the case law, although the respondent finds more caution in the decisions. In its view, the case law emphasizes that granting an extension should be exceptional and that doing so is meant to be a last resort.

[138] Even if broader considerations such as diligence, good faith, and transparency are applied when weighing the evidence, the respondent maintained that it is readily apparent that the House of Commons' actions and inactions precipitated the implementation problem.

[139] The applicant raised "everything and the kitchen sink" when enumerating the factors that it believes that the Board should consider. However, there is no real nexus between the factors it argued and the actual causes of the implementation delays.

[140] For example, the applicant did not indicate where and how specific gaps in staffing actually affected implementing the Award, offering only conjecture. To the extent that there were staffing issues, they were routine and could have been foreseen. The House of Commons could have planned how to resolve those issues so as not to delay implementing the Award.

[141] As to the alleged complexity of the pay elements, the applicant again failed to establish a nexus to the actual causes of the delay. Most of the pay elements were relatively routine, involving existing collective agreement provisions. Nothing really unusual came out of the bargaining round or out of the Award to make the task any more difficult than normal for the pay analysts. As Mr. Gay indicated, the one negotiated change involving acting pay simplified the provision.

[142] The applicant once more reached for an argument when it identified the pandemic as a factor to be considered. There is no concrete evidence before the Board establishing cause and effect, such as the number of hours of delay attributable to the pandemic or how and to what extent it delayed testing. In fact, in May, as the pandemic intensified, testing took place.

[143] On the use of post-application evidence, the respondent noted that there is some indication in the case law that the Board has been willing to consider such evidence. However, the heart of the matter must be what the applicant knew when it made the extension application.

[144] The applicant emphasized the diligence shown by the House of Commons to secure the implementation of the pay revisions. The evidence does not support that depiction. In the 90 days following the publication of the Award, the applicant was consistently "running out the clock". For example, it took 44 days before it sent the rate tables to PSPC. The applicant might have acted more diligently in March, April, and May of 2020, but that "last-minute diligence" is rather irrelevant.

[145] The respondent disputed that the developments with respect to the requirement imposed by PSPC to use the new mass retro process were unforeseen or unforeseeable. The applicant had experience using a previous version of Barracuda in 2018, yet it never sought improvements in the process by raising concerns earlier with PSPC. It simply dug in its heels and maintained its exceptionality.

[146] As of late summer 2019, the House of Commons was well aware that the new mass retro process was on the horizon. By July 25, 2019, the parliamentary partners knew PSPC's position that use of the new mass retro process was mandatory. On August 28, 2019, Mr. Hickey warned that PSPC was taking responsibility for the mass retro process, that it would be implemented by mid-October, that PSPC had no other contingency plan, and that in effect, the House of Commons would be at PSPC's mercy. Describing a catch-22 situation, Mr. Hickey noted that processing everything manually was also not ideal.

[147] Ms. Flibotte testified that she did not see Mr. Hickey's email until later, which is hardly an indicator of diligence. She testified that she knew about the MoU between PIPSC and the TB sometime during summer 2019, yet there seems to have been no subsequent engagement whatsoever on the issue. The House of Commons did not follow up to confirm what was happening. Had it engaged PSPC at that time, the applicant would have fully understood what PSPC was asking it to do.

[148] The information PSPC provided in summer 2019 was thorough. The respondent referred to the PSPC's presentations that accompanied Mr. Hickey's briefing email of August 28, 2019. Outlining the "New Methodology", PSPC stated that "[a]ccounts that

must be processed manually have an extended implementation deadline as compared to accounts that are processed automatically". PSPC described the detailed timelines that would apply, as well as the responsibilities of the different partners.

[149] Under any scenario, according to the respondent, the House of Commons knew that it faced an implementation problem. It knew, given the difficult experience using Barracuda in 2018 and given the information PSPC provided in summer 2019, yet it never engaged PSPC about the 2018 experience or about the developments in summer 2019. It also did not engage the bargaining agent. Both failures signify a lack of diligence.

[150] Instead of engaging PSPC, the applicant shut down the whole discussion. In concert with its parliamentary partners, it decided to reject using the new mass retro process. On September 8, 2019, the TB offered to assist with developing MoUs or with "… mov[ing] forward in accordance with the methodology outlined in the MoU". Ms. Boivin testified that she did not view the TB's email as a formal request to use the new mass retro process.

[151] With respect to the TB's request for information from the parliamentary partners "to better provide assistance", the partners determined that they did not need to provide information. The opportunity to address implementation issues head-on was lost, and the House of Commons insisted on going its own way.

[152] The respondent maintained that throughout fall 2019, the applicant did nothing internally to deal with Mr. Hickey's analysis with respect to the new implementation process, let alone communicate its concerns externally. Mr. Hickey completed the work identifying the issues raised by the new process in August, but Ms. Flibotte did not follow up to alert PSPC about the applicant's concerns until January 30, 2020.

[153] On the basis of information conveyed by PSPC during a conference call on December 10, 2019, the House of Commons knew that the new mass retro process applied to all Phoenix users and that the applicant would no longer be able to use the manual process. Ms. Flibotte asserted that the information did not come from an official source. In the applicant's view, the House of Commons effectively maintained that because it did not hear from the right person, it could ignore the information. The stance that it took represents the opposite of due diligence. Whether or not the

information conveyed during the conference call was official, the applicant should have "gone out and found out". Failing to was "more like negligence".

[154] The applicant's contention that it did not know until well into the new year that PSPC would not upload its rate tables is disingenuous. It knew in early December 2019 that it would not be able to use the manual process.

[155] By insisting on maintaining its autonomy, the applicant was the real source of the blockage. Ms. Leclair delayed providing rate tables to the pay and benefits team for several weeks. Ms. Flibotte complied, instructing her team to do no work. As a result, the applicant wasted the first month of the 90-day implementation period. Almost two thirds of that period passed before it sent the rate tables to PSPC despite understanding that from the past, it might take 2 to 6 weeks for PSPC to implement them.

[156] On January 28, 2020, PSPC reported to Ms. Flibotte that Barracuda had been successfully used for over 75 000 employees. Nonetheless, the applicant wanted to proceed with testing. The time for testing was months earlier.

[157] The respondent cited further examples to demonstrate what it claims was the applicant's lack of diligence. On February 6, 2020, Ms. Flibotte asked PSPC why the House of Commons could not opt out of the new mass retro process, but why did she not do so earlier? She testified that she reported as much to her superiors on February 10, 2020, but why did she not do it earlier, given what the applicant knew as of December 10, 2019? The House of Commons learned from PSPC that Barracuda had been used successfully for 75 000 employees, but it never reached out to the other employers involved, to learn about their experience. Despite being disabused on multiple occasions that it could continue with the manual process, as late as January 31, 2020, Ms. Flibotte was still maintaining her position. No action plan was put into place until February 18, 2020, but it was still based on using the manual process.

[158] The case law holds that a party should make an application for an extension of time for an implementation as soon as possible. The respondent questioned why the applicant waited until February 28, 2020, to make one. It submitted that the applicant had no plan other than to do whatever it wanted and to come to the Board at the last moment "to ask forgiveness".

[159] Both the *Jaworski decision* and the *1999 decision* focus on transparency and good faith. The respondent contended that the applicant's transparency and good faith should be judged through the lens of the applicant's failure throughout to contact it about implementation issues. In the *Jaworski decision*, at para. 80, the Board reported as a consideration favourable to the employer that it "… was transparent about the challenges with the time lines [*sic*] for implementation and discussed these with the respondent."

[160] There is no evidence that the applicant's communications with the local representatives of the bargaining agent included information about the nature of the implementation challenges that the applicant faced. As outlined by Mr. Gay, the TB and other employers were engaging bargaining agents about the issues. Mr. Gay testified that he was surprised by the application. He had received no previous indication from the applicant that there was a problem.

[161] The respondent characterized the applicant's request for a total of 270 days to implement the Award's provisions as "unheard of and unprecedented".

[162] The respondent indicated that if the Board were to consider any extension, a period of 68 days would be the most that could be justified.

[163] The respondent summarized its position as follows. The applicant has not discharged its onus to justify the need for an extension. No implementation delays were caused by something unforeseen or beyond the applicant's control. The applicant was not transparent with and did not demonstrate good faith in its dealings with the bargaining agent. It failed to communicate openly and to exchange information relevant to the bargaining relationship. Delays were solely attributable to the applicant.

[164] The respondent added that the Board is free to find that the applicant did not read the situation correctly throughout or that its reading of it was unreasonable. The Board should ask whether a reasonable employer would have acted the same way, given the same facts.

C. The applicant's rebuttal

[165] The applicant identified several errors in the respondent's argument and offered corrections as follows.

[166] The parliamentary partners were informed only in July 2019 that the new mass retro process would apply to separate agencies. The House of Commons is not a separate agency.

[167] The applicant maintained that some time before September 19, 2019, the House of Commons had an agreement with PSPC that it would process retroactive payments itself once the pay rates were entered into the system. That agreement eliminated the requirement to enter into an MoU and demonstrates the reasonableness of the applicant's understanding that it could continue to use the manual process.

[168] The House of Commons was not obstinate in its approach. The concerns raised about using Barracuda were significant and reasonable. The systems used by the House of Commons are not the same as, or compatible with, the systems used elsewhere.

[169] It is not true that there was nothing new or different in the concerns Ms. Flibotte made known to PSPC in January 2020 compared to what Mr. Hickey identified in August 2019. Barracuda was not running in summer 2019. The concerns conveyed to PSPC in January 2020 reflected new information based on the live system that had become operative in the interim.

[170] The Board need not choose between the applicant's proposal of a 180-day extension or no extension. It may determine any extension period that appears reasonable to it. Given the evidence that 99% of the pay revisions were implemented by July 8, 2020, the Board could use that date to order an extension of 121 days.

IV. Analysis

[171] The Board's mandate in this matter is clearly established by s. 59 of the *PESRA*, which reads as follows:

> ***Implementation of awards***
>
> ***59*** *The terms and conditions of employment that are the subject of an arbitral award shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required therefor, be implemented by the parties within a period of ninety days from the date on and after which it becomes binding on the parties or within such longer period as, on application to the Board by either party, appears reasonable to the Board.*

[172] When faced with an application for a period of longer than 90 days to implement an arbitral award, the Board may order whatever longer period that

"appears reasonable" to it. The applicant bears the onus of proving the need for an extension and the basis for the implementation period that it proposes. The Board may grant the extension sought by the applicant if it "appears reasonable", may substitute a different extension that it deems reasonable, or may reject the proposed extension as unreasonable. The Board's findings apply the civil standard of proof — on the balance of probabilities.

[173] The Board was not in a position to proceed with a hearing to decide this application for almost a year. The onset of the pandemic in March 2020 delayed by a number of months the mediation process that the parties had decided to pursue. Once the Board learned that the mediation in October 2020 did not yield a settlement, it moved forward with scheduling a videoconference hearing, but the earliest available dates convenient to the parties were not until February 2021, and a continuation was required in March 2021. The fact that the Board must now look back to a situation so many months distant is somewhat unusual for this type of proceeding. However, it does not materially change the mandate that the Board must discharge.

[174] The applicant formulated the question to be answered by the Board as follows: "What longer period for implementation, if any, appears reasonable to the Board in these circumstances?" The formulation is apt.

[175] The available case law to assist my ruling is not extensive or particularly controversial. Most of the decisions are not recent. Most do not deal with arbitral awards, although the distinction in the case law between implementing an award and implementing a negotiated settlement (explored in the *Jaworski decision*) does not appear important in this case.

[176] On balance, I draw from the cases cited by the parties several basic themes. An extension request should not be considered routine. Provisions such as s. 59 of the *PESRA* exist to deal with exceptional circumstances, when factors largely unforeseen or unforeseeable, normally beyond the employer's control, delay its ability to meet the 90-day statutory implementation deadline, despite concerted efforts. The imagery of a safety valve introduced in the *1969 decision* remains generally resonant.

[177] The case law does not prescribe a definitive list of determining factors. They will differ from situation to situation, making the Board's inquiry inherently fact-based. An argument for an extension requires evidence of the elements delaying or

blocking the implementation and, perhaps more crucially, of the employer's efforts to address them. In that latter respect, considerations such as diligence, transparency, and good faith come into play when evaluating the employer's actions.

[178] Should the inquiry into the facts include evidence of events that post-date the extension application? Citing the *1999 decision* and the *Jaworski decision* as supporting authorities, the applicant maintains that I should consider developments after February 28, 2020, the filing date. That said, the applicant also conceded that "considerable weight" should be given to the evidence from the period between the date of the Award and the date of the application. I note that the respondent accepted that there is "some indication" that the Board has been willing to consider post-application evidence.

[179] A note of caution must be sounded. I do not read the case law as in any way providing an open season for post-application evidence. In the *1999 decision*, the Board did consider evidence of the actual dates, subsequent to the application, when the implementation was completed for two bargaining units. Nevertheless, the Board's decision on the merits to accept an extension for one unit but not for the second appears to have been based principally on pre-application evidence. Post-application evidence entered into the Board's ruling, but essentially to determine a new extension deadline for one bargaining unit — to the date coincident with the actual implementation date.

[180] In the *Jaworski decision*, it is also apparent that the Board's determination was based primarily on evidence up to the date of the extension application. While it is not made clear in the decision, it may be that the new deadline determined by the Board and extending the implementation by slightly less than two months reflected its appreciation of post-application developments. Even if so, the decision can only be read as suggesting that post-application evidence has a limited use for determining the reasonable length of an extension, if an extension is otherwise justifiable. Post-application evidence will not normally have relevance for ruling on the main merits of the application itself.

[181] The only post-application evidence in this matter that I find useful is the record of when pay was actually revised on an ongoing basis and when retroactive payments were completed, which was in May 2020 and July 2020, respectively. As in the *1999*

decision and perhaps the *Jaworski decision*, this evidence may come into play when determining the length of an extension, if one is granted. I do not believe that it significantly assists making a finding on whether an extension should be granted in the first place, of whatever length.

[182] The other post-application evidence of any substance before me concerns the applicant's efforts to test the application of Barracuda, to gain the confidence that would allow it to move forward with the implementation, along with the pandemic, which became a compelling concern in March 2020.

[183] While the applicant's interest in the possibility of testing the application of the new mass retro process originated earlier, it was not until her March 19, 2020, briefing to Mr. Parent and Mr. Patrice that Ms. Flibotte actually recommended that testing go forward. In cross-examination, she maintained that the roles to be played by her team in the new mass retro process remained unclear through February 2020, forestalling the testing process. Her explanation is not very convincing. Had the House of Commons decided to approach PSPC earlier about testing, it seems quite likely that the roles to be played by her team members would have become better known sooner.

[184] Tests were conducted on March 26, 2020. Ms. Flibotte testified that on May 1, 2020, the House of Commons informed PSPC that it had decided to proceed with the new mass retro process.

[185] On one level, the applicant's concern for testing clearly indicates diligence on its part. Evidence about the very difficult experience in 2018 applying an earlier version of Barracuda provides ample justification for the applicant's concern to ensure accuracy in implementing pay revisions. However, on the negative side, the evidence suggests that testing itself could be accomplished quickly. Less than a week passed between the decision to proceed with tests and when were they actually run. Had the applicant arranged testing earlier, would an extension application have been needed or, if so, could the applicant have proposed a shorter extension?

[186] On balance, I find that the post-application evidence about testing — both positive and negative for the applicant's position — does not greatly inform my ruling.

[187] As to the pandemic, it is unquestionable that the COVID-19 health emergency was an unforeseeable factor outside the applicant's control. Nonetheless, given the

timing of the serious outbreak of COVID-19 cases, it does not explain why the applicant was unable to meet its obligation to implement the Award within 90 days. It is also unclear in the evidence how much of the later delay processing pay for the OSG Group was actually caused by the pandemic.

[188] Consideration of the application must be based pre-eminently on the evidence of what occurred and what the applicant knew up to the date of the extension application.

[189] The applicant's case rests, at least in substantial part, on the argument that it could not have foreseen crucial developments that occurred after the Award was issued on December 10, 2019. Foremost in its depiction of those developments was the red flag information received on February 10, 2020, from Mr. Dufour that PSPC would not upload pay tables into the Phoenix system until the issue of using the new mass retro process was resolved. According to the applicant, all the evidence up to that date indicated that it could follow the normal manual process. Mr. Dufour's email was the block that compelled the applicant to realize that it would need extra implementation time.

[190] The information in Mr. Dufour's email confirmed the block, but was the block really unforeseen or unforeseeable? Was it reasonable for the applicant to hold to its view until early February 2020 that use of the new mass retro process would not be mandatory, given its exceptional status and that of its parliamentary partners among employers using the Phoenix system?

[191] I do not find this element of the applicant's argument convincing. If, indeed, its staff believed that using Barracuda would not be obligatory until Mr. Dufour's email, it is nonetheless clear that there were many signposts along the way that presaged a different reality.

[192] In summer 2019, the existence of the MoU between the TB and PIPSC became widely known to users of the Phoenix system. The MoU was specifically introduced to the parliamentary partners as early as July 10, 2019. It appears to me that from that point on, there was a flashing signal that something very important was happening. Change loomed on the horizon. PSPC's briefings later in summer 2019 clearly conveyed what that change involved and what it would mean to Phoenix users.

[193] That the House of Commons was, or should have been, alerted to the possible implications of the impending change is apparent, given Mr. Hickey's email of August 28, 2019, to colleagues, including Ms. Boivin. Another clear sign quickly came in the form of the TB's offer on September 8, 2019, to assist with developing MoUs or moving forward with the new methodology outlined in the MoU.

[194] Despite Mr. Hickey's analysis and the TB's approach, the evidence indicates that the House of Commons and its parliamentary partners remained confident that the new retro process did not apply to them. Was that confidence reasonable, then or later?

[195] The parliamentary partners might have taken comfort, based in part on an email dated July 25, 2019, from believing that the new mass retro process would apply to "Separate Agencies" but not to them. However, the more detailed information received later in the summer should have challenged that confidence. Notably, the PSPC information presentations annexed by Mr. Hickey on August 28, 2019, refer generically to employers, as in employers who use Phoenix, without distinguishing between different classes of employers. I read nothing in the presentations that could be confidently interpreted as explicitly exempting employers in the parliamentary precincts.

[196] At that time and in the following months, it seems clear that the House of Commons continued to be animated by an unswerving belief that it had special status among employers. That conviction was evident throughout Ms. Flibotte's testimony. She testified that the House of Commons had always used the manual process and that its special separate status, in her view, meant that it would continue to be able to use it. While I do not doubt the sincerity of her belief, I question whether it was a fully reasonable reading of the emerging situation, if not in the summer and early fall of 2019, then at least by December 2019.

[197] The evidence shows that there was a conference call with PSPC on December 4, 2019, concerning the implementation of an arbitral award for a PPS bargaining unit. After that call, Ms. Flibotte received an email from Ms. McNeil reporting that PSPC required using the new mass retro process and that manual processing was not possible. In my mind, it is hard not to view December 4, 2019, as a definitive turning point. That Ms. Flibotte seems to have discounted the information received from

Ms. McNeil because it did not, in her view, comprise official written notification indicates, in my respectful opinion, an unreasonable reticence to accept the emerging reality of the situation.

[198] The Board issued the Award on December 10, 2019. Ms. Flibotte learned about it the next day.

[199] The record of what ensued offers indications of diligence on the applicant's part to understand and deal with the situation but also indications that it was itself the author of delays.

[200] Ms. Flibotte received a high-level description of the new mass retro process from PSPC on December 20, 2019. She asked for more information and followed up with PSPC on January 7, 2020. She described PSPC's information conveyed by that time as "a good summary" that allowed her team to consider how the mass retro process might work in its environment. She also learned from PSPC that it could fit in a run for a parliamentary bargaining unit using Barracuda sometime in February.

[201] By the end of January and early February, the pace and seriousness of interactions with PSPC appears to have escalated. The exchanges between the parties during a telephone conversation on February 6, 2020, and in writing on February 9, 2020, increasingly defined their disagreement. Ms. Flibotte turned to senior House of Commons management, seeking its intervention.

[202] Ms. Flibotte's actions in this period display a diligent determination to represent the applicant's interests and to move the implementation forward. However, the problem was that they came with only a few weeks remaining in the 90-day implementation period. At such a late date, with the implementation deadline looming, the applicant's diligence in holding to its position appears almost counterproductive in retrospect. Whatever else, it had the effect of delaying what became inevitable — the application to the Board. The case law suggests that such applications should be made as early as possible; see, for example, the *Jaworski decision*, at para. 81. I believe that is not unreasonable to suggest that the applicant could have applied somewhat earlier to the Board for an extension, if only on a contingent basis. That said, I view the timing of the application, just over two weeks before the statutory implementation deadline, as unfortunate but not as a determining element.

[203] The applicant pointed to the shortage of pay advisors as a factor affecting its implementation efforts, which is a reasonable point. However, it is difficult to give the factor more than minor weight without clearer information to depict the actual delay attributable to the shortage.

[204] The applicant also suggested that the complexity of the required pay revisions contributed to the challenge it faced. The evidence on this element is mixed. The cross-examination of Mr. Gay confirmed the substantial number of collective agreement provisions for which manual recalculations might have been required. However, there was also evidence that most of the provisions in question had been in place for some time. That they required careful work is obvious, but apparently, it was not new or unforeseen work.

[205] On the more clearly negative side, the evidence indicates that the pay and benefits team did not start to work on the pay tables immediately after the Award, and not until well into January. Ms. Flibotte stated that the Director of Employee Relations had asked it to hold off. Why? Ms. Boivin stated her understanding that Ms. Leclair wanted a better sense of how long it would take to implement the Award before proceeding. On January 9, 2020, Ms. Leclair told Ms. Boivin that the delay might be longer than usual.

[206] There is no satisfactory explanation in the evidence for the delay. Only on February 5, 2020, almost two months after the Award was issued, did Ms. Flibotte's team provide the new pay tables and the Award to PSPC. Ms. Leclair's intervention seems to have been quite counterproductive. Surely, in her role, she would have known about the statutory requirement to implement within 90 days. Her position to delay unaccountably and, in my view, unreasonably put the implementation process back by a month or more.

[207] To the extent that the case law suggests that transparency is among the factors to be considered when weighing the merits of an extension application, I find that the evidence seriously militates against the applicant's position. At no time from the summer of 2019 to the implementation of the new pay rates on an ongoing basis in May 2020 did the applicant substantially engage the bargaining agent, first about the emerging information about developments with respect to the Phoenix pay system, and then, after early December 2019, about the possible implications of the new mass

retro process for implementing the Award. The applicant involved local union representatives in rolling out membership information sessions about the Award and forewarned Mr. Thompson that there might be delays. That engagement was laudable and useful, but the bargaining agent, represented by Mr. Gay, had the authority to represent the interests of the membership and to address implementation issues.

[208] Despite evidence that the bargaining agent had assisted in an earlier round of negotiations by agreeing to an extended implementation deadline, the thought that it might be appropriate to approach it again, to discuss how to overcome the emerging implementation problems or the possibility of an extension, does not seem ever to have crossed the minds of the responsible House of Commons officials. Mr. Gay's testimony confirmed that the bargaining agent was kept in the dark throughout, for whatever reason.

[209] The applicant argued that as a favourable factor, it proposed a longer implementation period in collective negotiations and at the interest arbitration hearing, in both cases unsuccessfully. Mr. Gay's testimony suggested that a discussion of the applicant's proposal was not detailed at either stage. The bargaining sessions took place before the summer of 2019 (see 2019 FPSLREB 121, at para. 6). It is obvious that PSPC's mass retro process initiative, as it became understood in summer 2019, would not have been discussed at the table. The House of Commons did have relevant information about the initiative by the time of the interest arbitration hearing on September 12, 2019, but Mr. Gay's recollection was that there was again no detailed presentation of implementation issues or PSPC's plans to justify the proposed longer implementation time frame.

[210] In my view, the evidence about applicant proposals to lengthen the implementation period in bargaining and at arbitration is of limited value. It indicates that the time required to implement new pay provisions has been a consistent concern for the applicant. On the other hand, because the proposals were made in bargaining well before the PSPC initiative in summer 2019 and on September 12, 2019, at the interest arbitration hearing when interactions with PSPC were still at an early stage, they cannot be taken as a serious indicator of transparency for the purpose of the application.

V. Conclusions

[211] The analysis of the evidence identifies both factors that favour of an extension of the implementation period and factors that do not. The Board's burden is to evaluate the balance of the evidence, to determine what longer implementation period, if any, appears reasonable in the circumstances. My summary evaluation of that balance is as follows.

[212] Militating most in favour of the applicant's application are several considerations. Foremost is the reality that an external actor, PSPC, played an outsized role that greatly complicated the applicant's task. Obviously, the House of Commons was not in a position to control the course of events initiated by PSPC that eventually required it to use the new mass retro process. The entire pay system was changing, and the House of Commons could not and was not in control of that change. I note that in its *Parliamentary Protective Service Letter Decision*, the Board factored into its determination "… the complexity of having to deal with other entities to implement payments", referencing PSPC.

[213] The House of Commons' concern for ensuring accuracy in the process used to implement new pay rates on an ongoing basis and to process retroactive payments, and its determination to keep that concern at the forefront throughout, was certainly commendable.

[214] In the early months of 2020, applicant representatives showed persistence in their interactions with PSPC and eventually, through discussions with PSPC and through testing, were able to alleviate their concern for accuracy sufficiently to support a decision to proceed, using Barracuda. As indicated, the applicant displayed a clear degree of diligence once it became more actively engaged with PSPC in the early months of 2020.

[215] An additional consideration modestly in the applicant's favour was the difficulty it faced assigning sufficient staff resources to do the work (similar to the situation noted in the *Jaworski decision*, at para. 74). That consideration might have weighed more heavily had there been specific evidence substantiating the actual delay caused by the staffing issues.

[216] I must add that nothing in the evidence leads me to find that the applicant acted in bad faith at any time.

[217] The evidence militating against the application is substantial.

[218] The applicant argued that I must consider as a major factor its autonomy and the evidence that demonstrated the reasonableness of its view that it could continue to use the manual process. It is understandable that the House of Commons would wish to defend its separate status to the maximum extent possible. There is also a weight in past practice that provides support for its belief that it had continuing access to the manual process. However, the evidence suggests to me that its determination to hold to past practice and to its faith that the unique status of the legislative arm of government insulated it from developments in the wider system ultimately did not serve its interests well.

[219] As proven by the 2011 order-in-council, the government exercised authority over the use of the Phoenix pay system and required the House of Commons to use that system. That the government of the day could later revise Phoenix by introducing new requirements, such as use of the new mass retro process, and to bind Phoenix users to those requirements seems uncontestable. By summer 2019, it was becoming clear that the system was changing.

[220] By falling back on its belief in its separate status and on past practice in the following months, I believe that the House of Commons misread the situation. It missed opportunities to define more precisely how it would be affected by changes to Phoenix, and it lost time to manage those changes. Despite warning information from Mr. Hickey and others, and despite invitations from PSPC and from the TB to engage, it did not, at least until December 2019. Its failure to suggests a lack of diligence in the period leading up to the Award that casts a shadow over the greater diligence that it demonstrated in early 2020.

[221] In that same respect, I find it very difficult to conclude that the circumstances that the applicant began to address more forthrightly in early 2020 can be labelled as "unforeseen" or "unforeseeable". As the Board noted in in its *Parliamentary Protective Service Letter Decision*, "[t]he difficulty of implementing the Award due to the Phoenix problems [was] real, but it could not have been unforeseen."

[222] In my view, two other important elements weigh most significantly against the applicant. The first is that the intervention of the Director of Employee Relations, largely unexplained, delayed work on the pay tables and on their provision to PSPC by a month, if not more. The delay probably contributed as well to the relatively late date of the extension application to the Board.

[223] The second additional element of substantial weight is the applicant's failure to engage the bargaining agent at any point, but particularly in the period after the Board issued the Award, when the applicant increasingly realized the extent of the implementation problems that it faced. Pay issues are central to a bargaining relationship.

[224] The respondent was in a position to assist the applicant in dealing with those problems, as it did in a previous negotiation round, when it agreed to an extended implementation period. In the post-Award period, the respondent was never given an opportunity to play a role or to consider the possibility of a voluntary extension. At the very least, an employer animated by the imperative of maintaining an open and strong relationship with a bargaining agent should have and would have kept the affected bargaining agent well informed of developments. The House of Commons did not. Its communications with local representatives in early 2020 about the Award, however laudable, did not compensate for the absence of any contact whatsoever with Mr. Gay or with any other official authorized to make decisions on behalf of the PSAC about implementation challenges. The only contact came in May 2020, essentially after the fact, and then only to inform Mr. Gay about the imminent implementation of pay provisions. The applicant was not transparent.

[225] The balance of considerations, in my view, does not establish that an extension of the period for implementing the Award by 180 days is reasonable. The evidence overall reveals more elements that undermine the applicant's request than support it. That said, the situation is not black and white.

[226] While it would be unreasonable, in my view, to grant an extension as long as the 180 days sought by the applicant, given the balance of the evidence, it would also be unreasonable to reject the application entirely. There were elements beyond the applicant's control that made difficult the task of accomplishing the implementation of the pay provisions of the Award within the 90-day statutory limit. Those elements

support granting an extension. However, the substantial negative considerations that I have identified compel me to contemplate a shorter extension.

[227] In its argument, the respondent suggested that if the Board were to consider any extension, a period of 68 days would be the most that could be justified. The respondent's suggestion would have the effect of extending the implementation period to May 14, 2020, the date on which, according to the evidence, the applicant adjusted pay rates in the system on a going-forward basis. I find that the alternative proposed by the respondent "appears reasonable" within the meaning of s. 59 of the *PESRA*. It provides an extension period of just over two months, which I believe is in keeping with the balance of the evidence and is appropriate in the circumstances.

[228] Extending the implementation period to any later date, such as June 10, 2020, when pay revisions were reflected on the pay of employees, or July 8, 2020, when most retroactive payments were made, would exceed what I believe is reasonable, in light of the evidence.

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

(The Order appears on the next page)

VI. Order

[230] The application is granted in part.

[231] Under the authority of s. 59 of the *PESRA*, the period for the implementation of the provisions of the Award is extended to May 14, 2020.

April 30, 2021.

Dan Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board