Date: 20230417

File: 561-34-44377

Citation: 2023 FPSLREB 38

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

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

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Respondent

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

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

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Michael Fisher, counsel

For the Respondent: Jena Montgomery, counsel

Heard via videoconference,
January 9, 10, and 12, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] This decision is about a complaint made on March 14, 2022, by the Public Service Alliance of Canada ("PSAC", "the bargaining agent", or "the complainant") with the Federal Public Sector Labour Relations and Employment Board ("the Board") about changes to hours of work at call centres of the Canada Revenue Agency ("CRA", "the employer", or "the respondent") that the complainant alleged is a violation of s. 107 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Section 107 is commonly referred to as the "freeze provision" and reads as follows:

107 *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*	***107*** *Une fois l'avis de négocier collectivement donné, sauf entente à l'effet contraire entre les parties aux négociations et sous réserve de l'article 132, les parties, y compris les fonctionnaires de l'unité de négociation, sont tenues de respecter chaque condition d'emploi qui peut figurer dans une convention collective et qui est encore en vigueur au moment où l'avis de négocier a été donné, et ce, jusqu'à la conclusion d'une convention collective comportant cette condition ou :*
(a) *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*	***a)*** *dans le cas où le mode de règlement des différends est l'arbitrage, jusqu'à ce que la décision arbitrale soit rendue;*
(b) *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*	***b)*** *dans le cas où le mode de règlement des différends est le renvoi à la conciliation, jusqu'à ce qu'une grève puisse être déclarée ou autorisée, le cas échéant, sans qu'il y ait contravention au paragraphe 194(1).*

[2] Section 132 of the *Act* is not relevant to this complaint.

[3] PSAC is the certified bargaining agent for the employees of CRA in the Program Delivery and Administrative Services Group bargaining unit, comprised of the SP and MG-SPS occupational groups. The Union of Taxation Employees ("UTE"), a component of PSAC, represents these members in CRA workplaces.

[4] In its complaint, the complainant stated that the respondent violated s. 107 "… by unilaterally imposing extended hours of work on a permanent basis throughout the calendar year and mandatory Saturday shifts for employees in CRA's Call Centres, without agreement from the complainant or UTE."

[5] The complainant amended its requested remedy at the conclusion of the hearing of the complaint. It requested the following:

> 1) declaration that the employer violated s. 107 of the *Act*;
> 2) that the employer cease from acting unilaterally in imposing a permanent schedule of extended hours;
> 3) an order for the parties to resume consultations on hours of work;
> 4) an order that any hours of work outside of the period from 7 a.m. to 6 p.m. and on Saturdays be considered overtime and paid accordingly until an agreement is reached by the parties;
> 5) an order that the extended hours be voluntary until an agreement is reached;
> 6) posting the order at all call centres as well as on the CRA's internal website; and
> 7) that the Board remain seized to address any implementation issues.

[6] The respondent, in its reply to the complaint on April 28, 2022, sought the dismissal of the complaint. It also raised two preliminary objections but subsequently withdrew them. The complainant provided a rebuttal to the reply on June 1, 2022.

[7] PSAC also filed a policy grievance with CRA on March 7, 2022, relating to the imposition of extended hours of work at CRA call centres that was referred to the Board on September 16, 2022 (569-34-45730). That policy grievance is not yet scheduled for a hearing.

II. Summary of the evidence

[8] Three witnesses testified for the complainant, and one witness testified for the respondent. The main witness for the complainant was Shane O'Brien, a full-time employee of UTE and the delegated representative for discussions on hours of work with CRA. The only witness for CRA was Kira Sherry, director of national operations at

CRA. A joint book of documents was prepared by the parties. Additional documents were identified by witnesses and introduced as exhibits.

[9] The collective agreement between the parties expired on October 31, 2021. PSAC served CRA with notice to collectively bargain on October 15, 2021. Accordingly, the freeze period started on October 15, 2021.

A. The workplaces

[10] This complaint involves workplaces across the country that serve as the call or contact centres for CRA. These call or contact centres are part of the Assessment, Benefit and Service Branch ("ABSB") of CRA. Historically, these workplaces were called "call centres", and in the documents and the testimony, these workplaces were routinely referred to as "call centres". However, at some point, the name was changed to "contact centres", and some of the documents reflect this new term. In this decision, I will refer to "call centres" as this is the common terminology still used by the parties.

[11] The collective agreement (at clause 25.06) establishes the normal workday for CRA employees in the Program Delivery and Administrative Services Group bargaining unit as 7.5 consecutive hours (exclusive of a lunch period) between the hours of 7:00 a.m. and 6:00 p.m. The normal workweek is 37.5 hours, from Monday to Friday.

[12] The letter of offer received by each employee upon hiring determines the hours of work that they can be required to work by the employer. Some employees have, as a term and condition of hiring, the right of the employer to assign them to shift work.

[13] Since at least 2014, CRA has consulted with UTE about extended hours of service (hours of work before 7:00 a.m. or after 6:00 p.m. and on Saturdays) at the call centres during the income-tax filing season. This season is between mid-February and the end of April of each year. Consultations were held in accordance with clause 25.11 of the collective agreement, which states this:

25.11 Consultation	***25.11 Consultation***
…	[…]
b. Where hours of work are to be changed so that they are different from those specified in clause 25.06, the Employer, except in cases of	*b. Si les heures de travail doivent être modifiées de sorte qu'elles diffèrent de celles qui sont indiquées au paragraphe 25.06,*

emergency, will consult in advance with the Alliance on such hours of work and, in such consultation, will establish that such hours are required to meet the needs of the public and/or the efficient operation of the service. In no case shall the hours under clause 25.06 extend before 6:00 a.m. or beyond 9:00 p.m., or alter the Monday to Friday work week, or the seven decimal five (7.5) consecutive hours work day.	*l'Employeur, sauf dans les cas d'urgence, doit consulter au préalable l'Alliance à ce sujet et établir, lors des consultations, que ces heures sont nécessaires pour répondre aux besoins du public ou assurer le bon fonctionnement du service. Les heures décrites au paragraphe 25.06 ne peuvent en aucun moment se prolonger avant 6 h ou au-delà de 21 h, ou modifier la semaine de travail du lundi au vendredi ou le jour de travail de sept virgule cinq (7,5) heures consécutives.*
c. Within five (5) days of notification of consultation served by either party, the parties shall notify one another in writing of the representative authorized to act on their behalf for consultation purposes. Consultation will be held at the local level for fact finding and implementation purposes.	*c. Les parties doivent, dans les cinq (5) jours qui suivent la signification d'un avis de consultation par l'une ou l'autre partie, communiquer par écrit le nom de leur représentant officiel autorisé à agir en leur nom pour les besoins de la consultation. La consultation tenue à des fins d'établissement des faits et de mise en oeuvre a lieu au niveau local.*
d. It is understood by the parties that this clause will not be applicable in respect of employees whose work week is less than thirty-seven decimal five (37.5) hours per week.	*d. Les parties conviennent que les dispositions du présent paragraphe ne s'appliquent pas dans le cas des employés dont la durée hebdomadaire du travail est inférieure à trente-sept virgule cinq (37,5) heures.*

[14] In consultations on extended hours of work before 2021, CRA would provide a proposed schedule for each call centre in a document entitled, "Hours of Work Matrix" ("matrix"), for the upcoming year. Mr. O'Brien testified that the employer would demonstrate a need for extended hours, based on such things as call volumes. He testified that there was sometimes disagreement on the proposed extended hours but that the parties would "negotiate back and forth and agree". Mr. O'Brien testified that he made it clear to CRA that each agreement was only for that calendar year.

[15] Until 2021, the extended hours agreed to by UTE and implemented by CRA were only for the tax-filing season. In 2021, CRA proposed, for the first time, extended hours after the end of the tax-filing season.

[16] In January and February of 2021, CRA had discussions with UTE representatives about the impact on CRA of the government's Fall Economic Statement. A summary of the meetings was prepared by CRA. Mr. O'Brien testified that the summary was "fairly accurate". Most of the meetings related to a discussion about the temporary outsourcing of some call-centre functions that is not relevant to this complaint. The slide presentation that was presented at one of the meetings included the employer's commitment to extend the hours of service by extending tax-filing season hours for the balance of the year. The slide presentation also noted that the next steps included consulting with UTE. Mr. O'Brien testified that there was no discussion of extended hours at these meetings.

[17] Consultations on the matrix for 2021 did not commence until March 2, 2021. The CRA lead on these consultations was Michael Honcoop, the director general of ABSB. Mr. O'Brien testified that some call centres had implemented the proposed extended hours of work by February 22, 2021. He testified that the ultimate agreement on extended hours for the tax-filing season was effective March 2, 2021, and CRA paid overtime for those employees who had worked the extended hours from February 22 to March 2, 2021.

[18] Mr. O'Brien testified that unlike in previous years, the first draft of the 2021 matrix included proposed extended hours for the full calendar year. Mr. O'Brien testified that he told Mr. Honcoop that UTE was prepared to consult only on the extended hours for the tax-filing season and that any proposal for extended hours outside that season would have to be the subject of separate consultations.

[19] UTE agreed to the extended hours of work for the 2021 tax-filing season. In an email to the UTE Executive Council and other UTE representatives on March 17, 2021, Mr. O'Brien said that he had rejected the employer's proposals for extended hours outside the tax-filing season.

[20] On March 18, 2021, Marc Bellevance, the negotiator for CRA, provided the matrix for 2021 to UTE by email. In his email, he advised that the extended hours contained in the matrix applied only to the tax-filing season. He noted that in the attached matrix, the proposed hours for the post-filing season were highlighted in yellow; a note indicated that consultation with UTE on the post-filing season was not finalized and that it would be pursued by the parties on March 30, 2021.

[21] Mr. O'Brien testified that UTE was of the view that CRA had not demonstrated the need for extended hours in the post-filing season. It was also UTE's position that employees could not be required to work hours outside the regular hours of work. In cross-examination, Mr. O'Brien testified that he had no way of knowing if the extended hours were implemented as of May 1, 2021 (in other words, after the end of tax-filing season). He testified that he had received assurances from CRA that the extended hours would not be implemented, but he had also received calls from employees at call centres about the imposition of extended hours.

[22] Mr. O'Brien did not remember what was discussed at the consultation meeting on March 30, 2021. On April 6, 2021, Mr. Honcoop wrote an email to Mr. O'Brien, following up on that meeting. Mr. Honcoop set out how CRA would be "moving forward" on the items that had been discussed, as follows:

> …
>
> *2. New hours of service for Business Enquiries and Individual Tax Enquiries contact centres:*
>
> ○ *To recap, starting in April, the new hours of service for Business Enquiries contact centres will be Monday to Friday 8am to 8pm and Saturday 9am to 5pm, local time. Individual tax enquiries contact centres will adopt the same hours in May 2021 following the T1 tax filing season.*
>
> ○ *We will be scheduling hours of work to correspond with the contact centres' new hours of service as per the matrix discussed with you on March 2nd and 30th.*
>
> ○ *Contact centres will be following the approach described below:*
>
> ▪ *Most employees will be scheduled Monday to Friday during the core hours of 7am and 6pm.*
>
> • *Some employees will be scheduled to work to 8pm and they will be paid the late hour premium between the hours of 6pm and 8pm;*
>
> ▪ *Some employees may be scheduled Tuesday to Saturday using the following approach:*
>
> • *Permanent employees who volunteer to work a Tuesday to Saturday schedule, and*
>
> • *Term employees who have the "shift work" provision in their letter of offer*

> > > *• Employees who work on Saturday will be eligible for the weekend premium as per the collective agreement.*
> >
> > *○ Please note that ABSB will be assessing the level of client demand for Saturday hours of service for the Business enquiries service only between April and September 2021. Depending on the outcome of our review, if the call demand is not sufficient to maintain Saturday service, we may discontinue or alter the hours of service in the matrix. We will consult with the UTE in September to share our findings and discuss next steps.*
>
> *I have attached an amended version of the Hours of Work matrix for your reference.*

[23] Mr. O'Brien replied as follows on April 15, 2021:

> *Thank you for your email advising as to how the CRA intends to proceed with respect to Hours of Work for the ABSB contact centres.*
>
> *As I clearly indicated during the consultations held thus far and as I reinforced in our latest consultation on March 30, 2021, the Union of Taxation Employees-PSAC is opposed to the conditions proposed by the employer on the Hours of Work. Moreover, as I asserted during our consultations, we maintain that the employer is in violation of the collective agreement between the Canada Revenue Agency and the Public Service Alliance of Canada. Relatedly, we suggest that this is a willful and deliberate violation of the collective agreement between the parties.*
>
> *More specifically, we allege that the employer has failed [sic] during the consultation process that the proposed Post-Filing Season hours of work are required to meet the needs of the public and/or the efficient operation of the service and that the needs of the public and the efficient operation of the service cannot be met by the normal hours of operation of the CRA.*
>
> *We are insistent that the proposed schedule for some employees from Tuesday to Saturday does not constitute a **shift** as contemplated by the collective agreement and in fact, we submit that CRA has no shift workers, but are instead Day Workers.…*
>
> *…*
>
> *We ask that the employer seriously reconsider its position in this matter. Otherwise, we will have no choice but to file one or more Policy Grievances on the matters in dispute, along with an Unfair Labour Practice Complaint. Additionally, we will have no alternative [sic] to communicate with our members who are affected to advise them of their rights and to encourage them to file grievances, where applicable.*

> *I remain available for further consultation and discussion on this matter and hope for a positive and mutually acceptable resolution of these issues.*
>
> [emphasis in original]

[24] On April 17, 2021, Mr. O'Brien provided a summary of the consultations with CRA to the Executive Council and UTE locals in an email. He stated that UTE had completed consultations with CRA with respect to the post-filing season on March 30, 2021. He wrote that during the consultations, "… we strongly opposed the implementation of extended hours outside of the filing season …". The email continued as follows:

> *Notwithstanding our protestations, on April 6, 2021, we were advised by a representative of the employer that it intended to proceed as planned with some minor revisions. We have since responded in writing to this notice, outlining our objections. We have also escalated the matter to more senior levels of the Agency and have opened the door to further consultation, along with a request to extend the timeframes for the filing of individual, Group and Policy Grievances, if the matter remains unresolved.*
>
> *…*

[25] Mr. Honcoop wrote an email to Mr. O'Brien on April 19, 2021, summarizing CRA's position on the hours of work for call centres as follows:

> *…*
>
> *The Employer has met with the UTE on three previous occasions to discuss and consult on this topic: briefing on January 8, where the Employer briefed the UTE on the Fall Economic Statement 2020 and indicated that the tax season hours of work would continue for the balance of the year; official consultation on March 2, where the Employer presented the specific changes to the hours of work for each contact centre; and, official consultation on March 30, where we focused on the UTE's concerns with the post-filing season hours of work. During these meetings, you did not express any concerns about the fact that such hours are required to meet the need [sic] of the public and/or efficient operation of our services.*
>
> *It is the Employer's view that we have clearly demonstrated by the means of the Federal Government's direction in the Fall Economic Statement 2020 and by our Minister's mandate letter from the Prime Minister, that these changes to the hours of work are required to meet the needs of the public and/or the efficient operation of the service as outlined in paragraph 25.11(b) of the collective agreement.*

During the January briefing, the Employer indicated to the UTE that the Fall Economic Statement announced the government's investment in an integrated approach to improving the CRA client experience. The Employer also indicated that this initiative has many components that include improved web content and new digital services but the most significant part of this initiative is the investment in ABSB contact centre services to hire more call agents and increase service availability. Increasing service availability to Canadians requires that the hours of work in the contact centres be modified to include longer hours of service Monday to Friday and service on Saturdays. This information was well received by UTE at the time.

For these reasons, the Employer strongly believes that the requirements of paragraph 25.11(b) are demonstrated and satisfied.

To address your stance on shift work, for several years now the Employer has had employees working schedules that include Saturdays and hours beyond 9:00pm. The employees working these hours have always been paid the relevant premiums (shift and weekend). During our consultations, you indicated that you were not in agreement with having any employees working on Saturdays without receiving overtime.

Some employees have clearly expressed a desire to voluntarily work the Tuesday to Saturday schedule during certain periods of the year while enjoying Sunday and Monday as days of rest. This is never imposed on employees by the Employer. In changing to the Tuesday to Saturday schedule, these employees become subject to the shift work provisions of the collective agreement, and the Employer has therefore provided them with the relevant premiums. This practice has been in place for years and has not been challenged in the past.

What you are proposing in your response is, in order to have employees work on Saturdays, the Employer must assign the time to day workers as overtime which would then mean that these employees would have to work 6 consecutive days. Beyond the fact that we do not share your interpretation, you are aware that the past year, and more specifically the last few months, have been very intense for these employees. Given this, the Employer has substantial concerns related to the impacts that this would have on the health and well-being of these employees who are already overworked.

Finally, I think you would agree that it would be beneficial for the provisions governing the hours of work in the collective agreement be reviewed during the next round of negotiations in order to facilitate their application and reflect current realties [sic] and business needs.

Nevertheless, in the meantime, we are available to continue discussions on this issue with a view to finding a resolution.

[26] Mr. O'Brien responded to the email on April 22, 2021, as follows:

> *You are correct that that the matter of extended hours for the post-filing season was first introduced by you on March 2, 2021, despite the fact that I had been advised that the proposal contained no substantial changes to what was proposed in prior years. I am sure that you will agree that in prior years, no proposals were made and no consultations were held for extended hours in the post-filing season. As you may recall, on March 2, I made it clear that I was not prepared to deal with the post-filing season proposal.*
>
> *…*
>
> *During this consultation, I believe that I was clear that we could attempt to find a resolution to the extended hour proposal, but that it had to be subject to the provisions of the collective agreement and that neither UTE, nor I had the authority to set aside the provisions of the collective agreement. I made that commitment then on behalf of UTE and still hold true to that commitment.*
>
> *…*
>
> *… I also recognize the restrictions on hours of work in the current collective agreement and I remind you that it was me who first suggested to the designated representatives of the employer's Collective Bargaining, Interpretations and Recourse Branch that the parties needed to turn our minds to revisions to the appropriate articles of the collective agreement during the upcoming round of negotiations to address these concerns and issues. In fact, representatives of UTE (including me) and representatives of the CRA are presently in pre-bargaining discussions to discuss the issues and attempt to find agreeable solutions to propose to our principals.*
>
> *In closing, I reiterate our commitment to continued consultations on this matter with a view to determining an agreeable solution, but again, I must advise that neither the employer nor UTE has the authority to set aside the provisions of the collective agreement currently in force and effect. We welcome an opportunity to meet at your earliest opportunity at a mutually acceptable date.*

[27] Mr. O'Brien also wrote that if overtime had not been paid in the past, it was without notice to UTE. He also noted that individual agreements with employees on a Tuesday-to-Saturday schedule were contrary to the collective agreement and constituted an unfair labour practice.

[28] Ms. Sherry was the director of national operations from April 26, 2021, until May 30, 2022. She reported to Mr. Honcoop. Her role was, among others, to set hours of work for all call centres. Her first involvement with consultations with UTE were in April 2021. She testified that new extended hours of work of 8 a.m. to 8 p.m., and

Saturdays from 8 a.m. to 6 p.m., were implemented as of May 1, 2021. She testified that the extended hours included in the 2021 matrix were implemented without the consent of UTE. She did not participate in the consultations with UTE on the 2021 matrix. She testified that CRA did not believe it needed the agreement of UTE for the extended hours of work based on the direction from the government and senior management to expand the hours of service. She also testified that the money to pay for the extended hours of service was in place for the fiscal year 2021-22.

[29] Trixie Gorzo, a team leader at the Calgary call centre, testified about the hours of work there. All employees there received an email from Adrienne Ingleton, its assistant director, on May 3, 2021, announcing that extended service hours would be in place from May 1 to December 31, 2021, with hours on Monday to Friday from 7 a.m. to 8 p.m. and Saturdays from 9 a.m. to 5 p.m. She stated that only those who volunteered to work these hours should have contacted their team leaders. She also noted that all the other provisions of the collective agreement, including weekend and shift premiums, would be applied, as applicable.

[30] Ms. Sherry testified that the email from Ms. Ingleton was not "vetted" by CRA at the national level and that the extended hours were indefinite and not just to the end of December 2021. She also testified that the payment of overtime for working on Saturdays was not consistent across the regions of the organization. She testified that she believed that she found out about this disparity in early 2022. She testified that the Hamilton, Ontario, call centre was also paying overtime for Saturday work.

[31] UTE and CRA met to discuss hours of work on May 13, 2021. Mr. Honcoop wrote the following to Mr. O'Brien on May 17, 2021, after that consultation meeting:

> …
>
> *In response to UTE's feedback, I can share with you that management is prepared to transition away from using permanent employees who volunteered to work a Tuesday to Saturday schedule and we will move towards using term employees who have a shift work clause in their letter of offer.*
>
> *Management will need 4 to 6 weeks for the transition as schedules have already been implemented and additional training will need to be delivered.*
>
> *In addition, in the future management may hold an internal selection processes for permanent employment for the Tuesday to Saturday shift.*

> *Management will only use overtime on Saturdays in exceptional circumstances (i.e., someone called in sick and an additional resource is needed at the last minute).*
>
> *For additional context, it is important to recognize that there are about ~100 permanent employees who are currently volunteering to work the Tuesday to Saturday schedule out of the total contact centre workforce of ~5000.*
>
> *I trust this will satisfy the concerns raised by UTE in the meeting.*

[32] Mr. O'Brien testified that the reference in the email from Mr. Honcoop to "transition away" left him with the impression that CRA had not extended the hours in the post-tax season. In cross-examination, he agreed that Mr. Honcoop did not say that the hours of work had changed. Mr. O'Brien testified that some call centres were using extended hours, and some were not. He stated that Calgary went back to the traditional hours of work and that there were different hours of work for different business lines. He also testified that some call centres relented on the use of Saturday hours of work. In cross-examination, he testified that only after October 15, 2021, did the employer stop paying overtime for work on Saturdays.

[33] On June 9, 2021, National Traffic Coordination — which coordinates some of the call-centre functions — sent an email about the upcoming hours-of-work schedule, including work after 6 p.m. and on Saturdays. Employees were advised that they were all required to identify a minimum of 10 shifts that ended at 8 p.m. Although the email stated that management would select those who volunteered to work to 8 p.m., it warned that it might have to change those preferences, depending on the number of volunteers. Ms. Sherry testified that this email was also not vetted at the national level and that although the hours of work were correct, the method of scheduling was not.

[34] UTE posted an update on hours of work at call centres on July 13, 2021. Mr. O'Brien testified that he drafted the message for the president of UTE's signature. The message reported on the agreement in principle that was reached with CRA, as follows:

> …
>
> *… the parties have reached an agreement in principle which effectively addresses our concerns and allows the employer, within the confines of the collective agreement, to schedule hours of work to meet their operational needs. More specifically, the parties have agreed that the most effective instrument to address each of our issues and concerns are the provisions of clause 25.23 of the*

> *collective agreement with respect to Variable Shift Schedule Arrangements (VSSA).*
>
> *To conclude our discussions in this matter and execute the terms of our agreement in principle, the parties have agreed to the creation of a joint task force to review and analyse the issues surrounding the implementation of VSSA, including but not limited to, the provisions of the collective agreement, employee preferences, the operational needs of the employer with respect to call volumes, service requirements and extended hours, and other such matters. The parties have also agreed that we would also collaborate in the creation of guidelines for the implementation and administration of the VSSA provisions of the collective agreement.*
>
> *Even though the clause [sic] pertaining to VSSA schedules have been in the collective agreement for some time, they have not been applied to our members previously and it will take some time to identify all of the issues and details concerning this matter before implementation. The parties have committed to addressing this matter as a priority and will be earnestly dealing with this matter over the coming months.*

[35] The variable-shift schedule arrangements (VSSA) process is set out in the collective agreement under the provisions for shift work. Clause 25.23 outlines a consultation process at the local level for establishing shift schedules that are different from the shift schedules permitted under the collective agreement.

[36] Ms. Gorzo testified that after July 13, 2021, employees at the Calgary call centre continued to work extended hours until 8 p.m., but the hours of 6 p.m. to 8 p.m. were paid as overtime, and working those hours was voluntary. She also stated that those who had a shift-work notice in their letter of offer were scheduled for the Tuesday-to-Saturday schedule. In cross-examination, she agreed that the agreement at the Calgary call centre was about pay and who would work the extended hours.

[37] Ms. Gorzo emailed Ms. Ingleton on August 4, 2021, including the July 13, 2021, message from UTE. In the email, Ms. Gorzo noted that it appeared that schedules were changed to 8 p.m. without relying on volunteers and that the bargaining agent local had not been consulted. She requested a meeting to discuss the arrangement of shift schedules under the collective agreement. She also asked for the numbers of employees working voluntarily outside the core hours of work. Ms. Ingleton responded that evening coverage was compensated through overtime pay and the late-hour premium. She noted that some employees chose to start work later and work until 8 p.m., while others worked their regular hours plus overtime. For those employees who

chose to work Tuesday to Saturday, no overtime was paid for Saturday work. Ms. Ingleton then clarified that of the 33 employees on the Tuesday-to-Saturday shift, 28 had it as a term of their contract, and 5 requested those days of work.

[38] On August 5, 2021, the manager of client services for the western region, James Bell, emailed staff in that region, announcing upcoming changes in scheduling as a result of the agreement in principle between UTE and CRA to use the VSSA provision in the collective agreement "… to address scheduling outside of our core hours of Monday - Friday 7am to 6pm." He continued as follows:

> …
>
> *With this agreement in principle complete, we must now wait for the negotiated implementation plan for scheduling at the call centre. Until this agreement is reached at the national level we will return to our approach of covering the phones through voluntary scheduling and overtime past 6pm Monday to Friday.*
>
> *This means the following:*
>
> *1. … changes made to cover 8pm closing will be reverted to the originally submitted schedule. Those that offered to work to 8pm* [originally] *… will not be changed and will continue to be eligible for the late hour premium past 6pm.*
>
> *2. Overtime availability will be requested again.*
>
> *3. Overtime approval for phone line coverage past 6pm for Monday – Friday*
>
> *Schedules will be changed from August 9 thru October 26 to retain only those voluntarily working past 6pm. Traffic will focus on adjusting* ***schedules for next week today*** *and will endeavour to have the rest of the cycle updated by Monday. Overtime will be scheduled to cover our call centre hours past 6pm. Watch for that approval as well.*
>
> …
>
> [emphasis in original]

[39] Mr. O'Brien testified that CRA did not tell him before October 15, 2021, that extended hours after the tax-filing season were implemented. He also testified that he had received reassurances from UTE representatives that the imposition of extended hours had been "stayed". He testified that he did receive complaints because the hours-of-work schedules were not applied consistently across the country.

B. The employer's actions after notice to bargain was served (October 15, 2021)

[40] Notice to bargain was served by the bargaining agent on October 15, 2021.

[41] The first meeting of the VSSA task force was on October 19, 2021. A subsequent meeting was held on November 16, 2021. Ms. Sherry was the CRA representative for these consultations. CRA prepared a slide presentation that included the following "Overall approach statement": "Pre-determined schedules with hours **outside** 7AM to 6PM local time Monday to Friday will be determined based on operational needs" [emphasis in the original]. Ms. Sherry testified that the VSSA meetings were not intended to address the matrix but solely to discuss the way CRA was scheduling the extended hours of service. She testified that the parties were trying to find a solution to scheduling employees to cover the extended hours.

[42] At both meetings, CRA stated that under any VSSA, the employer would reserve the right to schedule employees for extended hours or Saturday work, should there not be sufficient volunteers. At a final meeting on December 13, 2021, UTE advised that it was withdrawing from consultations because it could not support involuntary scheduling.

[43] Mr. O'Brien testified that after the breakdown in VSSA discussions, the approach of call centres was inconsistent — some went back to regular hours, and some still imposed the extended hours.

[44] A draft hours-of-work matrix for 2022 was prepared by December 8, 2021, and a meeting was set up with UTE for consultations. On December 9, 2021, Mr. Honcoop asked the meeting organizer to hold off on sharing the matrix as CRA "may need to make some adjustments." The final version was provided to Mr. O'Brien on December 14, 2021. Mr. Honcoop and Ms. Sherry (and others) met with Mr. O'Brien on December 21, 2021. The matrix contained only extended hours for the full calendar year. Mr. O'Brien testified that an agreement could have been reached on extended hours for the tax-filing season.

[45] Ms. Sherry emailed Mr. O'Brien on December 23, 2021, with a revised hours-of-work matrix; she wrote the following:

> …
>
> *Based on the points you raised we have made the following changes.…*
>
> • *As the need after 9PM to complete any calls in the queue is very limited and to respect the extended hours in clause 25.11(b) of the collective agreement, we have adjusted the*

> *end time of the hours of work for Edmonton to 9PM for Monday to Friday.*
>
> *• Recognizing that these hours of work are permanent, we have changed the reference to the dates to indicate effective January 1, 2022, and changed the reference to August 1st to August Long Weekend.*
>
> *We noted your commentary about the hours of work on Saturday. There is a demonstrated need to provide services on Saturdays as we receive thousands of calls from Canadians year round on Saturdays. Our interpretation is that a schedule that includes a Saturday is irregular and as a result employees that have a Saturday in their schedule will be considered shift workers and paid accordingly.*
>
> *With respect to the hours of work and arrangements for the National Traffic Coordination in Ottawa, we will provide additional information in the near future.*
>
> *The CRA is still strongly committed to the union management approach, and to consultations as, and when, needed. Should you request it, or should there be changes to the hours of work in the future we will be glad to engage in consultation discussions.*

[46] Ms. Sherry testified that the revised matrix included in this email was only for discussion and was never issued as there was no agreement from UTE. She testified that the hours of work then reverted to what they had been before October 15, 2021.

[47] Mr. O'Brien testified that the December 23, 2021, email was his first notification that the extended hours would apply to the following and subsequent calendar years. In cross-examination, Mr. O'Brien testified that it was very clear to him that the consultations had been for the upcoming calendar year and that his observation was based not only on past practice but also on the title of the matrix provided for consultation (January-December 2021). Ms. Sherry testified that she had no knowledge of when or how it was communicated to Mr. O'Brien that the changes in hours of work were permanent.

[48] In a communiqué published on the UTE website on December 23, 2021, the UTE president wrote that "… should the employer attempt to impose extended hours or Saturday work involuntarily …", UTE would support the filing of grievances as well as making a statutory-freeze complaint.

[49] Mr. O'Brien testified that he had no idea when the employer implemented the extended hours set out in the matrix sent to him in December 2021. He testified that some call centres had implemented these extended hours before December 23, 2021.

[50] On January 10, 2022, Mr. O'Brien replied to Ms. Sherry's email of December 23, 2021, stating that UTE was opposed to the hours of work set out in the matrix and that it had requested PSAC to file a policy grievance and make a statutory-freeze complaint.

[51] The parties exchanged bargaining proposals in January 2022. The employer's proposals contained proposed changes to the hours-of-work provisions in the collective agreement. Morgan Gay, the negotiator for the bargaining agent, testified that hours of work had been a contentious issue at the bargaining table. He testified that the employer's bargaining proposals included eliminating the requirement to consult with the bargaining agent on hours of work. The bargaining agent's counterproposal was to maintain the status quo. Mr. Gay testified that the parties had reached an impasse in negotiations and that a public interest commission hearing was scheduled for February and March of 2023.

[52] On March 1, 2022, Ms. Sherry provided additional information to Mr. O'Brien about the National Traffic Coordination section as she had promised. She noted that the hours-of-work schedule for this section had been in place since April 2021. She noted some revisions to the matrix that included shorter periods for some offices as employees did not work the range of hours set out in matrix, changes to start times for locations where employees had been starting earlier before October 2021, and editorial changes to reflect changes in the names of call centres. Mr. O'Brien testified that he did not recall receiving this email. He did not agree that the matrix for 2021 and the matrix for 2022 contained the same extended hours.

[53] The bargaining agent filed a policy grievance with CRA on March 7, 2022, alleging the following:

> …
>
> *The Employer is in violation of Article 25, specifically clauses 25.06, 25.07, 25.08, 25.11, 25.12, 25.13, 25.16, 25.17, 25.23 as well as Article 27 and 28 and any other applicable articles of the CRA Collective Agreement.*
>
> *The Employer has altered the work hours of employees at Canada Revenue Agency in contravention of clause 25.06 by extending*

> *their hours of work after 6:00 p.m. for Monday to Friday and by implementing regularly scheduled Saturday work for certain employees without compensation at the applicable overtime rate.*
>
> *On December 23, 2021, the Employer advised the Bargaining Agent by email that it is permanently extending the hours of work of certain Call (Contact) Centre employees up to and including 9 p.m. for Monday to Friday and on Saturdays. The Employer has altered employees' work hours during the statutory freeze period, as the Bargaining Agent served Notice to Bargain on the Employer on October 15, 2021.*
>
> *Furthermore, there is no indication that the Employer intends to pay these employees the Late Hour Premium as required under clause 25.12 (b) or the applicable overtime compensation as it applies pursuant to Article 28.*

[54] As earlier noted, this policy grievance is awaiting scheduling for a hearing.

[55] Mr. O'Brien testified that UTE did agree to extended hours on a temporary basis for several pandemic benefit programs and the crisis in Afghanistan during 2021. He testified that UTE agreed with extended hours for a short period and as long as working those extended hours remained voluntary for employees.

[56] Ms. Sherry testified that there were no call centres with different hours of work from those set out in the 2022 matrix. She testified that call centres were required to adhere to those hours of service strictly. She testified that to her recollection, she never told UTE that the hours contained in the 2021 matrix were temporary.

III. Summary of the arguments

A. For the complainant

[57] The complainant submitted that this complaint is about the treatment by the parties of extended hours of work (after 6 p.m. and Saturdays). In essence, the complaint is about consultation on extended hours that in this case, did not end until December 2021. In the past, UTE and CRA had consulted on hours of work and had reached agreements on hours of work during the tax-filing season, including in 2021. The pattern was that hours of work were approved by UTE. This is demonstrated by the fact that employees were paid overtime for extended hours worked from mid-February until March 2, 2021 (when the consultation started). There was no indication that the parties would not continue to consult on extended hours for each calendar year. Consultations on extended hours continued between the parties through 2021,

and it was not until negotiations broke down in December 2021 that the employer advised that the extended hours were permanent. Mr. O'Brien testified that this was the first time he knew that the extended hours were to be permanent. This occurred after the start of the freeze period.

[58] The complainant noted that the first indication that the respondent was considering extended hours after tax-filing season was on March 2, 2021, when UTE was first consulted on those hours. When Mr. O'Brien received the 2021 matrix, it was clear that extended hours after the tax-filing season were still subject to ongoing consultation. The consultation on these extended hours did not result in an agreement, but the employer left the door open for further consultations. Those consultations took place in the discussions on the VSSA as well as in pre-bargaining discussions.

[59] The complainant noted that in an email of August 5, 2021, Mr. Bell stated that the Calgary call centre would return to the approach of the voluntary scheduling of overtime past 6 p.m., Monday to Friday. The complainant submitted that it was incredible to think that Mr. Bell did not obtain this information from an official source. It submitted that this commitment by Mr. Bell was indicative of the agreement between Mr. O'Brien and Mr. Honcoop. The evidence of Ms. Sherry is hearsay, and faced with the direct evidence of Mr. O'Brien, it should be ignored.

[60] The complainant submitted that the matrix provided by Ms. Sherry in December 2021 was much different from previous versions, which signalled a different approach by the employer and triggered this freeze complaint.

[61] The complainant submitted that the terms and conditions that are subject to the freeze provisions include terms based on past practices that could be included in a collective agreement (see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 at paras. 163 and 169). This complaint is not a collective agreement interpretation case — the policy grievance is pending. The term and condition at issue in this complaint is a term and condition based on past practice — the consistent consultation on hours of work.

[62] The complainant submitted that s. 107 of the *Act* is a strict liability provision: it does not matter if the employer had good reason to implement the change, and there is no requirement to find anti-union animus (see *Public Service Alliance of Canada v.*

Treasury Board (Correctional Service of Canada), 2017 FPSLREB 11 at paras. 60 and following).

[63] The complainant submitted that the two-stage analysis in freeze cases was affirmed by the Federal Court of Appeal in *Canada (Attorney General) v. National Police Federation*, 2022 FCA 80 ("*NPF no. 2*"). There are four elements in the first stage, as follows:

1) The condition of employment existed on the day that the freeze started. In this case, the condition of employment was the consultation and agreement on annual hours of work at call centres.
2) The condition of employment was changed without the consent of the bargaining agent. In this case, the change was imposed unilaterally by the employer on December 21, 2021.
3) The change was made during the freeze period; that is, after notice to bargain was served.
4) The condition is capable of being included in a collective agreement. In this case, there should be no dispute that scheduling is a contentious bargaining issue.

[64] Once these four elements have been met, the second stage involves the consideration of the employer's defence that it was simply doing business as before, the complainant submitted. Another way of analyzing the employer's actions is the "reasonable expectations" approach as outlined in *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11 at para. 63. The complainant directed me to the further elaboration of the test in *National Police Federation v. Treasury Board*, 2020 FPSLREB 44 ("*NPF no. 1*") at paras. 53 and following.

[65] The complainant submitted that the "business as before" was a pattern of consulting on hours of work. The door on that practice was not closed before notice to bargain was served. The consultation did not end until the consultation for the VSSA ended after the start of the freeze period.

[66] The complainant submitted that the potential argument of the respondent that the "wheels were in motion" is not supported by the facts — the reasonable expectations of Mr. O'Brien, the negotiator on behalf of the employees, are what matter. The employer represented to Mr. O'Brien that the consultations would continue as they had done in the past and that was his expectation until December 2021, when he was advised that the employer had made a final decision.

[67] The complainant submitted that the testimony of Ms. Sherry was mostly hearsay because she was not involved in extended hours until much later in the process. To the extent that her testimony differs from Mr. O'Brien's, his version should be preferred.

B. For the respondent

[68] The respondent submitted that the term and condition at issue in this complaint should be taken from the complaint as made. In the complaint, the complainant's agent stated that the term and condition was the agreement of UTE to the changes in hours of work. The complaint is not about pay or consultations, and only at this hearing is the complainant trying to recharacterize the term and condition as being about consultation.

[69] The respondent submitted that if the term and condition in question was about consultations, then the Board would be required to determine the meaning of "consultation" to determine when that process was completed. This would require collective agreement interpretation — which is the subject matter of the policy grievance that has not yet been scheduled for a hearing. The respondent submitted that the complainant was conflating the policy grievance with the complaint.

[70] The respondent submitted that it was clear that Mr. O'Brien wrongly assumed that if discussions on hours of work were ongoing, the respondent had made no firm decision about extended hours. The respondent submitted that the term and condition of employment changed no later than May 2021, when employees continued to work extended hours after the end of the tax-filing season. They have continued to work those hours.

[71] In the alternative, the respondent submitted that any change in hours of work after the freeze period was consistent with normal practice. The complainant was aware of the employer's decision to extend hours outside the tax-filing season as of January 8, 2021. In other words, the practice of setting extended hours of work by consent ended when the employer stated in January 2021 that it would be extending hours for the full calendar year.

[72] The respondent submitted that by at least mid-April 2021, employees were aware that extended hours would continue past the end of tax-filing season. This was confirmed by emails sent by Mr. O'Brien and in his testimony that he was besieged by

emails from his members. The respondent submitted that the hours of work were firmly set and that ongoing discussions were about the method of scheduling and how the collective agreement would be applied in terms of pay. These ultimately unsuccessful discussions occurred in the consultations on a VSSA.

[73] Mr. O'Brien testified that there was an inconsistent approach to extended hours at three call centres. However, the respondent submitted that only evidence related to the Calgary call centre was called. It submitted that the bulletin of July 2021 stated that the agreement in principle was limited to scheduling and collective agreement application, not the extended hours of work themselves.

[74] The respondent submitted that although the matrix for 2022 that was sent to the bargaining agent in December 2021 contained additional extended hours, Ms. Sherry testified that these hours were never implemented. The respondent submitted that Ms. Sherry's testimony was the only evidence on this point and that it should be accepted.

[75] The respondent noted that the revised matrix for 2022 sent in March 2022 had the same hours as the 2021 matrix. The only change was to adjust the hours of the National Traffic Centre to correspond with the actual hours in place from 2021. The hours set out in the March 2022 matrix were implemented and remain in place to date.

[76] The respondent referred me to the Supreme Court of Canada's decision in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 ("*Walmart*") at paras. 39 and 57. The respondent submitted that the Supreme Court made it clear that a freeze does not paralyze the working environment but allows for changes that are consistent with the rules and with employer business practices. The respondent also referred to the "reasonable expectations" test and submitted that those expectations were from the perspective of the employer, which does not consider the reasonable expectations of the employees.

[77] The respondent submitted that it was taking the same position it took in *NPF no. 1* and in the judicial review of that decision (*NPF no. 2*). The respondent stated that leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada has been sought. After the hearing of this complaint, leave to appeal was denied by the Supreme Court of Canada (2023 CanLII 14937).

[78] However, the respondent submitted that this complaint does not require the application of the reasonable-expectations test because there is no doubt that the complainant and employees were aware of the change in hours of work long before the freeze.

[79] The respondent referred me to *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107 ("*Firebird*"), and submitted that the facts in this case should lead to the same conclusion that there was no breach of the statutory-freeze provision.

[80] The respondent submitted that although it did not agree with the articulation of the test set in *NPF no. 1*, it had met the test in this case. The employer also submitted that the changes set out in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110 ("*Sudbury Tax Office*"), occurred months after the freeze period started, which is not the case in this complaint. In *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16, the Board determined that the employer's decision was not final until it was implemented and should be limited to the facts of that complaint.

[81] The respondent submitted that the decision in *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68, did not apply the business-as-usual test.

[82] The respondent submitted that the complaint should be dismissed.

[83] If the complaint is allowed, the respondent submitted that the remedy should be limited to a declaration. It submitted that there is no need to post the decision as the complainant can send the information to its members. The respondent submitted that the purpose of posting is to inform, not shame.

[84] The respondent submitted that the Board does not have the jurisdiction to order that the parties consult as the Board cannot make an order that would have the effect of amending the collective agreement. The respondent submitted that the permanence of the change in a term and condition of employment is not part of the test of a breach of a statutory freeze and is not a consideration when crafting a remedy.

[85] The respondent submitted that it is not appropriate to dismiss Ms. Sherry's evidence solely on the basis that it was hearsay. Her evidence was reliable and was corroborated through email exchanges.

C. The complainant's reply

[86] The complainant submitted that the complaint is not just about the hours of work — it is about how those hours of work were implemented. Mr. O'Brien was candid that the unilateral implementation of changes in hours of work would impact the payment for those hours. The complainant submitted that there was no discussion of mandatory hours of work at the January and February 2021 meetings.

[87] The complainant submitted that the Board has not accepted the employer's argument that the law has changed as a result of the *Walmart* decision. It also noted that the Federal Court of Appeal agreed with the Board's approach in the judicial review of the *NPF no. 1* decision. The complainant submitted that I should apply the existing law and that I should reject the novel arguments put forward by the employer. The complainant also submitted that the cases relied on by the respondent are distinguishable on the facts.

IV. Reasons

[88] The complainant has also filed a policy grievance relating to the imposition of extended hours of work outside the tax-filing season. That policy grievance is not yet scheduled for a hearing, and therefore, I have not addressed it. The Board's sole role in this complaint is to determine whether the employer breached s. 107 of the *Act*.

[89] The purpose of a statutory-freeze provision such as s. 107 of the *Act* is to provide both parties with a "… firm and stable frame of reference from which bargaining can proceed" (see *The Queen v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 at page 91).

[90] The parties agree that a statutory-freeze complaint requires a two-stage analysis. In *Sudbury Tax Office*, the Board summarized the two-stage analysis as follows (at paragraph 137):

> *[137] … First, it tests whether a complainant has met its principal evidentiary burden of establishing that notice to bargain was served, that an employer subsequently changed a term and condition of employment that might have been included in a*

> *collective agreement and that was in force on the date notice to bargain was served, and that the complainant did not consent to that change. In the second stage, the Board considers any defence offered by the employer that despite the fact of a change in a term and condition of employment within the meaning of s. 107, its action did not comprise a violation of s. 107, most often because it was conducting "business as usual". In some cases, the Board views business as usual as an approach permitting a complainant to discharge its burden of proof by demonstrating that a term and condition of employment was in place before notice to bargain was served but subsequently was changed by the employer, in violation of s. 107.*

[91] The burden of proof rests on the complainant in both stages of the analysis.

1. Was there a change in a term and condition of employment during the freeze period?

[92] There is no dispute that notice to bargain was served by the complainant on October 15, 2021. There is also no dispute that extended hours of work after the end of the tax-filing season were implemented without the complainant's consent. It is also not disputed that provisions related to hours of work, generally, can be included in a collective agreement (and, of course, are already included in the expired collective agreement between the parties). Where the disagreement lies between the parties is whether the change in the term and condition occurred before or after October 15, 2021.

[93] The critical determination of the timing of the change hinges on what the term and condition of employment is that the complainant alleged has changed. The starting point for identifying the term and condition at issue is a review of the complaint made by the complainant and its characterization of that term and condition. In the complaint, the complainant stated as follows:

> …
>
> *26. …*
>
> *• There was a condition of employment that existed through past practice when the notice to bargain was served, specifically that hours and days of work other than the regular hours and days of work in the collective agreement would only be scheduled on the mutual agreement of CRA and UTE ….*
>
> …

[94] In its rebuttal to the respondent's reply to the complaint, the complainant further elaborated on the term and condition at issue in this complaint, as follows:

> …
>
> *… The regular days and hours of work in the collective agreement have only been departed from with the express agreement of UTE on a temporary basis in specific years, which was not provided in this instance.…*
>
> *7. Further, except for during the current freeze period, the Employer has never scheduled permanent year-round extended hours, including mandatory Saturday shifts. Even if the collective agreement allowed these shifts to be unilaterally imposed, the Employer could not depart from the established pattern of behaviour during the freeze period.*
>
> …
>
> *9. The Complainant's position is that there was a condition of employment that existed through an established pattern of behaviour when the notice to bargain was served: specifically, that hours and days of work other than the regular hours and days of work in the collective agreement would only be temporarily scheduled, and only with the mutual agreement of CRA and UTE. This is the condition of employment that was changed by the Employer's unilateral imposition of permanent extended hours of service and mandatory Saturday shifts in January 2022 for the duration of the calendar year, over UTE's objections and without UTE's consent or approval.*
>
> …
>
> *16. … even if the Employer had complete unilateral discretion (which PSAC maintains it does not in this context), it cannot during the freeze period schedule permanent year-round extended hours including mandatory Saturday shifts, as there is no pattern of the Employer previously doing so.*

[95] In its submissions at this hearing, the complainant focused on the consultation on extended hours of work and the permanency of the change to extended hours of work.

[96] I conclude from the complaint, rebuttal and submissions at the hearing that the term and condition of employment that the complainant has alleged was changed after the commencement of the freeze period was the permanent change in hours of work, without UTE's consent. The complainant's position is that this change occurred with the imposition of extended hours as of January 2022. The respondent's position is that

the change in hours of work occurred before the commencement of the statutory freeze.

[97] After reviewing the documentary evidence and the testimony, I make the following findings:

- Before May 2021, extended hours of work were agreed to by UTE and were only for the tax-filing season or other time-limited periods.
- Extended hours of service were raised at the January or February 2021 meetings related to the Fall Economic Statement, but the respondent explicitly stated at those meetings that changes were subject to consultation with UTE.
- The summary of the January and February 2021 meetings indicated that the respondent was planning to extend hours of service for the balance of the year (2021).
- The proposed matrix provided to UTE in March 2021 was only for the 2021 calendar year.
- On April 6, 2021, Mr. Honcoop stated that extended hours of service would continue after the tax-filing season, and on April 19, 2021, he reiterated the respondent's position that extended hours would continue "for the balance of the year".
- The assistant director at the Calgary call centre indicated in May 2021 that extended service hours would be in place from May 1 to December 31, 2021.
- After May 1, 2021 (after tax-filing season), extended hours of service were implemented at all call centres.
- On May 17, 2021, Mr. Honcoop stated (referring to a meeting on May 13, 2021) that the respondent was "transitioning away" from scheduling employees who volunteered to work the extended hours, but he did not indicate any change in the extended hours of service (in other words, the extended hours of work remained in place).
- After the agreement to discuss the VSSA (before October 15, 2021), extended hours of service continued, although at least at the Calgary call centre, the respondent returned to using volunteers or those with shift-work requirements in their letters of offer.
- The draft matrix for the 2022 calendar year was provided to UTE in December 2021, after the commencement of the freeze period.
- Initially, the draft matrix was only for the 2022 calendar year, and only on December 23, 2021, were the dates changed to reflect a permanent change in hours of work (in other words, for 2022 and beyond).
- The extended hours of work as of January 1, 2022, and ongoing were the same extended hours of work that were implemented as of May 1, 2021.

[98] Based on these findings, I find that the respondent implemented extended hours of work without the consent of UTE before the commencement of the freeze period. However, that change to a term and condition of employment before the freeze period was implemented only for the 2021 calendar year. Before the commencement of the freeze period, Mr. Honcoop was clear that the extended hours were to be in place only for "the balance of the year"; that is, until December 31, 2021.

[99] The matrix for 2022 was prepared by the respondent and shared with UTE after the commencement of the freeze period. Only when UTE first received the new matrix did it become aware that extended hours outside the tax-filing season were being proposed by the respondent for 2022. Only on December 23, 2021, did UTE become aware that the extended hours of service were permanent — that is, for the 2022 calendar year and ongoing.

[100] The imposition of extended hours of work without the consent of UTE occurred before the commencement of the freeze period (in May 2021). Therefore, the imposition of extended hours of work with the consent of UTE was no longer the practice that existed before the freeze. The practice that existed before the freeze was consultations on extended hours of work on an annual basis for the upcoming calendar year. That practice was unilaterally changed by the respondent after the commencement of the freeze period (in December 2021), when it changed the extended hours-of-work schedule permanently and not just for 2022.

[101] I do not accept the respondent's argument that the permanence of a change is not included in the determination of whether there was a breach of the statutory freeze provisions. In this case, the change in the term and condition was from an annual consultation to no further consultations which I find is a material change.

[102] Therefore, I find that there was a unilateral change to a term and condition of employment after the commencement of the freeze period.

2. Was the change "business as usual" or within "reasonable expectations"?

[103] I now turn to the second stage of the analysis. It has long been accepted by the Board and other labour boards that a statutory freeze does not require an employer to maintain a completely static work environment. Therefore, some changes may be made without violating the freeze provision if the changes are business as usual for the employer or if they are within the employees' reasonable expectations, or both (*NPF no. 1*, at para. 49).

[104] I first note that the Federal Court of Appeal, in *NPF no. 2*, has firmly rejected the respondent's position that the analysis in *Walmart* has fundamentally changed the interpretation of statutory-freeze provisions. At paragraph 43, the Court notes that the respondent's position "… would mark a radical change in the way most labour boards

have applied statutory freeze provisions over the last several decades." The Court continued at paragraphs 90 to 95 as follows:

> *[90] Second, the Board's interpretation of* Wal-Mart *squarely conforms to the labour precedents decided both before and after* Wal-Mart. *This is a strong – if not decisive –* indicia *of its reasonableness.*
>
> *[91] Indeed, were the applicant's interpretation of* Wal-Mart *to be accepted, it would largely undermine statutory freeze provisions in labour legislation and allow employers to make unprecedented changes to employee wages and working conditions during a freeze period so long as there was a business justification for the decision that is not tainted by anti-union animus and management had reached the decision internally before the freeze commenced. However, there are other provisions in labour legislation that prohibit employer actions tainted by antiunion animus (in the FPSLRA, for example, in ss. 186(1) and 186(2)). The applicant's interpretation would lead to the unreasonable result of rendering the freeze provisions largely superfluous by giving them the [sic] much the same scope of operation as these other provisions.*
>
> *[92] Third, with respect, I believe that the applicant has taken some of the comments in paragraphs 55-57 of* Wal-Mart *out of context and placed an undue emphasis on a few of the words used by the majority of the Supreme Court in those paragraphs. As noted, the fact pattern in* Wal-Mart *involved a store closure. The employer's arguments in* Wal-Mart *centred on what was asserted to be the fundamental principle that an employer cannot be required to continue in operation against its will and possesses a fundamental right to cease operations. By definition, there cannot ever be a prior pattern of ceasing operations. Thus, the business as usual exception to the statutory freeze did not fit the situation in* Wal-Mart.
>
> *[93] The Supreme Court found that* Wal-Mart *violated the freeze because it was unreasonable for it to have closed a profitable store following certification in the absence of any prior plans to do so. In so deciding, the Supreme Court applied an objective test that is not unlike the reasonable employee expectations test.*
>
> *[94] Whether viewed from the point of view of the employer or the employees, what is evaluated is whether the decision to impose a change is a reasonable one in light of the prohibition on making unilateral change to employees' terms and conditions of employment during the period of the freeze. In other words, the Supreme Court in effect asked whether a reasonable employer, aware and desirous of complying with the freeze provisions, would have closed the store. It answered no, in part, because so doing would have contradicted the reasonable expectations of its employees.*

> *[95] In sum, I agree with the Board that the Supreme Court intended to apply and not fundamentally alter the decades of labour board jurisprudence in* Wal-Mart.*…*
>
> *…*

[105] The Supreme Court in *Walmart* set out the two ways to determine whether a specific change in a term and condition of employment is permitted during a freeze period (at paragraphs 55 to 56), as follows:

- the decision maker must be satisfied that the change was made in accordance with the respondent's past management practices; or, failing that,
- the respondent must continue to be able to adapt to the changing working environment, consistent with what a "reasonable employer in the same position" would have done.

[106] In this case, the respondent did not have a past management practice of imposing extended hours of work on a permanent basis. As discussed earlier, the past practice was consultation on extended hours of work for the upcoming calendar year, followed by the implementation of extended hours for the calendar year, with or without the consent of UTE. During the freeze period, the respondent started out by acting in accordance with the usual management practice when it initially proposed a schedule of extended hours only for 2022. Had it stopped at that point and unilaterally implemented extended hours for the period of January 1 to December 31, 2022, as it had done prior to the statutory freeze period it would have been within normal management practice (even though it remains to be determined, in the policy grievance, if that management practice is in accordance with the collective agreement) and not a breach of s. 107 of the *Act*. However, when the respondent amended the matrix and on December 23, 2021, advised UTE that the extended hours would be permanent, that is, for 2022 and beyond, it deviated from its normal management practice.

[107] A change in a term and condition of employment can be made during a freeze period without violating the freeze provision if the change was within the employees' reasonable expectations (see *NPF no. 1*, at para. 78). To be within the employees' reasonable expectations, there must have been a firm decision to make the change that was communicated to the employees before the onset of the freeze period, or a change must be part of an established pattern such that the employees would reasonably expect it (see, for example, *NPF no. 1* and the cases it cites at paragraph 78).

[108] The key to determining reasonable expectations is determining what CRA call-centre employees and UTE knew by the time notice to bargain was served (*Firebird*, at para. 50). In *Firebird*, the Board's predecessor concluded that by the time notice to bargain was served, any pattern that had existed with respect to the ship's operations was already destabilized and could not be counted on to continue. However, in this case, employees and UTE had been given assurances before the notice to bargain that extended hours of work would be in place only for 2021. Although it might have been clear in Ms. Sherry's mind that the change was to be permanent, there is no evidence that this was ever communicated to UTE or the employees. It was first communicated to UTE that the change would be for 2022 and future years after the notice to bargain was served (on December 23, 2021).

[109] The respondent's position that the change to permanent extended hours was part of an established pattern or was "in motion" before the commencement of the freeze period is also not supported by the facts. As discussed, the recent pattern had been changes to hours of work on an annual basis, which was a reasonable expectation of employees at call centres. As noted in *NPF no. 1*, at para. 82, to be credible, "… the concept of 'wheels in motion' has to mean work being done to implement a firm decision that employees know about. Wheels turning silently on an exclusively inside track mean nothing."

[110] In communications from Mr. Honcoop, and in the testimony of Ms. Sherry, it was suggested that the imposition of extended hours was done because of the government's Fall Economic Statement and the minister's mandate letter. I have already determined that Mr. Honcoop (who did not testify) referred only to extended hours of service for 2021. As in *Sudbury Tax Office*, the implications of s. 107 of the *Act* were likely not in the forefront of the respondent's mind when it implemented permanent extended hours of work. I also accept the reasoning in *Sudbury Tax Office* as follows on why a finding that the employer might have made the same change in the absence of a notice to bargain is not relevant:

> …
>
> *[169] My approach to applying s. 107 of the* Act *cannot leave the respondent with unfettered freedom of action; I must similarly give the statutory freeze real meaning and force. To be sure, s. 12 of the* Interpretation Act *(R.S.C. 1985, c. I-21) in the Board's jurisdiction imposes the same requirement that I give to s. 107 of the* Act*, which is, as per s. 12, "… such fair, large and liberal*

> *construction and interpretation as best ensures the attainment of its objects."*
>
> *[170] … To suggest that Mr. Bouchard could continue to exercise his powers and significantly alter past management practice after notice to bargain was served as if nothing changed would be to do exactly what* Walmart *says should not happen:* ***"To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit"*** *[emphasis added]. A finding that the respondent might have proceeded to change hours of work in the way it did had the complainant not served notice to bargain — a finding that may not even be required or appropriate given the precondition stated at paragraph 56 of* Walmart *— is, in my view, far from a compelling reason to fail to give s. 107 of the* Act *its required broad and liberal application.*
>
> *[171] If the collective bargaining regime that lies at the heart of the* Act *is to function effectively within the purposes stated by the* Act *in its preamble, it is essential that an employer respect the injunction against unilateral changes in terms and conditions of employment during the s. 107 statutory-freeze period. The grounds for a business as usual exception must be constructed conservatively, in my view, to not frustrate the compelling purpose of s. 107.…*
>
> *[172] … The respondent changed a term and condition of employment that might have been included in the collective agreement after notice to bargain was served, without the consent of the bargaining agent. The change did not conform to past management practice. Based on the evidence, it cannot safely be concluded that a reasonable employer would have acted in the same fashion in the same or similar circumstances. While one might accept that Mr. Bouchard and his team would have implemented the same changes in the absence of the notice to bargain, to hold that therefore, the respondent was free to exercise its powers in the way that it did as if nothing happened, would risk rendering s. 107 of the* Act *meaningless.*
>
> …
>
> [Emphasis in the original]

[111] I find that the change in the term and condition of employment was not part of a consistent management practice and was not a reasonable expectation of employees at CRA call centres. Accordingly, the complaint is allowed.

V. Remedies

[112] Since the term and condition of employment that was changed during the freeze period was limited to the consultation on extended hours of work on an annual basis, I find that the remedy should be limited to a declaration.

[113] The imposition of extended hours without the consent of the complainant occurred outside the freeze period, and any issues related to that imposition can be addressed in the policy grievance. Similarly, since the imposition of extended hours was made before the commencement of the freeze period, it would be inappropriate to order the respondent to cease imposing the extended hours that it had imposed prior to the statutory freeze period or to order the other remedies sought by the complainant. It is important to note that this complaint relates solely to whether a change in a term and condition was a breach of s. 107 of the *Act*, not whether the respondent had the authority under the collective agreement to extend hours of work without the consent of UTE.

[114] While ordering that the employer maintain its consistent management practice of consulting on changes in hours of work would be the usual remedy for a breach of the *Act*, I find that it is not appropriate in the circumstances. In determining an appropriate remedy under the *Act*, its preamble can provide some guidance. The preamble includes the statement that "…harmonious labour-management relations is essential to a productive and effective public service".

[115] The policy grievance referred to adjudication by the bargaining agent is not before this panel of the Board in this complaint. However, the parties included it in their joint book of documents. The corrective action being sought in that policy grievance includes:

> 1. A declaration that the employer has breached Articles 25 and 27 and 28 of the collective agreement and a posting of that declaration;
> 2. An immediate reinstatement of employees to their normal hours of work pending consultation and agreement with the bargaining agent;
> 3.. Consultation with the bargaining agent to obtain consensus on any proposed changes to work schedules;

[116] The bargaining agent has alleged in its policy grievance that any consultation must result in a "consensus" or "agreement" on changes in the hours of work. The employer clearly disagrees with this interpretation of the collective agreement. Under

these circumstances, ordering a return to consultations for extended hours of work beyond December 31, 2022, would be an empty exercise. In addition, ordering that the parties consult at this time on the hours of work at play in this complaint would not be a productive use of the parties' resources while engaged in the collective bargaining process, where hours of work are already the subject of negotiations.

[117] Accordingly, I find that it would serve no labour-relations purpose to order a consultation on extended hours of work for the period beyond 2022.

[118] I also decline to order that the order of the Board be posted at call centres and on the CRA internal website. The complainant has not identified a demonstrable need for the posting of the Board's order.

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

(The Order appears on the next page)

VI. Order

[120] The complaint is allowed, in part.

[121] I declare that the employer violated s. 107 of the *Federal Public Sector Labour Relations Act* when it unilaterally implemented permanent extended hours for the period beyond December 31, 2022, without consultation.

April 17, 2023.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board