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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: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Andrew Astritis and Simcha Walfish, counsel

For the Respondent: Richard Fader and Larissa Volinets Schieven, counsel

Heard at Ottawa, Ontario,
January 20, 21, and 24, 2025.

REASONS FOR DECISION

I. Overview

[1] The Public Service Alliance of Canada (PSAC) has made a bad faith bargaining complaint against the Canada Revenue Agency (CRA). PSAC alleges that the CRA bargained in bad faith by failing to disclose the fact that it was about to end a number of term contracts of call-centre workers early and that it was not going to extend the contracts of other call-centre workers on term contracts that expired in May 2023. The effect of this decision was that a large number of call-centre workers did not receive a $2500 signing bonus negotiated by PSAC because their employment ended before PSAC and the CRA signed a new collective agreement on June 27, 2023.

[2] This complaint raises three issues.

[3] The first issue is whether the CRA bargained in bad faith by failing to disclose this information to PSAC. In a complaint based on the duty of unsolicited disclosure, a bargaining agent needs to demonstrate three things: that the employer's decision has crystallized sufficiently to require disclosure, that the decision has a significant impact on the bargaining unit, and that it did not have any forewarning of the decision that would have triggered its obligation to ask questions. In this case, there is no dispute that the CRA made its decision before concluding the collective agreement. I have also concluded that the decision had a significant impact on the bargaining unit. The difficult issue is whether PSAC was forewarned about the decision. I have concluded that the warnings that the CRA provided about potential job losses were too vague and were contradicted by increased hiring, so that PSAC was not put on notice about job losses during the critical window of time when eligibility for the $2500 signing bonus was at stake.

[4] The second issue is whether PSAC's decision to ratify and sign a collective agreement after being informed of the CRA's decision cures the breach of the duty to bargain in good faith. I have concluded that it does not. The timing of the CRA's decision, made during a strike, and its disclosure after that strike was over deprived PSAC of the opportunity to negotiate different terms and conditions in light of that decision.

[5] The third issue is remedy. I have decided not to award damages in this case because the likelihood that PSAC would have negotiated different eligibility conditions for the $2500 signing bonus even if there had been timely disclosure is too low. I will issue a declaration of a breach of the duty to bargain in good faith, but that is all.

[6] My detailed reasons follow.

II. Procedure followed in hearing this complaint

[7] The CRA filed a preliminary motion to dismiss this complaint on the grounds that entering into a collective agreement after the events complained of meant that the complaint was moot or raised no arguable case. I dismissed that preliminary motion in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2024 FPSLREB 57 ("the *Preliminary Decision*"), and provided lengthy reasons for doing so.

[8] PSAC submits that the conclusions reached in that case are not binding because a conclusion reached when deciding a preliminary motion to dismiss a claim is not binding at the merits stage. PSAC cites *Ducap v. Canada (Attorney General)*, 2021 FC 631 for that proposition. At paragraph 5 of that decision, the Federal Court stated simply that the issue in that judicial review (which was whether a recommendation that an inmate receive medical treatment was reviewable) "… was addressed previously in a preliminary motion to dismiss the application; however, this is not binding on the Court …".

[9] In support of that proposition, the Federal Court cited *Fournier v. Canada (Attorney General)*, 2019 FCA 265 at para. 29. In that case, an appellant won on judicial review but appealed anyway because he was dissatisfied with the reasons given by the Federal Court for his victory. The Federal Court of Appeal dismissed the appeal based on the general principle that a party appeals orders, not reasons. The Attorney General had previously attempted to strike the appeal on that very ground, but the Court of Appeal dismissed that motion. The Court of Appeal stated as follows:

> *[29] During the hearing, counsel for the appellant argued that Justice Boivin had dismissed a motion to strike based on this very reason that had been filed by the Attorney General (order of Justice Boivin dated on September 25, 2018). However, it is well established that a decision rendered on a preliminary motion,* ***especially when it is unaccompanied by reasons****, is not binding on the Court when it hears the case on the merits.*

[Emphasis added]

[10] PSAC's submission is usually the one made by a party in the CRA's position in this case — namely, the fact that I decided that PSAC's claim should not be dismissed as disclosing no arguable case does not prevent the CRA from running the same arguments over again. That was the situation in both *Ducap* and *Fournier*; the Attorney General lost preliminary motions to strike both cases but won on the merits by using the same arguments that they tried to use in the preliminary motions. That is the limit of the proposition advanced by PSAC: the *Preliminary Decision* does not prevent either party from rerunning the same arguments.

[11] Later in this decision, I address PSAC's specific arguments about why the *Preliminary Decision*'s reasoning was wrong. There are also many parts of the *Preliminary Decision* that neither party disagrees with; I will sometimes simply refer to those parts instead of reproducing them in this decision.

III. Whether the CRA breached the duty of unsolicited disclosure

[12] I outlined the history and basis of the duty of unsolicited disclosure in the *Preliminary Decision*, in particular at paragraphs 23 and 36 to 42 of that decision. I do not propose to go into detail about the history and basis of this duty again.

[13] The parties to this complaint do not dispute the legal approach to the duty of unsolicited disclosure. The parties agree that the duty of unsolicited disclosure has three elements: there must have been a decision (instead of just an idea), the decision must have a significant impact on the bargaining unit, and the employer must not have provided the necessary disclosure of either the decision or enough information that the union or bargaining agent should have asked more questions about it. These three elements are summarized nicely in *University of Manitoba Faculty Association v. University of Manitoba*, 2018 CanLII 5426 (MB LB) at pages 53, 62, and 63:

…

> *The disclosure requirement is not limited to circumstances in which a party specifically requests information. A duty of unsolicited disclosure has developed in labour law over the course of the past 40 years and is now well-established in this and other Canadian jurisdictions. It has been described as "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision or* de facto *decision that it has already made*

> *which will have a significant impact on the employees in the bargaining unit.*
>
> …
>
> *The duty of unsolicited disclosure requires there be full and frank discussion about issues arising out of the disclosure. Hints, vague comments, and cryptic messages … do not satisfy the obligation to make unsolicited disclosure.…*
>
> …

[14] I will address these three elements of the duty of non-solicited disclosure in order. While the parties do not dispute that there was a decision made before they reached a tentative collective agreement, I will begin with that element of the test to describe the nature and timing of the decision in this case. I will then explain why the decision had a significant impact on the bargaining unit. Finally, I will address my conclusion that the employer did not provide enough information about the decision to meet its obligations.

A. Overview of collective bargaining process

[15] Since this is a bad faith bargaining complaint, I will begin with a brief chronology of the collective bargaining before discussing the call centre.

[16] The previous collective agreement between PSAC and the CRA expired on October 31, 2021. PSAC served notice to bargain on October 15, 2021. The parties went to a Public Interest Commission, which issued its decision on February 14, 2023.

[17] PSAC went on strike on April 19, 2023, at both the CRA and for a number of bargaining units at the Treasury Board. It reached a tentative agreement with the Treasury Board on April 30, 2023, ending that strike.

[18] PSAC and the CRA returned to the bargaining table on May 1, 2023, in light of the end of the strike at the Treasury Board. According to the testimony of PSAC's negotiator, Morgan Gay, the agreement reached between the Treasury Board and PSAC included a $2500 lump-sum payment for everyone employed as of the date of the signature of the collective agreement. He explained that initially, PSAC did not want a lump-sum payment (because it wanted regular wage increases instead). It pivoted on May 2 to agreeing to a lump-sum payment, but it wanted more than $2500 and to have it paid on the date PSAC's members ratified the agreement instead of its signature date. Ultimately, PSAC and the CRA reached a tentative agreement late on May 3, 2023.

The tentative agreement reached between PSAC and the CRA included a term that every person employed in the bargaining unit as of the date of the signature of the collective agreement would receive a $2500 lump-sum payment.

[19] Employees (including call-centre agents) returned to work the next day. The parties signed the collective agreement on June 27, 2023.

B. The decision to end the employment of call-centre workers

1. Background: the nature of call-centre work at the CRA before the COVID -19 pandemic

[20] Probably every Canadian has an interaction with a call-centre worker at the CRA at some point in their life, to deal with some tax or benefit issue. The CRA calls its call centres “contact centres”, but I have decided to use the more common term, “call centre”, in this decision.

[21] Before the COVID-19 pandemic, the CRA had three major telephone lines for Canadians to call with inquiries: a line to help individuals with their income taxes, a line to deal with benefits (such as, for example, GST credits), and a line to deal with business inquiries (such as, for example, registering a GST number). Of those three, the income tax line had the largest volume by far; approximately 70% of calls were about individual tax returns. The CRA has call centres in eight locations: Surrey, British Columbia, and Edmonton and Calgary, Alberta (collectively, “the Western region”); Hamilton and Toronto, Ontario (collectively, “the Central region”); Montréal, Quebec (“the Quebec region”); and Saint John, New Brunswick, and Saint John’s, Newfoundland (collectively, “the Atlantic region”). Since 2018, when a Canadian calls the help line, they can connect with a call-centre agent in any of those eight locations.

[22] Pre-pandemic, the CRA oscillated between 2500 and 3500 call-centre agents, depending on the time of year. It has a spike in calls shortly before income taxes are due on April 30. Therefore, it hired approximately 600 term employees every December or January to deal with that spike in calls. Roughly 350 of these term employees would be let go in May after that tax season spike had ended. There was another, smaller spike in calls in July to deal with some benefits administered by the CRA, so some of the term employees would be kept on through that period until September when they would be let go. The low point in the CRA’s call-centre staff count was usually December, when it would ramp up again for tax season.

[23] The term employees hired each December or January had contracts that spelled out the length of their terms. The terms of their contracts usually ended sometime in May. The contracts all had clauses stating that they could be lengthened or shortened, depending on operational requirements.

2. Change in staffing levels during the COVID-19 pandemic

[24] The pandemic upended this staffing model because the CRA was responsible for administering a number of new benefits for Canadians. When the pandemic hit in March 2020, the CRA was already at its normal peak for its call-centre staff. Rather than let them go in May of 2020, it kept them on to deal with calls about pandemic benefits. It then hired almost 3000 more call-centre agents between October 2020 and March 2021 to deal with the volume of calls.

[25] In 2021, the CRA decided to extend all its term employees through to May 2023. The employer filed copies of some of these extensions, which were provided to the term employees in 2022. The extensions were to either May 5 or May 26, 2023.

[26] In early 2022, the CRA began to look at returning to pre-pandemic staffing levels. While it did not reduce the number of call-centre agents significantly in 2022, it began not hiring replacements for agents who left on their own. However, in the fall of 2022, the federal government announced 2 new benefits: the Dental Benefit and the Housing Benefit. Both were administered in part by the CRA. The CRA expected an enormous spike in calls about the Housing Benefit over a 6- to 8-week period. Therefore, it hired approximately 2000 term call-centre agents in the fall of 2022, to support that need. Those new hires had term contracts that expired in May or September 2023.

[27] As it turns out, the expected spike in calls about the Housing Benefit did not materialize. By January 2023, the CRA knew that it did not need these call-centre agents to work on the Housing Benefit. Rather than end their terms immediately, it had them answer other calls instead.

[28] Also, at some point in 2023, a number of term employees were extended from May to September 2023. The Western region did this for all its term employees; a small number of term employees in other regions might have been extended to September as well.

[29] At its peak in January 2023, the CRA had 8548 call-centre agents.

[30] There was also a unique issue in the Montréal office. Before the pandemic, call-centre agents in Montréal were expected to be bilingual. The CRA hired unilingual call-centre agents in 2021. On May 5, 2022, the CRA held a town hall with its call-centre agents in Montréal to inform them that they had until May 6, 2023 to become bilingual. If they did not, their terms would not be extended beyond that date.

3. The decision to reduce the number of call-centre agents

[31] As I mentioned earlier, the CRA intended to reduce its call-centre agent complement to something approaching pre-pandemic levels. It started to work on that in earnest in January 2023. Senior management responsible for the call centres initially feared that it would have to reduce staff immediately in January 2023 because of the lack of calls about the Housing Benefit, but it obtained some additional funding that permitted it to retain these call-centre agents for a time.

[32] Through the evidence of Kira Sherry (currently the director general of the contact centre services directorate, but at the time a special advisor for that directorate), I heard about senior management's internal discussions between January and April 2023 about when and how to reduce the number of call-centre agents. The decision was made to allow a number of employees' terms to end naturally in May of 2023 and to end other terms prematurely, also in May of 2023. The precise number of term employees affected was still a moving target through the end of April 2023 and varied from region to region. However, there is no dispute that by April 25, 2023, a firm decision had been made to end the employment of approximately 1700 term call-centre employees.

[33] A number of call-centre agents had their employment ended after May 3, 2023. There were 1125 call-centre agents employed as of May 3, 2023, who did not receive the $2500 signing bonus because they were not employed as of June 27, 2023. I will call them the "affected employees".

[34] The Western region had 584 affected employees. Most of the term employees in that region had been extended through September 2023. The Western region had 528 employees whose terms were ended early, 14 who resigned, 40 whose terms ended for other reasons (likely performance or other issues, according to Ms. Sherry), and 2 who

did not receive the bonus for other reasons. The Western region originally planned to end these terms on May 26 but ended up doing so on June 9 instead for 527 of them and then June 10 for 1 more.

[35] The Ontario region was relatively unaffected by all of this, with only 23 affected employees. It did not end any terms early as a result of this decision and had only 10 employees whose terms ended for other reasons. In addition, 11 employees resigned before being eligible for the bonus, and 2 did not receive it for other reasons.

[36] In the Quebec region, there were a total of 238 affected employees. Of those, 73 had their contracts end because they did not reach the required level of bilingualism. Sixty-three of them were let go on May 5, and another 10 were let go on May 26 because they were close to reaching the required level and given a short period to reach that requirement but were unsuccessful. There were 15 resignations, 8 employees whose terms ended on May 5 (the documents are inconsistent about whether these 5 were also because of the bilingualism issue or just the natural end of their terms), and 2 more employees let go for other reasons. This means that there were 140 employees whose terms were ended early, on May 26 (137 of them) and May 28 (3 of them) respectively.

[37] In the Atlantic region, there were 280 affected employees. The Atlantic region postponed the early end of term contracts and extended other term contracts to June 30, 2023, so that a large number of employees were paid the bonus almost immediately before they were let go. Ms. Sherry testified that it was almost 600, but the summary document filed by the employer suggest that it was 425 instead. The difference is not relevant to my decision. Of the 280 affected employees, none of them were early ends of term contracts: there were 12 resignations and 2 employees who did not receive their bonus for other reasons, and the remaining 266 employees had their terms ended naturally (i.e., on their end date, or for other reasons).

[38] In conclusion, of the 1125 affected employees, 668 of them had their terms ended early.

[39] I note for completeness that one of the documents filed by the employer indicates that there were another 13 affected employees (i.e., a total of 1138 who did not receive the signing bonus), but nothing material turns on the possibility of there being another 13 affected employees.

[40] Finally, taking a step back to look at the CRA as a whole, the entire bargaining unit comprised 42 761 employees as of May 4, 2023 and 41 321 employees as of June 27. Of those employees, 40 477 were paid the signing bonus. Obviously, there were departures of other CRA employees outside of call centres. The CRA also hired 581 employees after May 4, 2023 who received the $2500 lump-sum payment.

[41] To take this narrative up to the date of the hearing, the CRA has continued to reduce the number of call-centre agents. There was a group of just under 300 call-centre agents let go in September 2023, and then a much larger group of just under 1900 call-centre agents let go in May 2024. The CRA went down to as low as just over 4000 call-centre agents before hiring a group of almost 700 employees in August or September 2024. As of October 1, 2024, the CRA had 4844 call-centre agents. This is still higher than pre-pandemic levels but down significantly from the January 2023 heights.

4. The nature and date of the decision

[42] Before I decide the date of the "decision", it is necessary to state precisely what the decision was.

[43] PSAC characterizes the "decision" in this case that should have been disclosed as the decision to end approximately 1700 term contracts of call-centre agents in May and June 2023. Ultimately, 1125 term contracts were ended during that period; however, whether the CRA's initial estimate was accurate is not important at this stage because a decision of some kind affecting job security was made.

[44] Having reviewed the course of events in some detail earlier, I have concluded that while there was a broad decision to reduce the number of call-centre agents, that decision should be divided into three elements.

[45] First, there was the decision to end the term contracts of any call-centre agents in the Montréal office who were not bilingual by May 6, 2023. That decision was made sometime before May 5, 2022, when it was communicated to those call-centre agents. The CRA then made another decision in April or May 2023 to grant a grace period of roughly three weeks to some call-centre agents who were very close to meeting their bilingualism requirement. However, for the purposes of this case, the decision to end

the term contracts was made sometime before May 5, 2022, because that decision was communicated to the call-centre agents on that day.

[46] Second, there was a decision not to extend the terms of a number of contracts that were due to expire in May 2023.

[47] Third, there was a decision to end the term appointments of call-centre agents early. These last two decisions were interwoven in that they were made at the same time and for the same reasons.

[48] Ms. Sherry testified about the process of making the second and third decisions. While the precise number of affected employees remained a moving target for some time, by March 31, 2023, a decision had been made to move forward with reductions in May of that year. By April 25, 2023, the regions had reported to her with firmer estimates of their numbers of affected employees; Ms. Sherry thought that it would be about 1000 that afternoon, but she received an update from the Western region later that day that would have increased her estimate.

[49] Regardless of the precise date that the decision "crystallized", it was certainly made at some point between March 31 and April 25, 2023. Therefore, the decision was made before the parties reached a tentative collective agreement. As I have said earlier, the CRA does not dispute this element of the duty of unsolicited disclosure; I have set it out largely for the purposes of completeness.

C. The decision had a significant impact on the bargaining unit

[50] The duty of unsolicited disclosure applies only to decisions that have a significant impact on the bargaining unit. However, the case law does not explain or define what constitutes a "significant impact". The cases in this area usually just use generalities to describe the necessary impact, such as:

- "The duty of unsolicited disclosure only applies to decisions that have a significant impact on employees in the bargaining unit" (from *International Association of Fire Fighters, IAFF Local 4794 v. Rocky View County*, 2013 CanLII 67124 (AB LRB) at para. 45). In that case, the decision was to lay off all full-time firefighters. The Alberta Labour Relations Board pointed out that there was no suggestion that the decision in that case was not significant.

- "Canadian case law on the duty to bargain in good faith holds that during bargaining, an employer has a duty to make unsolicited disclosure of management decisions that will have a major negative impact upon the

bargaining unit …" (from *Communications, Energy And Paperworkers Union Of Canada, Local 255G v. Central Web Offset Ltd.*, 2008 CanLII 46476 (AB LRB) at para. 139). In that case, the decision was a plant closure that resulted in the laying off of almost the entire bargaining unit.

- "The duty to bargain in good faith requires the timely disclosure of *de facto* decisions that will have a significant impact on the employees in the unit" (from *University of Manitoba*, at page 62). In that case, a provincial government mandate about a wage freeze had a significant impact on a bargaining unit of university faculty.

[51] In this case, PSAC makes 2 arguments about why the decision was significant. First, it argues that a mass termination is inherently significant and needs to be disclosed. Second, it argues that the impact on the affected employees of losing out on the $2500 signing bonus was significant, particularly in light of their relatively modest rates of pay. The CRA argues that the number of employees affected was relatively modest in comparison with the entire bargaining unit, especially after considering the 581 employees hired after May 4, 2023, who were paid the bonus. The CRA also argues that there are always "*winners and losers*" with any cutoff date for a signing bonus, which mitigates against there being a significant impact in this case.

[52] In a case about the duty of unsolicited disclosure during collective bargaining, I do not believe that the significance of a decision can be reduced to solely a question of its subject matter or the number of employees affected. Instead, the significance of a decision should be considered in light of the purpose behind the duty of unsolicited disclosure.

[53] As I set out in the *Preliminary Decision*, the duty of unsolicited disclosure is "… a byproduct of the duty to bargain in good faith …" (paragraph 36) and "… the purpose behind the duty of unsolicited disclosure is to ensure that both parties have an opportunity to engage in rational, informed negotiation" (paragraph 42). Therefore, in my view, the significance of a decision depends on the relationship between that decision and collective bargaining.

[54] This is neither a new nor a particularly insightful conclusion. There are a number of labour board decisions that discuss the significance of a decision by referring to its impact on collective bargaining. For example:

- From *Moose Jaw Firefighters' Association No. 553 v. City of Moose Jaw*, 2019 CanLII 98484 (SK LRB) at para. 86:

> *This duty [of unsolicited disclosure] is applicable both to* ***decisions impacting negotiations for the conclusion of a collective agreement****, and to decisions with a major impact on the terms and conditions of employment of certain employees****, over which there is an ongoing or impending negotiation***
>
> [Emphasis added]

- From *Noranda Metal Industries Ltd. (Re)*, [1974] B.C.L.R.B.D. No. 149, [1975] 1 Can L.R.B.R. 145:

> …
>
> *… One would hardly say that an employer who deliberately withheld factual data which a union needed to* ***intelligently appraise a proposal on the bargaining table*** *was making "every reasonable effort to conclude a collective agreement"….*
>
> [Emphasis added]

- From *United Electrical, Radio & Machine Workers of America v. Westinghouse Canada Limited*, 1980 CanLII 893 (ON LRB) at para. 39:

> *… Similarly, can there be any doubt that an employer is under a section 14 [duty to bargain in good faith] obligation to reveal to the union on his [sic] own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot* ***realistically assess its priorities or formulate a meaningful bargaining response*** *to matters of fundamental importance to the employees it represents.…*
>
> [Emphasis added]

[55] In this case, the parties negotiated a lump-sum payment. The parties traded proposals over two days about this lump sum, negotiating both its amount and its effective date. The decision in this case impacted how many employees were eligible for this lump-sum payment. This decision was significant enough to trigger the duty of unsolicited disclosure because the decision impacted the very term or condition being negotiated by the parties — namely, the effective date of the lump-sum payment.

[56] This is the same conclusion reached by the CRA's negotiator, Marc Bellavance. Mr. Bellavance testified that he has been working for the CRA in labour relations for over 25 years. He was the CRA's chief negotiator for the collective agreement reached on May 3, 2023. He was not informed about the decision to reduce the number of call-centre agents at the CRA. When he was asked during cross-examination what he would have done if he had been told about a reduction of about 1000 employees, he said unequivocally that he would have had a duty to inform the negotiator from PSAC.

[57] The CRA argued that it is not bound by the opinion of its chief negotiator. That may be legally true, strictly speaking. However, Mr. Bellavance's evidence is a clear indication about the significance of the impact of this decision. If the CRA's chief negotiator thinks that it was significant enough that it should have been disclosed, that is a strong indication that it was.

[58] On this point, I also rely on the decision in *Canadian Union of Public Employees, Local no. 30 v. Edmonton (City)*, [1995] Alta. L.R.B.R. 102. That was another case about the duty of unsolicited disclosure. In that case, the employer's negotiator knew about the pending decision (a restructuring) and recommended that the employer disclose it to the bargaining agent. The manager responsible for the reorganization characterized it as significant. The employer did not disclose the decision. The Alberta Labour Relations Board relied on both employer witnesses' admissions in concluding that the decision was impactful enough to warrant disclosure, stating, at paragraph 41:

> ***41*** *The decision reached would have, and did have, a significant impact on employees in the unit and on collective bargaining. Mr. Shewchuk* [the employer's negotiator] *recognized the potential impact on bargaining and expressed his views on that at the January 4th meeting. Mr. Anderson* [the manager] *characterized this reorganization as major or significant from an organizational perspective.…*

[59] Like the Alberta Labour Relations Board, I find the testimony of the employer's negotiator to be convincing.

[60] For these reasons, I conclude that the decision had a significant enough impact on collective bargaining that it should have been disclosed.

D. Whether the CRA had provided enough information about the decision that PSAC should have asked about it

[61] The CRA argues that it provided enough information about the decision that PSAC should have asked about it before reaching the tentative agreement. PSAC disagrees.

[62] In terms of the legal framework for this issue, the CRA argues that the duty of unsolicited disclosure is exceptional and limited to extreme cases. It argues that this means that the more foreseeable an issue is, the greater the obligation is on the bargaining agent to inquire, instead of relying on the duty of unsolicited disclosure.

The CRA relies in particular on *Elementary Teachers' Federation of Ontario v. The Crown in Right of Ontario as represented by the Ministry of Education*, 2022 CanLII 35068 (ON LRB). In that case, the union alleged that the employer had failed to disclose its plans to repeal a regulation dealing with a seniority-based mechanism for hiring occasional teachers into longer-term or even permanent positions. The Ontario Labour Relations Board (OLRB) described the duty of unsolicited disclosure at paragraph 88 as a duty that "… requires the employer to share information or a decision that it has already made that will have a significant impact on terms and conditions of employment, and which the trade union **could not have anticipated**" [emphasis added]. In that case, the OLRB concluded at paragraph 90 that the union was "on notice" about the revocation of the regulation because the employer had stated that the "… withdrawal of the parties' proposals would leave the Crown's regulatory authority unencumbered." The OLRB in that case was satisfied because the possibility of the repeal of the regulation was "alluded to."

[63] PSAC did not contest the broad proposition that disclosure does not need to be fulsome or complete in all circumstances. Instead, PSAC's arguments are about the quality of disclosure. PSAC relies in particular on the *University of Manitoba* decision, in which the Manitoba Labour Board stated at page 60 that the duty of unsolicited disclosure is not met by "various hints and cryptic comments".

[64] The dispute between the parties on this issue is largely factual. Therefore, I will begin by describing what was disclosed to PSAC and when. I will then turn to whether that disclosure met the CRA's duty.

1. Disclosure about staffing call centres provided to PSAC

[65] The parties agree that the information that was disclosed to PSAC was provided through the Contact Centre Committee. The Contact Centre Committee is a bipartite committee composed of representatives of both CRA management and PSAC. It was designed as a forum for consultation between CRA management and PSAC about working conditions at CRA call centres. It met roughly once each quarter; there were also occasional *ad hoc* meetings to discuss issues that came up.

[66] Before each meeting, the CRA circulated an agenda and information about some of the items on the agenda. The agenda circulated in advance of a meeting was typically incomplete. The meetings began with some opening remarks and issues that

were not reflected on the advance agenda. Discussions about staffing levels were held during these opening sessions and were not typically on the formal agendas for these meetings.

[67] Someone from the CRA took notes at the meeting and prepared a meeting summary based on those notes. Starting in 2022, the summary was sent to PSAC for review before being finalized. Two of the witnesses in this complaint were members of the Contact Centre Committee: Ms. Sherry for the CRA, and Eddy Aristil for PSAC. Both of them were also on the negotiating teams for the CRA and PSAC, respectively. Both of them confirmed that the meeting summaries accurately reflected what happened in the several meetings held between 2021 and 2023.

[68] Where helpful, I will provide excerpts from the meeting minutes because I am satisfied that the minutes accurately reflected those discussions. I will also set out Ms. Sherry's and Mr. Aristil's impressions of the messages that were being conveyed at those meetings.

[69] Both of them testified that they did not share anything from these committee meetings with their respective bargaining teams. This was not because the meetings were confidential but just because they did not think it was important to do so.

[70] I set out the staffing practices at CRA call centres already; broadly, there were about 3000 call-centre agents pre-pandemic, with seasonal fluctuations; an increase to over 8000 call-centre agents post-pandemic; and then a drawdown in the number of call-centre agents starting in May 2023.

[71] The first committee meeting that discussed staffing occurred on November 11, 2021. The minutes for that meeting read in part as follows:

> …
>
> - *Look ahead for ABSB/CVB contact centres (new COVID programs, upcoming T1 filing season, etc.)*
>
> - *Management confirmed that the Agency still faces a high number of calls especially for business inquiry due to the economy recovery. They had to transfer T1 call agents to business lines to help out. There are around 6000 employees in contact centre which has doubled in size since the pandemic hit but turnover is still high.* ***On that issue and to bring stability, management confirmed that they are going to extend all terms to May 2023****.*

> - *The union asked if collections activities were back on track as it was before the pandemic.*
> - *Management confirmed that collections through DMCC is back and running. However, additional staffing resources are required to handle the volume of calls.*
>
> …
>
> [Emphasis added]
>
> [*Sic* throughout]

[72] Ms. Sherry testified about the CRA's decision to extend the contracts of its term call-centre agents to May 2023, and she explained that this decision is what the minutes refer to. Mr. Aristil also testified that the bullet points just quoted accurately reflect what he was told.

[73] The next relevant committee meeting was on February 22, 2022. The minutes of that meeting read in part as follows:

> …
>
> *Management opened up the meeting by advising that the Contact Centres are better prepared for the tax filing season than before.* ***They currently have approximately 7000 contact centre employees****, 7200 including management. Management shared that they are optimistic about the program and this year's tax season.*
>
> ***Management advised that in future meetings, there should be conversations about what the future will look like. For example, if we are truly coming out of the pandemic and Covid-19 relief program won't be the drivers, we will start to downsize and funding from those programs may not be around in the future. He advised that we still need to wait and see how this will pan out.***
>
> *The union asked how many employees there usually are during a normal filing season. Management responded there are normally 3000 for a normal season, so we are more than double over.*
>
> ***Management confirmed that the downsize from 7200 will not be all at once, and it would like it to be a measured approach (i.e. a couple years, not a couple months). Management advised there will be more to share on this in the future.***
>
> *From a CVB perspective, management shared that Collections is going the other way in terms of numbers of employees and that they will not be downsizing. Once assessments go out and notice of debts, CVB is preparing to be ready for the volume of calls they will be getting.*

> *The union asked if contact centres will be going back to original numbers after the pandemic is over. Management confirmed that if they are using 2019 numbers as a benchmark, they do not anticipate that they get to those numbers for at least three years as there is a lot to work through before we get there.*
>
> …
>
> [Emphasis added]
>
> [*Sic* throughout]

[74] Mr. Aristil testified that he was the one who asked the question about the normal number of employees. He explained that he asked that question because PSAC always wanted to know about the future of employees at the call centre, and it was interested in knowing that people would still have jobs after the pandemic. There was also an item in the minutes about the ratio of permanent to term employees. He explained that PSAC's main goal was to have a higher ratio of permanent employees to term employees and to make sure that the ratio was consistent across the 4 regions. The minutes state that the ratio of term to permanent employees was roughly 70/30 at the time and that PSAC's goal was 100% permanent but that it would settle for 96%. Ms. Sherry's testimony about this meeting lined up with the meeting minutes.

[75] The next meeting was on June 28, 2022. The item that touched on staffing levels read as follows:

> …
>
> *Further discussion between management and UTE was held on the lack of stabilized permanent funding in ABSB which impacts the number of permanent positions in the contact centres. Management shared that they are unable to increase the number of permanent employees with temporary funding. From a CVB perspective, management shared that attrition is happening at a high rate and that it is recognized that staffing strategies need to change. With this said, funding that is received is currently being based on cost recovery, not a budget, which makes it difficult to increase the number of permanent staff. UTE thanked management for sharing this information and suggested that they work together to achieve the common goal of more permanent funding to allow for more permanent employees. They reiterated their desire for members to have permanent employment with the Agency and have a career here.*
>
> *Management concluded by re-iterating* [*sic*] *their commitment to getting back to UTE by the next committee meeting with specific ratio data and will advise of the recommended interval to share this information.*

…

[76] Ms. Sherry testified that the point to this item was that the CRA did not have permanent funding for high staffing levels at call centres. It did get funding in Budget 2022, but that funding was only over two years and was mostly in year 1 (2022-2023) and declined in year 2. Mr. Aristil testified that his takeaway from this item was that the issue of obtaining data on the ratio of terms to permanents continued to move forward. He also testified more generally that he understood that when the CRA said that something depended on funding, he knew that it was not set in stone because everything depends on funding.

[77] The next meeting was on September 27, 2022. The minutes for that meeting read as follows:

…

> *Management (Kira Sherry) opened the discussion by advising that Michael Honcoop had asked her to add one more topic to the meeting as a "heads up" for the committee, regarding the two new benefit programs that CRA will be administering: the Canada Dental Benefit and the Canada Housing Benefit Program. More details will be shared in the future, but the following points were shared:*
>
> - *Each region will hire 500 new contact centre agents to start as early as October 2022, with the anticipation that they will go live on call with taxpayers in December 2022. This will mean a total of approximately 2000 new agents which will bring the contact centres to close to 8000 employees nationally, the highest it has been so far.*
> - *UTE asked whether training for these new agents will be the regular contact centre agent training, in addition to specific training on the two new benefits. Management indicated that for the Dental Benefit, because it has the same eligibility as the Child Benefits, they are looking to have people trained specifically for these two topics. Furthermore, they will have employees cross-trained on benefits topics, so that any extra volume of calls can be absorbed.*
> - *Management explained that the Dental Benefit program is a three-year program and because taxpayers need to have made a dental appointment to qualify, while the demand will be there, there may not be as dramatic of a spike compared to the Housing Benefit. On the other hand, the Housing Benefit is a one-time payment to eligible individuals, and applicants will have a 90-day window to apply and receive benefit, which is anticipated to cause a massive spike in taxpayer calls. Therefore, in terms of training, anyone who is being hired*

> *early will be given the normal Tier 1 training. Dental Benefit training will be provided to employees who are already trained on the Benefits programs. For the Housing Benefit, they are looking to add this training to as many employees as they can, though training for this has not yet been formulated.*
>
> - *Contract lengths for these new employees will last until next May 2023, possibly next September 2023. As a result, even if an employee is only trained on the Housing Benefit, what might happen is that they will take Housing Benefit calls through the peak, and then provided Tier 1 Agent training afterwards.*
> - *A 6-8 week peak of calls is anticipated. The goal will be to ensure that agents are well set-up and that there is enough staff. Business Enquiries agents may be asked to assist with the Housing Benefit spike, but details are still being worked out.*
> - *Management also provided information on the upcoming GST Credit Top-Up that is expected to be in November. Agents are already receiving general queries on timeframes and eligibility on this, in addition to the Dental and Housing benefits.*
>
> …
>
> [*Sic* throughout]

[78] Ms. Sherry testified that this message was intended to make it clear that the additional hiring spike was temporary. As for the bullet point about contract lengths, the existing term employees at the time had contracts ending in May 2023. She did not want the new term contracts to be longer than those of existing employees. However, she mentioned September 2023 because of the need to "risk manage", to a certain degree.

[79] Mr. Aristil testified that his main concern was about cross-training the new employees on programs other than housing. His goal was to make sure that people were still working in the call centre, no matter what happened. He understood from that meeting that people would have a job no matter what happened until September 2023, at the least. He could not explain why he understood that the statement "[c]ontract lengths for these new employees will last until next May 2023, **possibly** next September 2023" [emphasis added] meant that they would have a job until September 2023, no matter what.

[80] The last committee meeting before the parties reached the tentative agreement took place on January 24, 2023. The minutes of that meeting included the following:

> …
>
> *Management stated that the Government introduced these two programs last Fall to help with dental and rental costs. Both programs were launched in December 2022, and it was an overall success. For the Dental benefit, management used existing contact centre agents and the existing workforce at the contact centres. For the Housing benefit, approximately 2000 new employees were hired as high volume of calls were expected on the newly built telephone system. After about one month following the implementation of this new structure, management shared that call volumes have not been as high as expected. Based on this, management is now looking at re-assessing resources for the housing and dental benefits. For the housing program, management is anticipating that it will begin the sunset period in March 2023 with only a low number of residual calls expected after that period. The dental program is for a duration of three years and is expected to expand over the course of next few years.*
>
> …
>
> *Management confirmed they are presently looking at re-allocating housing benefit call agents to regular contact centres. Also looking at the possibility of cross training employees and creating the opportunity to develop multi skilled agents. This initiative will depend on available funding.*
>
> …
>
> [*Sic* throughout]

[81] Ms. Sherry testified that this was an attempt to communicate that the work of call-centre agents was drying up, which could result in an early end of their term contracts. However, the CRA also recognized that they were quality employees, so it wanted to cross-train them, to support tax filing season, but doing so depended on funding. She admitted in cross-examination that she did not tell PSAC that there could be early ends of term contracts "in so many words" but that she believed that it should have been assumed from this message. By this time, she was nervous about having to make staffing reductions, but stated that she "did not want to send up a red flag at that point" and that she did not want to engage in "fear mongering" because she had some confidence that there would be more funding.

[82] Mr. Aristil testified that he interpreted this message to mean that management would do everything it could to keep people at work. If the housing program ended, it

would do everything to get them other jobs at the call centres. He testified that there was no discussion at this meeting about the possibility that term contracts would be ended early.

[83] My impression from reading the minutes and hearing the testimony is that Ms. Sherry was trying to sound an alarm without creating panic. This led to her ringing the alarm so quietly that Mr. Aristil did not hear it.

[84] There was another meeting scheduled for April 27, 2023. Since PSAC was on strike at that time, it cancelled the meeting. The CRA expected the meeting to be cancelled.

[85] The CRA sent the usual agenda for that meeting to PSAC along with some briefing materials. That agenda and the briefing materials did not include anything about staffing levels. However, the CRA intended to brief PSAC verbally about its decision to let go a large number of call-centre agents in May 2023.

[86] Ms. Sherry explained that staffing levels were not included in this meeting's agenda and briefing materials because she was not comfortable giving that information in writing. I have difficulty understanding her reluctance to do so. She said that one reason was that the CRA was still finalizing the precise number of staffing reductions. She was not clear about why a verbal briefing (followed by sending written meeting notes) that was imprecise was better than a written briefing. She also stated that she wanted to make sure that senior management was comfortable sending something in writing before she did so.

[87] Ms. Sherry was clear that the collective bargaining situation, and the strike in particular, was a significant factor in her deciding not to disclose this information to PSAC. She testified that she sought senior management's approval because she recognized that the CRA was in an unusual situation with collective bargaining and had not had layoffs (her term) in years.

[88] On April 25, 2023, Ms. Sherry drafted an email to be sent to PSAC. That email would have said, specifically, "We expect to reduce our term employee base by approximately XXX in May, through a combination of natural and early end of term." She did not have the precise number of reductions when she drafted this email, so she put in "XXX" as a placeholder.

[89] Later that day, Ms. Sherry sent an email to more senior management, stating, "We need to inform the union as well [as senior management] which is sensitive at the moment."

[90] The CRA eventually sent an email to the Contact Centre Committee (and, hence, PSAC) on May 12, 2023, informing it that there would be a reduction of roughly 1700 call-centre agents by the end of June 2023.

[91] As to why there was a delay, Ms. Sherry stated that there was never a specific decision to hold off sending that information to PSAC. She attributed the delay to finalizing numbers and briefing more senior management.

[92] Finally, in cross-examination, Ms. Sherry confirmed several times that, until May 12, 2023, the CRA had not said anything to PSAC about early terminations at any point. She admitted that PSAC would not have known about early terminations. She stated that PSAC understood (or should have understood) that there would be call-centre agents whose contracts would not be renewed in May, but she never said anything about early terminations. She acknowledged that her draft email of April 25 would have been the first time that anyone at the CRA told PSAC about the early end of terms. She said that the early end of terms should have been a reasonable assumption if the CRA could not obtain the funding to move the call-centre agents hired for the Housing Benefit into other work.

2. Whether the CRA met its duty by providing enough information before reaching the tentative agreement

[93] As I stated earlier, the CRA's position is that it provided enough information about the decision that PSAC should have asked about it before reaching the tentative agreement.

[94] Both parties argued this case as if there was a single decision. However, as I stated earlier, there are three parts to the decision in this case: letting go employees in Montréal who did not meet their bilingualism standard, not renewing term contracts, and ending term contracts early.

a. The Montréal bilingualism issue

[95] I am satisfied that there was sufficient disclosure about the Montréal bilingual call-centre agents' aspect of that decision. The CRA informed each of those employees a year in advance and held a town hall about that decision as well.

[96] PSAC argued that this was an issue known only to individual employees and that its bargaining team was not aware of it. PSAC also argued that there was no reason for it to piece together the number of affected employees or the likelihood of the bilingualism issue affecting anyone. I disagree. The decision could have impacted hundreds of employees and ended up affecting 78 of them. Hundreds of call-centre agents were informed of the need to become bilingual by May 6, 2023, both individually and collectively, at a town hall. If PSAC's negotiating team was never aware of this decision, frankly, that is on it. If it was aware but forgot, the duty is one of unsolicited disclosure, not unsolicited reminders.

b. Non-renewals of terms that ended in May 2023

[97] The second part of the decision was about the non-renewals of term employment. This is a tricky issue because of the nature of a non-renewal of term employment. A non-renewal of a term appointment is not a termination or dismissal of the term employee; see *Shenouda v. Treasury Board (Department of Employment and Social Development)*, 2017 PSLREB 21 at para. 49, among many other Board cases stating the same thing. In this way, PSAC is not asserting an obligation on the employer to disclose a decision but is asserting that the employer is required to disclose the absence of a decision (i.e., the absence of a renewal).

[98] PSAC argues that I need to consider this problem in its factual context, and I agree. The pre-pandemic factual context is that some terms were ended on time immediately after tax season and some were extended for a relatively short period, to deal with other benefits when the calls dried up in the early summer instead. This seasonal cycle of term contracts ended in 2020 and restarted again only in 2024 (after the events complained of in this case). Instead, the CRA extended the terms of call-centre agents after the onset of the COVID-19 pandemic in 2020, hired a bunch more, and then made a decision in early 2021 to extend all term contracts to May 2023.

[99] Mr. Aristil testified about his understanding after the committee meeting on September 27, 2022. He testified that he already knew that terms had been renewed

until May 2023 before that meeting. Therefore, when the CRA said that contracts for new employees would last only until May 2023, this was something he already knew. He testified that the new information was about the extension of contracts to September 2023. He testified that his understanding was that employees would remain employed until September 2023. Having read the minutes of that meeting and heard the testimony of Ms. Sherry, I find that was not the message communicated by the CRA. The minutes are very clear that contract lengths would be until May 2023 and **possibly** until September 2023. Mr. Aristil then confirmed on cross-examination that he knew that many term contracts were ending naturally in May 2023 and that he did not pass this information on to the rest of the bargaining team.

[100] That factual context is not enough to convince me that PSAC had a reasonable expectation of a renewal of term contracts that would have required the employer to disclose a decision not to renew them. Even with that context, the decision not to renew term contracts was not a change to the status quo that needed to be disclosed. PSAC knew that many term contracts had been extended only to May 2023. The fact that the CRA told it that there was a possibility that some contracts would be extended to September 2023 did not require the CRA to disclose that most of them were not, particularly in light of Mr. Aristil's admission that he knew about contracts ending in May 2023.

c. Early end of terms

[101] However, I have reached a different conclusion about the early end of term contracts.

[102] None of the minutes of the committee meetings mention an early end of term contracts. Ms. Sherry agreed during cross-examination that she never mentioned ending term contracts early during the committee meetings.

[103] The CRA argues, in essence, that PSAC should have anticipated the early end of term contracts, in light of the general warnings it provided about a return to pre-pandemic staffing levels. I have concluded that those general warnings were not the same thing as a warning about an early end of term contracts.

[104] The CRA submits that I should focus on the February 22, 2022, committee meeting. In that meeting, it never mentioned an early end of term contracts. On the

contrary, the CRA said that "… we still need to wait and see how this will pan out", that "… the downsize from 7200 will not be all at once, and it would like it to be a measured approach (i.e. a couple years, not a couple months)", and that "… there will be more to share on this in the future." That was not enough to put PSAC on notice that there would be early ends of term contracts in general, let alone during the important period of May and June 2023.

[105] The CRA's actions after that meeting also created some mixed messaging. At best, it told PSAC in February 2022 that it would be reducing its current complement of call-centre agents down from 7200 to roughly 3000. Then, 8 to 9 months later, it hired 1200 new call-centre agents to deal with the Housing Benefit.

[106] The CRA realized almost immediately it did not need that many call-centre agents for the Housing Benefit. However, it did not say so in the January 24, 2023, meeting. Ms. Sherry testified in examination-in-chief that she had tried to communicate that, without more funding, the CRA would have to release call-centre agents as soon as possible. However, that message was nowhere to be found in the minutes of the meeting. Instead, it told PSAC that it had hired approximately 2000 new employees, that the call volumes were not what it had expected, and that it was reassessing resources as a result. The closest it came to warning PSAC about the possibility of an early end of term contracts is when it stated that it "… is anticipating that it will begin the sunset period in March 2023 …". Then, it said that it was looking at reallocating Housing Benefit call agents to other calls.

[107] During cross-examination, Ms. Sherry said specifically that she did not want to cause disruption and did not want to send up a red flag in her messaging to PSAC. The CRA cannot have it both ways: it cannot decide not to raise any red flags while at the same time submitting that PSAC should have known that there were red flags.

[108] I am satisfied that PSAC knew, or at least ought to have known, that there would be some sort of reduction in the number of call-centre agents. I am not satisfied that it ought to have known or even suspected that this reduction would happen through the early end of terms in May and June 2023. A general reduction in the number of employees to take place over years is different from the early end of term contracts concentrated in a 2-month period. The general warning was over a year old by the time

the CRA decided to end the terms early. The general warning was also undermined by the CRA telling PSAC that it had hired another 2000 employees.

[109] In addition, when it gave that general warning on February 22, 2022, the CRA said that "… there will be more to share on this in the future." PSAC was entitled to assume that it meant that the CRA would share that information at the appropriate time. In light of that undertaking, PSAC did not have to ask for an update every time that it met to bargain with the CRA.

[110] The CRA submits that this case is similar to *H.S.A.A. v. Peace Regional Emergency Medical Services*, 1998 CarswellAlta 1401 (ALRB) ("*Peace Regional*"). I disagree. In *Peace Regional*, the union was newly certified to represent employees in the bargaining unit. On the first day of bargaining, the employer informed it in writing that it intended to restructure its operations. It informed the union that it would be laying off 6 of 24 employees in the bargaining unit. On the third day of bargaining, the employer raised the restructuring again and said that it wanted to discuss its impact with the union, but the union said that it did not wish to discuss it further. Later that day, the union broke off negotiations. The layoffs were made the following week. The Alberta Labour Relations Board found as follows:

> …
>
> *27 … In this case, the Employer provided information to the Union which identified the nature of the organizational change and the impact on the employees. It told the Union about the options which would be presented to the employees. Those options were open for discussion. In addition, the Employer attempted to communicate the urgency of the situation.…*
>
> …

[111] The CRA did none of that. The CRA did not disclose the impact on the employees (i.e., the early end of terms), did not inform PSAC of the options available to call-centre agents, did not open that for discussion, and certainly never communicated the urgency of the situation. On the contrary, the CRA downplayed the urgency and impact of its decision.

[112] The CRA also relies on *Nanaimo Daily News (Postmedia Network Inc) v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2013 CanLII 12927 (BC LRB). In that case, the union negotiated a premium for a single employee

who performed supervisory duties. Two weeks later, the employer stopped assigning that employee supervisory duties and hired a manager outside the bargaining unit to perform those duties instead. The union alleged a breach of the duty of unsolicited disclosure. However, the employer in that case told the union specifically during bargaining that the premium would not prevent it from hiring a manager and that it was looking for one. The British Columbia Labour Relations Board concluded that this put the union on notice that the employer was doing exactly what it said — looking for a manager to perform supervisory duties. The labour board concluded at paragraph 25 that "[t]he hiring of a manager could reasonably be anticipated to affect the need for an employee acting in a supervisory capacity, particularly when mentioned by the Employer in connection with discussions about the premium, as in this case." In this case, telling PSAC in February 2022 that there would be a general reduction in call-centre agents over a three-year period did not mean that PSAC should have reasonably anticipated that the CRA would end term contracts early in May or June 2023.

d. Conclusion on the duty of unsolicited disclosure

[113] For these reasons, I have concluded that the CRA did not fulfil its duty to bargain in good faith by failing to disclose its intention to end the term contracts early of a significant number of call-centre agents in May and June of 2023 until May 12, 2023.

IV. Whether the events after May 3, 2023, cured the breach of the duty of unsolicited disclosure

[114] In the *Preliminary Decision*, I dismissed a motion by the CRA to reject this complaint because the parties signed a collective agreement after it had disclosed the early end of terms to PSAC. I concluded that there was at least an arguable case that the roughly six-week period between the disclosure and signature did not afford PSAC a sufficient opportunity to collectively bargain a resolution to this matter. To put this another way, I concluded that there was an arguable case that this six-week period did not cure a breach of the CRA's duty to bargain in good faith.

[115] I will begin by describing the events that took place between May 1 and June 27, 2023. I will then explain my conclusion for why the disclosure on May 12, 2023, did not cure this breach.

A. The events between May 1 and June 27, 2023

[116] As I mentioned earlier, PSAC reached an agreement with the Treasury Board on April 30, 2023, that ended the strike by its members at the Treasury Board. PSAC and the CRA returned to the bargaining table on May 1 and reached a tentative agreement late on May 3. Striking employees at the CRA returned to work on May 4.

[117] All PSAC's witnesses took the opportunity of this case to relitigate the reasons for the strike and in particular why the strike lasted an extra three days at the CRA. Each of its witnesses said that there was no reason for those extra three days and that the CRA was responsible for the delay. All three said they were angry about the delay. However, before the parties returned to the bargaining table on May 1, PSAC's negotiator (Mr. Gay) made it clear to his counterpart (Mr. Bellavance) that PSAC would not agree to the Treasury Board deal and that it wanted more for CRA employees. The parties included their emails back-and-forth over those three days setting out their respective bargaining positions that walked toward the Treasury Board deal on economic issues, which is ultimately where they ended up.

[118] My role in this complaint is not to assign responsibility or blame to either party over the strike or the time it took to resolve it.

[119] During these back-and-forth offers, the parties exchanged proposals about the lump-sum payment, both the amount and the eligibility date. PSAC continuously proposed that it be payable to anyone employed on the date that PSAC ratified the tentative agreement, while the CRA insisted that it be payable to anyone employed on the date the collective agreement was signed. PSAC eventually agreed to the CRA's proposed eligibility date. The eligibility date was one of the last things that the parties agreed upon.

[120] As another part of the tentative agreement, PSAC agreed that its bargaining team would publicly recommend ratification to its membership.

[121] PSAC sent out what Mr. Gay called a thumbnail sketch of the tentative agreement to its members on May 4, 2023. It then sent out its ratification kit to its members on May 12. The ratification kit contained the full text of the tentative agreement. Then, on May 17, PSAC sent its members instructions about how to vote in the ratification process. The voting was held between May 17 and June 16. PSAC

members voted to ratify the tentative agreement, and PSAC had calculated that result immediately (the evidence is not clear whether it was on June 16 or the following day).

[122] As I stated earlier, the CRA eventually sent an email to the Contact Centre Committee (and, hence, PSAC) on May 12, 2023, informing it that there would be a reduction of roughly 1700 call-centre agents by the end of June 2023.

[123] The negotiators for PSAC and the CRA never spoke to each other about this decision.

[124] However, there was at least one discussion between the President of the Union of Taxation Employees (UTE) and the Commissioner of the CRA about this decision. Neither the President nor the Commissioner testified in this proceeding. However, both Adam Jackson, a Vice President for the UTE and someone on the PSAC bargaining committee, and Mr. Bellavance testified that they knew that the discussion took place. Further, there are documents filed by the parties that outline the fact of that discussion, including an email from the President of the UTE saying that he had that discussion.

[125] That discussion took place on or shortly before May 16, 2023 — because that is the date of the President's email confirming the discussion and the date of an email by Mr. Bellavance that he says he prepared after being told about that discussion. According to the President's email, he asked the Commissioner to delay the job losses until the tentative agreement was ratified. Mr. Jackson explained that the request was actually to delay the job losses until after the agreement was signed. According to Mr. Bellavance, he was told to fast-track the signature of the collective agreement after that discussion.

[126] For context, s. 112 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") requires a separate agency to obtain the approval of the Governor in Council to enter into a collective agreement. He explained that the CRA needs to obtain a "non-objection letter" from the Treasury Board Secretariat and prepare a submission to the Treasury Board itself (a sub-committee of cabinet) to approve the collective agreement, followed by the approval and signature of the Governor General. Mr. Bellavance testified that the process of doing so can be lengthy and that for a tentative agreement reached on May 3, 2023, he expected that approval to take until September to obtain.

[127] While I did not have any direct evidence from the participants of that discussion, the witnesses and documents indicate that the President of the UTE asked the Commissioner of the CRA to delay the job losses. The CRA was not willing to delay the job losses. The President of the UTE then asked that the signature date be expedited. The Commissioner of the CRA agreed, and Mr. Bellavance was instructed to do so.

[128] There was also a union-management consultation meeting on June 15, 2023. At that meeting, an assistant commissioner of the CRA stated that the collective agreement would be ready for signature in July. Mr. Jackson said that he was surprised and upset to learn it would take that long, since PSAC's ratification vote would be done shortly, and the results should be known quickly.

[129] The CRA was able to obtain the required approval and signed the collective agreement on June 27, 2023. According to Mr. Bellavance, it obtained the non-objection letter from the Treasury Board Secretariat on May 30 and the Order in Council on June 19.

B. Why PSAC did not ask to reopen the tentative agreement

[130] Two of PSAC's witnesses provided evidence about why PSAC did not attempt to reopen collective agreement negotiations after learning about the early end of terms.

[131] Mr. Jackson testified that he could not think of any mechanism to reopen the collective agreement. However, he also gave two other explanations. First, he said that it would open a "can of worms" because if PSAC tried to reopen negotiations for one issue, its membership would want to reopen it for other things too. Second, he thought that it would be unrealistic to expect PSAC to take its members back out on strike, to address this issue. He thought that not every member would be willing to go back on strike to acquire a signing bonus for certain call-centre agents.

[132] Mr. Gay gave similar explanations. He testified that he has never reopened a contract on a substantive matter after a tentative agreement has been reached. However, he qualified that to some extent by stating that this was because of the size of this bargaining unit. Like Mr. Jackson, he also testified that there were other explanations. He referred to reopening collective bargaining as a Pandora's Box, meaning that if they reopen negotiations on one issue, they would have to do so for

other issues too (like Mr. Jackson's can of worms). He also relied on PSAC's lack of leverage in any renegotiation, stating that he did not see any universe in which the CRA would have reopened the contract for this issue. As he put it, there was no point opening Pandora's Box when he knew that the CRA would have said, "No."

[133] Both Mr. Jackson and Mr. Gay testified that the PSAC negotiation team had agreed to endorse the tentative agreement, and they felt that trying to reopen the tentative agreement would contravene that agreement. Both testified that they feared the consequences of breaching that agreement, which could include the CRA making an unfair-labour-practice complaint against PSAC.

[134] Both Mr. Jackson and Mr. Gay testified about what they would have done differently had they known about the pending job losses before reaching the tentative agreement. Mr. Jackson testified that the bargaining team would have caucused and come up with something, maybe pushing for the eligibility date for the lump-sum payment to be the date of the tentative agreement instead of the date of signature. Mr. Gay said similar things, namely, PSAC could have proposed changing the eligibility date to the date of the tentative agreement or maintained its position that the eligibility date was the date of PSAC's ratification.

[135] Mr. Bellavance testified that PSAC did have an opportunity to renegotiate with him. He said that he had one previous situation (with a different bargaining agent) of an issue that arose after the tentative agreement was reached and the bargaining agent's negotiator called him to discuss it. Mr. Bellavance did not give any details about that issue (aside from it happening many years ago), so I do not know whether it was on a matter of substance or a more minor, technical issue.

[136] Mr. Bellavance also testified that, had PSAC proposed the date of the tentative agreement as the eligibility date for the bonus, he would have had to obtain approval from the Treasury Board before agreeing to it. He could have received an answer quickly, but he did not know what the answer would have been.

C. Whether the opportunity to renegotiate was sufficient to cure the breach

[137] In the *Preliminary Decision*, I characterized this issue as being whether PSAC having entered into a collective agreement after receiving the disclosure of job losses "cures" what was at that time an alleged breach of the duty of unsolicited disclosure.

Both parties adopted a similar formulation of this issue, namely, whether the breach could be cured by disclosure after the parties reached a tentative agreement but before the agreement was ratified and signed.

[138] This issue involves a tension between two aspects of the duty to bargain in good faith.

[139] The first aspect is that the duty to bargain in good faith starts from the moment that a party serves notice to bargain on the other and ends when the collective agreement is signed. As the Federal Public Sector Labour Relations and Employment Board ("the Board") stated recently, "… the duty to bargain in good faith applies until the final signing of the collective agreement …" (see *Public Service Alliance of Canada v. Canadian Security Intelligence Agency*, 2024 FPSLREB 120 at para. 59 ("*PSAC v. CSIS*"); see also *N.A.B.E.T. v. CKLW Radio Broadcasting Ltd.* (1977), 23 di 51 at para. 82; and *Public Service Alliance of Canada v. Listuguj Mi'gmaq First Nation Council*, 2021 CIRB 975 at para. 110). This aspect is important in this case because it means that the duty to bargain in good faith continued to run after the CRA disclosed the job losses to PSAC on May 12, 2023. PSAC ratified and signed a collective agreement after learning the information that the CRA should have disclosed to it earlier. It did not have to. It could have kept negotiating instead, and both parties would have been required to bargain in good faith.

[140] The second aspect is that the duty of disclosure (whether solicited or unsolicited) is a duty to provide timely disclosure. Labour boards, including the Board, have concluded that employers have breached the duty to bargain in good faith by delaying providing the standard disclosure, such as copies of employer policies or basic information about the composition of and compensation paid to employees in the bargaining unit; see *U.F.C.W., Local 401 v. Economic Development Edmonton*, [2002] Alta. L.R.B.R. 313 at para. 131; and *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78 at para. 68. In those two cases, the respective labour boards allowed complaints of bad faith bargaining about the late disclosure of information, even though the information had already been disclosed by the time the complaints had been heard. This indicates that providing untimely disclosure does not "cure" the initial breach of the duty to bargain in good faith in the sense of depriving the bargaining agent of at least a declaration of a breach of that duty.

[141] In my view, the way to reconcile these two aspects in this case is to examine the facts as of particular points in time.

[142] From the period between April 25 and May 12, 2023, the CRA was in breach of the duty to bargain in good faith because of its failure to disclose the decision to end the employment of a large number of term employees early. Had it disclosed the information before reaching the tentative agreement (such as during the scheduled meeting on April 27), that late disclosure would have cured the breach. Instead, it disclosed the information on May 12.

[143] For the period after May 12, 2023, in the *Preliminary Decision* I stated that the issue was whether there was some opportunity to collectively bargain after that time. In doing so, I relied on *Campbell River (District) v. Canadian Union of Public Employees, Local 623*, 2002 CanLII 53413 (BC LRB) ("*Campbell River*"). PSAC submits that I overstated the impact of that case.

[144] *Campbell River* was a somewhat complex case procedurally. In short, the parties negotiated a tentative agreement on January 31, 2001, and both had ratified the agreement by February 13. After the tentative agreement was ratified but before it was signed, the employer laid off five employees. The union filed a bad faith bargaining complaint, arguing that the employer had made that decision before reaching the tentative agreement and that it had a duty to disclose those layoffs to it. The union then filed a separate complaint about the layoffs (dealing with a provision in British Columbia's labour legislation requiring notice to a union of something that affects a significant number of employees and a requirement to negotiate an adjustment plan) and a number of grievances. On April 19, the union and employer settled the grievances and the second complaint, but did not settle the bad faith bargaining complaint. The parties signed the collective agreement on May 31.

[145] The British Columbia Labour Relations Board dismissed the complaint because it was moot. In doing so, it said as follows:

> …
>
> *40 Even if I accept that the Union has made out its case, the usual remedy granted by the Board for failure to disclose information is to order the parties to go back and bargain in light of the disclosure. The Board has not been asked to order that result here.*

> *Instead, the Union wants the Board to reverse the decision to layoff.*
>
> *41 The purpose of any remedy is to put a party in the position it would have been had a breach not occurred. The Union says that it has lost the opportunity "to pressure the Employer appropriately to achieve an acceptable outcome". The Union asserts broadly that had it known of the Employer's plans, its priorities in bargaining would have been significantly different. It claims that by denying the Union the information, it removed the Union's opportunity to address the issue in negotiations.*
>
> *42 Any right that the Union may have lost is only an opportunity to bargain. A lost opportunity does not necessarily confer a right to the remedy the Union seeks. There is no absolute guarantee that the Union would have obtained a prohibition against layoffs had the possibility of elimination of jobs been disclosed, and had there been bargaining on that subject.*
>
> …
>
> *48 Apart from the unusual nature of the relief sought* [to reverse the layoffs], *another factor in this case that militates against the remedy sought is that the parties did negotiate after-the-fact. The Board's usual reluctance to inject itself into the collective bargaining process is heightened where an agreement has since been reached after there has been disclosure.*
>
> *49 Discussions held after the Sections 11 and 54 complaints were filed allowed the Union some opportunity to speak to the Employer about alternatives to those layoffs. The Union, therefore, had some opportunity to address the issue when it reached the agreement with the Employer in April. I appreciate the Union's argument that those discussions did not amount to a complete reopening of the collective agreement. The Union says it sought to reopen the collective agreement in March, but the Employer refused. The Employer appears to deny that assertion. For the purposes of determining the mootness objection, it does not matter which claim is true. Whether the Union's claim or the Employer's denial is true, the parties subsequently negotiated an agreement to resolve some of the matters in dispute and signed the collective agreement on a without prejudice basis. In its Section 11 complaint, the Union does not ask the Board to open up the collective agreement. Nor does it ask the Board for a declaration that the collective agreement is not in existence because of any misrepresentation.*
>
> …

[146] PSAC makes three arguments about why the *Preliminary Decision* overstated the impact of *Campbell River*.

[147] First, PSAC argues that the "agreement" referred to in paragraph 49 of *Campbell River* was the agreement to settle the other complaint and grievances, not the

collective agreement. However, paragraph 49 of that case is clear that the British Columbia Labour Relations Board was referring to both, stating that "… the parties subsequently negotiated an agreement to resolve some of the matters in dispute **and signed the collective agreement** on a without prejudice basis" [emphasis added].

[148] Second, PSAC argues that the parties in *Campbell River* did negotiate after the fact and reached an agreement. PSAC further argues that the failure of a party to seek an opportunity for further discussion does not preclude a claim that its counterpart violated the duty to bargain in good faith.

[149] The union's allegation in *Campbell River* was that it asked to reopen the collective agreement but that the employer refused. The labour board in that case did not consider that important because the negotiation around the grievances was enough of an opportunity to deal with any of the issues raised by the lack of disclosure.

[150] This case is different, yet similar. It is different in that PSAC did not ask to reopen the collective agreement. Yet, it is similar because the parties did discuss this issue. While their negotiators did not discuss or negotiate this issue, their principals did. As I outlined earlier, the President of UTE contacted the Commissioner of the CRA. He asked for two things. First, he asked for the job losses to be put on hold. The Commissioner said, "No." Then he asked the CRA to speed up the signing date of the collective agreement. The Commissioner agreed to do that, and the CRA did speed up the signing process, so that it was signed within 11 days from the date that PSAC members ratified it. I will say more later about whether this qualifies as collective bargaining, but I note that the settlement in *Campbell River* was not the product of collective bargaining either.

[151] Third, PSAC argues that *Campbell River* was just about layoffs and their consequences, while in this case, the issue is about eligibility for a lump-sum payment. Fourth, and related, PSAC argues that the union in *Campbell River* sought an order setting aside the layoffs, while it seeks only to make employees eligible for the lump-sum payment. I agree that those aspects distinguish this case from *Campbell River*, but they are important when dealing with remedy and do not detract from the idea that a breach of the duty of unsolicited disclosure can be cured by an eventual disclosure, so long as that disclosure still gives the parties some opportunity to collectively bargain in good faith.

[152] In any event, PSAC still acknowledges in its submissions that a breach of that duty can be cured by later bargaining in good faith. It characterizes the threshold as a "meaningful opportunity" instead of "some opportunity". In this case, I do not consider it helpful to try to distinguish between a meaningful opportunity and a regular opportunity.

[153] This is a borderline case; however, I have concluded that PSAC did not have a sufficient opportunity to bargain in good faith after the May 12, 2023, disclosure.

[154] I say this is a borderline case because there are many factors indicating that there was a sufficient opportunity to bargain. No one at PSAC ever tried to negotiate with the CRA for what it seeks in this case — namely, that employees be eligible for the signing bonus as of May 3, 2023, instead of June 27. PSAC's witnesses explained that they did not try to reopen the agreement in part because doing so would open a "can of worms" or "Pandora's box" because other groups of employees would want other changes made to the collective agreement. I am frankly unpersuaded that this is a good enough reason not to try to negotiate.

[155] PSAC's witnesses testified that they did not know how to restart negotiations after reaching a tentative agreement. However, Mr. Gay's evidence at least was undermined when he immediately put that in context by stating that he could not do so for a large bargaining unit in the era of social media. He said that this bargaining unit was "not some UFCW unit at a Swiss Chalet on the highway." I take the point, but I still took this as an acknowledgement that he knew that a bargaining agent could reopen a tentative agreement, just that it would be very difficult to do so for this bargaining unit.

[156] PSAC's witnesses also said that they were afraid of the CRA making an unfair-labour-practice complaint if they refused to encourage their members to ratify the collective agreement; however, the disclosure had enough of an impact on the negotiations to justify at the very least having a discussion with the employer and then deciding what to do if negotiations were not productive.

[157] Despite these factors indicating that PSAC had a sufficient opportunity to negotiate with the CRA, I keep coming back to the fact that there was a strike.

[158] Mr. Gay's evidence was clear that PSAC would have had no leverage if it had tried to reopen the collective agreement after the strike was over. Mr. Bellavance did not suggest otherwise.

[159] The entire purpose of a strike is to create leverage for a union in collective bargaining. Strikes are critical to collective bargaining. As the Supreme Court of Canada put it in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4:

> …
>
> *[46] … it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals. As Prof. H. D. Woods wrote in his landmark 1968 report, the "acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike" (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations *(1969), at p. 175). The strike is "an indispensable part of the Canadian industrial relations system" and "has become a part of the whole democratic system" (pp. 129 and 176).*
>
> *[47] Bob Hepple writes that "the strike weapon as a last resort is an essential safety-valve, a sanction aimed at achieving meaningful participation" ("The Right to Strike in an International Context" (2009-2010), 15* C.L.E.L.J. *133, at p. 139).*
>
> *[48] The recognition that strikes, while a powerful form of economic pressure, are nonetheless critical components of the promotion of industrial — and therefore socio-economic — peace, was also cogently summarized in* R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 S.C.R. 156:*
>
> > *Labour disputes may touch important sectors of the economy, affecting towns, regions, and sometimes the entire country. The cost to the parties and the public may be significant. Nevertheless, our society has come to see it as justified by the higher goal of achieving resolution of employer-employee disputes and the maintenance of economic and social peace. The legally limited use of economic pressure and the infliction of economic harm in a labour dispute has come to be accepted as a legitimate price to pay to encourage the parties to resolve their differences in a way that both can live with (see generally G. W. Adams,* Canadian Labour Law *(2nd ed. (loose-leaf)), at pp. 1-11 to 1-15). [para. 25]*
>
> …

*[51] The preceding historical account reveals that while strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining. Protection under s. 2(*d*), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.*

[52] Within this context and for this purpose, the strike is unique and fundamental. In Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home *(1983), 1983 CanLII 1928 (ON SC), 4 D.L.R. (4th) 231 (Ont. H.C.J.), Galligan J. emphasized the importance of strikes to the process of collective bargaining:*

> *… freedom of association contains a sanction that can convince an employer to recognize the workers' representatives and bargain effectively with them. That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it.*
>
> *… If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the* raison d'être *for workers to organize themselves into a union is gone. Thus I think that* the removal of the freedom to strike renders the freedom to organize a hollow thing*. [Emphasis added; p. 249.]*

…

[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context.…

…

Judy Fudge and Eric Tucker point out that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" (Prof. Michael Lynk, "Expert Opinion on Essential Services", at par. 20; A.R., vol. III, at p. 145).

…

[57] Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial judge recognized, strike action has the potential to place pressure on both *sides of a dispute to engage in good faith negotiations. But what it does permit is the*

> *employees' ability to engage in negotiations with an employer on a more equal footing (see* Williams v. Aristocratic Restaurants (1947) Ltd.*, 1951 CanLII 24 (SCC), [1951] S.C.R. 762, at p. 780;* Mounted Police*, at paras. 70-71).*
>
> …

[160] Without the threat of a strike (or binding interest arbitration), there is no collective bargaining — just collective begging. That was what was going on between the President of the UTE and the Commissioner of the CRA after the tentative agreement. The President asked for something, and the Commissioner said, "No." The President asked for a second, lesser thing and the Commissioner said, "Yes." That is not collective bargaining.

[161] Mr. Gay was also clear in his evidence that there was "no way" that PSAC members would go back out on strike to protect the signing bonus for the affected employees after the bargaining team reached a tentative agreement. Mr. Jackson also testified that he did not "know how we could" go back on strike after May 12, 2023.

[162] I agree with those witnesses. While it may be theoretically possible to take members back out on strike after reaching a tentative agreement to secure a benefit for under 3% of the bargaining unit (1125 affected employees out of a bargaining unit of 42 761), it would be impossible in practical terms. This in turn means that PSAC had lost all of its leverage between reaching the tentative agreement and the CRA's disclosure, which deprived it of a sufficient opportunity to collectively bargain different terms of eligibility for the signing bonus.

[163] For these reasons, I have concluded that the disclosure on May 12, 2023 coupled with PSAC's decision to ratify and sign the collective agreement despite that disclosure did not cure the breach of the duty to bargain in good faith. Providing the disclosure after PSAC had ended the strike deprived it of a sufficient opportunity to collectively bargain.

V. Remedy

[164] PSAC seeks an order paying $2500 to all employees affected by this matter. The CRA submits that a declaration is sufficient in this case.

[165] Specifically, PSAC seeks an order of $2500 in general damages to the "affected employees". While its written outline does not define who the affected employees are,

it means the employees in the call centres who left their employment between May 4 and June 27, 2023. In its oral argument, it clarified that this includes call centre employees who resigned during that period.

A. Remedial principles — put the non-breaching party in the position they would have been in but for the breach

[166] The Supreme Court of Canada set out the general remedial power of labour boards in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. A labour board's remedy must not be punitive in nature, violate the constitution, or contradict the objects and purposes of its constituting legislation. In addition, the remedy must be rationally connected to the unfair labour practice. As the Supreme Court put it at paragraph 56, a labour board's remedy "must be rationally connected or related to the breach and its consequences."

[167] The remedial principle followed by labour boards to ensures that the remedy is rationally connected to the breach is that the parties should be placed into the position they would have been in but for the unfair labour practice. This principle has been articulated by many labour board decisions, including these:

- *Swift Current (City) v. International Association Of Fire Fighters, Local 131*, 2014 CanLII 76050 (SK LRB) at para. 60:

  > *[60] The Board's authority with respect to a remedy is generally to* ***place the parties into the position they would have been but for the commission of the unfair labour practice****. In so doing, the Board is aware that any remedy framed must have a labour relations purpose, that is, generally speaking, to insure* [*sic*] *collective bargaining and fosters a good and long term relationship between the parties to the dispute.*
  >
  > [Emphasis added]

- *Moose Jaw Firefighters' Association No. 553 v. City of Moose Jaw*, 2019 CanLII 98484 (SK LRB) at para. 125:

  > *[125] In determining the proper remedy, the Board has a broad discretion. In the exercise of that discretion, it must* ***seek to place the parties in the position they would have been in, but for the commission of the unfair labour practice****. There must also be a rational connection between the breach, its consequences and the remedy ordered. Further, the goal of the remedy should be to ensure collective bargaining and promote a healthy relationship between the parties, and should not be punitive in nature.*
  >
  > [Emphasis added]

- *Construction Labour Relations Association of British Columbia v. Bargaining Council of British Columbia Building Trades Unions*, 2001 CanLII 33287 (BC LRB), which was not a bad faith bargaining complaint but still set out the principle that "Board orders are intended to **place an applicant in the position it would have been in but for the conduct of the other party**" [emphasis added].

- *Unifor Canada Local 594 v. Consumers' Co-operative Refineries Limited*, 2022 CanLII 95885 (SK LRB) at para. 166:

> *[166] The Board must be concerned with remedying the specific breach of the Act, and in so doing there must be a relationship between the unfair labour practice that has occurred, its consequences to the bargaining process, and the remedy imposed. It must provide a constructive settlement to the dispute and effectively redress the contravention of the Act.* ***The goal is to put the parties in the position they would have been in but for the Employer's conduct****. If the Employer had advised the Union that it had decided to layoff* [*sic*] *all of the master operators, the Union would have had an opportunity to seek a compensating benefit at the bargaining table. The breach resulted in the Union agreeing to a collective agreement that it might not otherwise have agreed to had it known of the Employer's plan.*
>
> [Emphasis added]

[168] The element of PSAC's complaint that I have allowed is that the CRA breached the duty to bargain in good faith through its untimely disclosure of the early end of terms. In such a case, the harm suffered by PSAC is an inability to negotiate different eligibility rules for the $2500 lump-sum payment. In *Rocky View County* at para. 59, the Alberta Labour Relations Board outlined the following approach to remedying a failure to disclose:

> *[59] When granting a remedy, our task is to "undo, to the extent possible, the damages caused by the breach":* Alberta Projectionists Local 302 of IATSE *v.* Famous Players Inc., *[1995] Alta. L.R.B.R. 162 at page 201. In the case before us,* ***the real loss caused by the failure to disclose is the lost opportunity to bargain alternatives*** *to the lay-offs or greater lay-off protection, failing which the Association could have sought different job protection language from the CAB.*
>
> [Emphasis added]

B. General damages are inconsistent with that remedial principle in this case

[169] PSAC's request for a $2500 lump-sum payment made to every "affected employee" as general damages is inconsistent with this remedial principle, for two reasons.

1. The nature of general damages

[170] First, there is no basis for an award of general damages for a breach of the duty of unsolicited disclosure in this case.

[171] At one point, damages were divided into general and special damages: general damages were those that the law presumed were a direct natural or probable consequence of the breach, while special damages were those that the law would not infer from the nature of an act. Therefore, special damages needed to be claimed and proved specifically, and general damages did not; see *Ströms Bruks Akt Bolag v. Hutchison*, [1905] A.C. 515 (UK HL).

[172] However, the term "general damages" has evolved over the past 120 years, and it is now used as a term for damages for losses that cannot be precisely assessed. "General damages" is now the term used to refer to damages for injury to dignity in human rights claims (see *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 at paras. 44 to 54; and *Dominion Forming Inc. v. Universal Workers' Union (LIUNA, Local 183)* (2013), 233 L.A.C. (4th) 315 at para. 123), damages for a loss of reputation flowing from defamation (see *Hodgson v. Canadian Newspapers Co. Ltd.*, 2000 CanLII 14715 (ON CA) at paras. 67 to 69), and damages for a breach of the obligation of good faith and fair dealing in the manner of dismissal (see *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 22).

[173] PSAC does not allege that its members suffered mental distress or other non-pecuniary losses as a result of the CRA's failure to disclose the pending job losses. Instead, it says in its written outline, "It is this amount that PSAC believed it had secured for its members, but for the Employer's failure to disclose that these members would not be eligible to receive it." Its claim is based on economic loss.

[174] General damages, no matter whether they are defined in the old or the more modern fashion, remain compensatory damages. This means that there must be a link between the legal cause of action and some harm that is compensated. The legal cause

of action in this case is the breach of the duty of unsolicited disclosure. Any award of damages must be to compensate a person for losses sustained as a result of that breach. It is simply not enough that PSAC believed that it had secured this benefit for its members; it must show losses to compensate as a result of the breach.

[175] The Board has the jurisdiction to award general damages in s. 192(1) of the *Act* which gives the Board the power to make "any order it considers necessary in the circumstances"; however, general damages are used to compensate for a non-pecuniary harm. The purpose of damages is to put the non-breaching party in the position it would have been in but for the breach. The loss PSAC claims is an economic loss. Therefore, general damages would not compensate for that economic loss.

2. Cases relied on by PSAC in support of general damages, and why they are distinguishable

[176] Second, the cases that PSAC relies on are distinguishable. PSAC relies in particular on two cases: *University of Manitoba* and *PSAC v. CSIS*. The first case is legally distinguishable, and the second one is factually distinguishable.

[177] *University of Manitoba* was an unfair labour practice complaint containing a number of allegations about the employer's conduct during negotiations. The Manitoba Labour Board upheld the complaint about the duty of unsolicited disclosure but dismissed the union's other allegations.

[178] *University of Manitoba* was about collective bargaining that led to a roughly two-week strike by faculty in 2016. The issues between the parties included both monetary and non-monetary issues such as workload, tenure and promotion, and job security. The university was largely dependent on the provincial government for its funding. While it is an independent employer and negotiates its collective agreement without the province at the table, the province uses its funding to influence wage increases at the bargaining table. During the bargaining in 2016, there was a provincial election and a change in government. The new government informed the university that it was going to impose a new mandate on it, requiring no wage increases for a least a year. The university had already tendered an offer in bargaining with a wage increase, which the union had rejected. At the risk of oversimplifying a complicated and evolving situation, the Manitoba Labour Board concluded that the university had a duty to disclose this provincial mandate and that it breached that duty by not disclosing it for

roughly a month. The Manitoba Labour Board also concluded that the university did not bargain in bad faith by reducing its pre-mandate wage offer, sending negotiators without authority to bargain, or pressing an unacceptable offer to impasse.

[179] The Manitoba Labour Board also concluded that the university's breach of the duty of unsolicited disclosure did not cause the strike and refused to order compensation for losses incurred by the union and its members as a result of the strike. However, it awarded $2000 paid to each employee in the bargaining unit when the unfair labour practice was committed "… for having interfered with their rights under the [Manitoba] *Act* …" (see page 84). PSAC submits that the Board should therefore do something similar in this case by paying $2500 to each affected employee.

[180] The Manitoba Labour Board provided no reasons for its $2000 award. However, it did cite s. 31(4) of *The Labour Relations Act* (C.C.S.M. c. L10) of Manitoba. That provision reads as follows:

31(4) *Where the board finds that a party to a hearing under this section has committed an unfair labour practice it may, as it deems reasonable and appropriate and notwithstanding the provisions of any collective agreement,*	***31(4)*** *La Commission peut, si elle conclut qu'une partie à une audience prévue au présent article a commis une pratique déloyale de travail, selon ce qu'elle juge raisonnable et indiqué et malgré les dispositions de toute convention collective :*
…	[…]
(e) where the unfair labour practice interfered with the rights of any person under this Act but the person has not suffered any diminution of income or other employment benefits or other loss by reason of the unfair labour practice, order the party to pay to the person an amount not exceeding $2,000.; or	*e) ordonner à la partie de payer à une personne une somme maximale de 2 000 $ lorsque la pratique déloyale de travail a porté atteinte aux droits conférés à cette personne par la présente loi mais que la personne n'a subi aucune perte, notamment une diminution de revenu ou autres avantages reliés à l'emploi, en raison de la pratique déloyale de travail;*
(f) where the unfair labour practice interfered with the rights of a union, employer or employers' organization under this Act, whether or not the union, employer	*f) ordonner à la partie de verser à un syndicat, à un employeur ou à une association d'employeurs une somme maximale de 2 000 $ lorsque la pratique déloyale de*

or employers' organization has suffered any loss by reason of the unfair labour practice, order the party to pay to the union, employer or employers' organization an amount not exceeding $2,000. ….	*travail a porté atteinte aux droits conférés au syndicat, à l'employeur ou à l'association d'employeurs par la présente loi, peu importe que le syndicat, l'employeur ou l'association d'employeurs ait ou non subi une perte en raison de la pratique déloyale de travail;* […]

[181] These are "unique provisions" (from Jeffery M. Andrew, *Labour Relations Board Remedies in Canada*, 2nd ed., chapter 9.19) that are not found anywhere else in Canada and are not found in the *Act* that governs this case. While the author of *Labour Relations Board Remedies in Canada* suggests that the intention behind ss. 31(4)(e) and (f) of the Manitoba legislation is "to introduce something in the nature of aggravated damages", those paragraphs do more than that: they give the Manitoba Labour Board a clear mandate to order damages even when a party has not suffered any "… loss by reason of the unfair labour practice …". To put this another way, Manitoba has specifically legislated that its labour board should not apply the remedial principle I outlined earlier that the parties should be placed into the position they would have been in but for the unfair labour practice.

[182] Therefore, I am not following *University of Manitoba* because of that important statutory difference.

[183] I acknowledge that the Government of Manitoba was later held liable for damages to the affected employees in that case for the breach of their freedom of association and that the courts disagreed with the Manitoba Labour Board's conclusion that the wage freeze was not responsible for the strike; see *Manitoba Federation of Labour v. The Government of Manitoba*, 2023 MBCA 65. That decision does not impact PSAC's argument, or my rejection of it, described earlier.

[184] In *PSAC v. CSIS*, the Board allowed an unfair-labour-practice complaint against the Canadian Security Intelligence Service (CSIS). CSIS has a small bargaining unit of approximately 74 employees performing clerical and administrative duties, and thousands of unrepresented employees. On February 17, 2022, the parties reached a tentative agreement, which PSAC ratified on April 13. On April 26, CSIS announced that its unrepresented employees would receive a lump-sum payment of 2.5% of their salaries. It refused to pay this to its represented employees. The tentative agreement also required CSIS to implement the negotiated retroactive wage increases within 180

days of signature, failing which it would pay each employee $50 and an additional $50 for each additional 90-day period it was late. CSIS then sat on the tentative agreement for over a year and did not sign it until May 3, 2023.

[185] The Board found that CSIS's actions amounted to four unfair labour practices: it failed its duty to bargain in good faith by failing to provide any information about the lump-sum payment to PSAC until it was announced, it failed its duty to take all reasonable steps to enter into a collective agreement by not signing the collective agreement for over a year (aside from a three-month delay attributable to the Governor in Council), it undermined the relationship between PSAC and the employees it represented to an extent that constituted interference in their representation by PSAC, and it discriminated against those employees by virtue of their union membership. The Board found that the failure to inform PSAC about the lump-sum bonus to represented employees was particularly unfair because "… the terms and conditions granted to unrepresented employees were used as a benchmark in negotiations" (at paragraph 79).

[186] As a remedy, the Board ordered that the represented employees be awarded the 2.5% lump-sum payment and an additional $100 for the undue delay ratifying the collective agreement.

[187] PSAC argues that the remedy it seeks in this case ($2500 for each affected employee) is the same as the Board's remedy in *PSAC v. CSIS*, which was that the represented employees be paid the lump-sum bonus. However, there are two important differences between *PSAC v. CSIS* and this case. First, the Board found that the 2.5% lump sum payment would have been negotiated because payments to unrepresented employees formed the benchmark used by the parties to reach their collective agreement. Second, the Board did not make that order solely to compensate for the employer's breach of the duty of unsolicited disclosure. Instead, the Board made that order to remedy the unfair labour practices as a whole (except for the delay in ratification, which was remedied with the $100 payment).

[188] The Board's reasons for awarding that remedy read as follows:

> …
>
> *[81] Section 192 of the* Act *provides that the Board may make any order that it considers necessary in the circumstances if it*

> *determines that a complaint referred to in s. 190(1) is well founded. It also lists examples of orders, without limiting the Board to them. For failing to comply with s. 186(2)(a), for instance, s. 192(1)(b)(ii) provides for an amount not exceeding the remuneration that would have been paid had it not been for the breach.*
>
> *[82] In* Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139, the former Board found that s. 192(1) provides jurisdiction to make an award of damages for a non-monetary loss and that such damages have been awarded "… where there is an important and intrinsic right to be protected or enforced and where deterrence is an important factor" (at para. 38). The former Board added that "[h]armonious labour-management relations, which are one of the objects of the* PSLRA *[now the* Act*], are not possible when one of the parties has no hesitation in ignoring provisions of the* PSLRA *designed to achieve labour relations peace" (at para. 38). Like in that case, I find that an award of damages in the circumstances of this case is necessary to emphasize that the provisions of the* Act *are to be respected and that there are consequences for breaching them.*
>
> *[83] I have found that the respondent has failed to comply with s. 106 of the* Act *and has committed an unfair labour practice within the meaning of ss. 186(1)(a) and 186(2)(a)(i). Two of the main factors in those findings were the respondent's actions around the TRLSP* [Temporary Recognition Lump Sum Payment] *and its failure to finalize the collective agreement in a timely fashion. The remedies requested by the bargaining agent are directed at these two main issues.*
>
> *[84] I find it necessary to award the TRLSP to the members of the bargaining unit. Again, the terms and conditions granted to unrepresented employees were used as a benchmark in negotiations. The rationale for granting the TRLSP to unrepresented employees, in recognition of the increase in transformational initiatives and employees' continued support of the changes, applies equally to the work of bargaining unit members. Like in* Federal Government Dockyard Chargehands Association*, this remedy goes to the "… heart of the relationship between the parties, and failing to rectify it in a meaningful way could give rise to cynicism about labour-management relations and could undermine the ability of the union to represent its members effectively" (at para. 41).*
>
> …

[189] Unlike in *PSAC v. CSIS*, there is no "benchmark" using the date of the tentative agreement as the eligibility date for a signing bonus. On the contrary, the evidence in this case is that the agreement reached by these parties on monetary elements mirrored that reached at the Treasury Board, which was a lump-sum payable on

signature and not ratification. This was also the date used in every previous round of bargaining. To the extent that there was a "benchmark", it was followed.

[190] Additionally, the lump-sum payment ordered in *PSAC v. CSIS* was the result of multiple unfair labour practices. The Board concluded that CSIS chose not to pay the lump-sum bonus because of "… the fact of representation by a bargaining agent" (at paragraph 75). CSIS provided no evidence, or even an explanation, to discharge its onus to show a non-discriminatory reason for the refusal to pay the lump-sum bonus to its unionized employees. The Board also concluded that after PSAC's negotiator reached out to CSIS, it "… did not engage with the PSAC on the issue …" (at paragraph 63) after announcing the lump sum.

[191] In this case, PSAC did not attempt to engage with the CRA through its negotiator, and the CRA Commissioner did engage with the UTE's president by agreeing to his alternative proposal of speeding up the signing of the collective agreement. There is no evidence or even an allegation that the CRA was discriminating against PSAC members or undermining PSAC through its actions.

[192] The Board's order that CSIS pay the bonus in that case was to remedy three unfair labour practices, only one of which is present in this case. The Board did not untangle what part of the award was for each of the unfair labour practices. If the award was linked to the discrimination or diminishment of respect for the bargaining agent, then general damages were appropriate because the harms flowing from those actions are non-tangible and non-pecuniary. If the award was linked to the duty of unsolicited disclosure, then the award was consistent with the lost opportunity principles I will discuss shortly because the disclosure was about a benchmark used by the parties to reach their agreement. In essence, the Board was able to conclude that, but for the breach, the parties would have reached a different collective agreement. For these reasons, *PSAC v. CSIS* does not assist PSAC in this case.

[193] In conclusion, *PSAC v. CSIS* is factually distinguishable from this case.

[194] Additionally, I considered *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Local 849 v Egg Films, Inc*, 2015 NSLB 213 but decided it did not assist PSAC for the same reason. In that case, an employer locked out its employees after bargaining in bad faith by refusing to disclose financial information and by making bargaining proposals that

showed it was not serious about entering into a collective agreement and, instead, wanted to decertify the union. The Nova Scotia Labour Board concluded that the lockout was illegal and a breach of the statutory freeze because it was not preceded by good faith bargaining. It ordered that the employees who were locked out be paid what they would have earned during the illegal lockout.

[195] Like the *PSAC v. CSIS* decision – and unlike this case – that case involved multiple unfair labour practices designed to undermine the union's ability to represent employees. That case also involved a clear causal link between the breach and the remedy, and did not award general damages that were unlinked to a quantifiable loss.

[196] Finally, I considered the *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139 decision cited by the Board in *PSAC v. CSIS*. That case involved the late implementation of an arbitral award. The Board awarded $7500 to the bargaining agent as a result of a roughly four-month delay implementing the arbitral award. The bargaining agent in that case sought damages of $100, payable to each employee in the bargaining unit, which it characterized as "nominal" damages. The Board's order was for roughly the same total dollar amount, except payable to the bargaining agent. Unlike that case, PSAC does not characterize a $2500 payment as nominal damages.

[197] For these reasons, I have concluded that these other, earlier cases do not assist PSAC's claim for general damages in this case. The *University of Manitoba* decision is legally distinguishable. The other cases where this Board or other labour boards have awarded damages are factually distinguishable.

C. Damages for the lost opportunity to bargain

[198] Therefore, I have returned to the principle of damages I set out earlier in this section of the decision. That principle is that the Board should put the parties into the position they would have been in but for the breach. The breach in this case was the CRA's failure to disclose the early end of terms on or before April 27, 2023. Therefore, my task is to decide what would have happened if it did disclose that and whether any losses flow from that.

1. Principles of loss of opportunity damages

[199] The common phrase for this type of analysis is a "loss of opportunity" case. I averred to that concept when quoting from the *Rocky View County* decision earlier. In *International Union of Operating Engineers, Local 865 v. Canadian Pacific Forest Products Limited*, 1990 CanLII 5820 (ON LRB) the OLRB described the approach to loss-of-opportunity cases in much greater detail as follows:

> …
>
> *6. This is not the first time the Board has had to grapple with a difficult problem while fashioning an appropriate remedy for a breach of the duty to bargain in good faith where that breach consists of a failure to disclose pertinent information in collective bargaining … In approaching such cases, the Board has recognized that a right which is not backed by an effective remedy has little meaning. Accordingly, the loss of opportunity to bargain for a benefit has long been recognized by the Board to be a loss which is compensable in damages. However, the Board has also recognized that its remedies must fit the circumstances of the particular case before it and must be compensatory not punitive. Such remedies must be fashioned having regard to the labour relations principles which underlie the* Labour Relations Act. *In that respect, the Board has not found it appropriate to impose or change terms in collective agreements under the guise of compensation … because the right being addressed in such cases is not the right to a particular collective agreement but rather the right to bargain in pursuit of one.*
>
> *7. The purpose of a remedy in this context is to put the aggrieved party (in this case the complainant trade union and the affected bargaining unit employees) in the position it would have been in but for the wrongful conduct found by the Board. In this case, that wrongful conduct is not the actual shutting down of turbine #1 but rather the respondent's failure to advise the complainant in a timely manner of its intention to do so. The nature of the breach of the obligation to bargain in good faith which the Board has found the respondent guilty of in this case necessarily requires the Board to engage in some speculation in terms of the damages claimed by the complainant. That speculation must, however, be as informed as possible.*
>
> *8. It is often difficult to assess damages in cases like this one, but a wrongdoer cannot be relieved from paying damages just because they are difficult to assess. Consequently, although an aggrieved party must prove its damages on the balance of probabilities, the nature of "loss of opportunity" cases dictates that it be given the benefit of the doubt in that respect.* ***However, that does not relieve an aggrieved party from the responsibility of calling sufficient evidence to establish the opportunity it lost and the damages it asserts resulted there from*** [*sic*]***. It must***

> ***demonstrate a reasonable probability that it could have obtained the benefit for which it seeks compensation but for the respondent's misconduct. A mere chance of a benefit will entitle an aggrieved party to only nominal damages at most. And, as the Board and the Divisional Court observed in*** **Radio Shack, supra*****, damages will be reduced in proportion to the contingencies to achieving the benefit claimed in the absence of the wrongful conduct*** *(see also* Burlington Northern Air Freight (Canada) Ltd.*, [1987] OLRB Rep. Aug. 1064).*
>
> …
>
> [Emphasis added]

[200] In that case, the employer failed to disclose that it was shutting down one of its turbines, which led to the elimination of some positions. The OLRB concluded that it was unlikely that the union would have persuaded the employer to change its decision to shut down the turbine or agree to enhanced benefits or compensation for affected employees, and it decided not to award any damages as a result.

[201] The OLRB was building on its seminal decision in *United Steelworkers of America v. Radio Shack*, 1979 CanLII 817 (ON LRB), upheld in *Tandy Electronics Ltd. v. United Steelworkers of America*, 1980 CanLII 1738 (ON SC). *Radio Shack* was part of a series of decisions by the OLRB in response to egregious unfair labour practices by the employer during the certification campaign, collective bargaining, and the resulting strike. In this particular decision, the OLRB concluded that the employer engaged in so-called "surface bargaining" — going through the motions of bargaining but in a way that made it clear that it had no interest in reaching an agreement. The OLRB then turned to the appropriate remedy in such a case. It concluded that it did not have the power to issue a fine or penalize the employer, and it did not have the power to impose a collective agreement on the parties. However, it could still make an effective remedy for the loss of opportunity to reach a collective agreement. It stated as follows:

> …
>
> *100 After reviewing these policy pronouncements, we have decided that some qualification is demanded by our experience and by a need to ensure our remedies remain effective. While we admit that monetary relief based on the collective agreement that would have been negotiated had there been good faith bargaining requires the assumption that an agreement would have resulted, awarding no monetary relief is tantamount to assuming no agreement would have arisen out of good faith bargaining. Clearly, reality is usually somewhere in between in the sense that either proposition may be valid in any particular case. What trade unions like the*

> *Complainant and the employees it represents lose in cases of this kind is "the loss of an opportunity" to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the Complainant may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands. For example, an employer may be able to escape with no contract at all if the initial organizing strength of the union can be so eroded by unfair labour practices that a strike can be outlasted. Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed by the legislation — bargaining agent recognition. The failure to consider any monetary relief seems to encourage these consequences.…*
>
> *101 It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature — a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See* Mayne and McGregor on Damages *12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example:* Withers *v.* General Theatre Corporation, *[1933] 2 K.B. 536;* Roach *v.* Yates, *[1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.*
>
> …

[202] The OLRB then spent several paragraphs summarizing court decisions that compensated plaintiffs for a loss of opportunity. After that summary, the OLRB stated:

> …
>
> *111 If the courts have not shied away from attempting to provide effective monetary relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when*

> *confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.*
>
> *112 A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular collective agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union's bargaining capacity in negotiations which have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this "loss — the bargaining expectancy — that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too. Indeed, at least one American statute specifically provides for such an approach. See* California Labor Relations Act of 1975, *incorporated as Part 3.5 (sections 1.40 to 1166.3) of Division II of the California Labor Code. Also see Yates,* The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experience Under the California Agricultural Labor Relations Act *(1978) 29 Lab. L.J. 666.*
>
> …

[203] The OLRB went on to quote from some U.S. decisions dealing with loss-of-opportunity damages and then concluded:

> …
>
> *115 We are sensitive that too arbitrary an approach to this kind of monetary loss might have the effect of unduly burdening employers and, accordingly, we embark on this new direction with caution. However, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss. The fear of over compensation, in many contexts, has all too often resulted in no compensation with iniquitous results. To a very real extent, bargaining orders simply direct an employer to do what was originally required except that by virtue of the unlawful conduct the employer may have weakened the bargaining position of the union and thereby strengthened his own position. If awarding employees compensation for economic losses established by reasonable proof has the incidental effect of making such misconduct less attractive, it would be unduly restrictive to rule out this more effective remedy because of the incidental deterrent*

> *effect. Clearly, the preamble to the Act demands this Board to devise a compensatory remedy where this is at all possible. See Note,* The Need For Creative Orders Under Section 10(c) of the NLRA *(1963), 112 U.Pa.L.Rev.69.*
>
> …

[204] The OLRB directed the employer to pay all monetary losses that the union could establish as arising from the loss of opportunity to negotiate a collective agreement, due to the employer's unlawful conduct. The OLRB was not called upon to make a decision quantifying those damages, as the parties resolved their strike; see *U.S.W.A., Local 9011 v. Radio Shack*, [1985] O.L.R.B. Rep. December 1789 at para. 5.

[205] More recently, in *Elementary Teachers' Federation of Ontario v. The Crown in Right of Ontario*, 2022 CanLII 15874 (ON LRB), the OLRB concluded that the employer breached the duty to bargain in good faith by telling a union that it had to withdraw certain grievances to obtain a benefit in collective bargaining and that all other unions had done likewise, when in fact, one other union had preserved its grievances and still received the benefit. In *Elementary Teachers' Federation of Ontario v. The Crown in Right of Ontario*, 2022 CanLII 51963 (ON LRB), the OLRB turned to the issue of remedy. It decided not to award damages for loss of opportunity for two reasons: the evidence did not disclose that, but for the misrepresentation, the grievances would not have eventually been withdrawn (at paragraph 36), and the union did not establish that it would have bargained the issue to impasse or that the parties would have agreed to preserve the grievances (at paragraph 37).

[206] This concept of lost opportunity damages is summarized in George W. Adams, *Canadian Labour Law*, 2nd edition, at paragraph 10.42 as follows (footnotes omitted):

> *Nevertheless, boards have been cautious in considering trade union relief for "a loss of opportunity to bargain". A lost opportunity can be difficult to evaluate and can involve considerable speculation in any assessment. Thus, it may require exceptional circumstances for a board to impose a particular term in a collective agreement because that term is what the union says it would have sought had the appropriate information been forthcoming from the employer. This is because it is difficult to recreate the conditions existing at a bargaining table in order to assess just what would have happened had the appropriate disclosure been made. Nevertheless, a right without a remedy is not likely to engender the required respect for needed disclosure or*

> *deterrence. Boards are, therefore, conscious of the balancing required and may fashion a probabilistic award where appropriate.*

[207] These authorities indicate that my task is to determine what would have happened had the information about job losses been disclosed in a timely manner. I have the jurisdiction to order damages based on what would have happened in the event of timely disclosure. However, I should act cautiously before awarding such damages because of the difficulty in reconstructing collective bargaining and the inadvisability of an order that, in effect, creates a new collective agreement for the parties.

[208] In making my decision, I will focus on two questions: what would PSAC have proposed if it had received timely disclosure, and what would the CRA have agreed to?

2. What would PSAC have proposed, had it known about the decision?

[209] The first question is what would PSAC have proposed in collective bargaining if it had been told about the job losses. I was particularly struck by the testimony of the two members of PSAC's negotiating team. Neither of them said that they would have insisted on or even necessarily proposed changing the eligibility date from the date of signature to the date of the tentative agreement.

[210] Mr. Gay testified that the PSAC bargaining team would have had to discuss the issue. He said that it **could** have gone to the CRA to propose something — but he never said that it would have done so. He said that using the date of the tentative agreement was an option, but he also said that he could have continued to press for the date of ratification (which was PSAC's proposal until the very end). I note that using the date of ratification would have helped only six employees who left between the date of ratification and the signing date, of whom three resigned, and three had terms ending naturally during that period.

[211] Mr. Jackson's evidence was even more vague. He said that PSAC would have done something but that it was unfair for him to speculate as to what. He mentioned that PSAC could have rushed its ratification process by relying on more virtual meetings, but even as of the hearing he did not know whether that would work.

[212] Mr. Gay testified that, during the crucial three-day period of negotiations ending the strike, the negotiating team was tired, frustrated, and angry. That is entirely understandable. However, it makes it less likely that PSAC would have proposed making the eligibility date the date of the tentative agreement. The two witnesses had the better part of two years to think about what they would have done differently and were unable to say that they would have made the proposal; it is unlikely that they would have come up with this proposal during a three-day bargaining period when they were tired, frustrated, and angry.

[213] I was also struck by the discussions after the disclosure was made. The President of the UTE asked the CRA to postpone the job losses and then speed up the signature of the collective agreement — not to change the eligibility date for the lump-sum payment. This was the proposal made closer to the "heat of the moment" and is an indication of what might have been proposed by the bargaining team. It is also more consistent with Mr. Jackson's and Mr. Gay's evidence about PSAC's main interest when dealing with term employees at call centres. They testified that the main concern was about the precarity of term employment and that PSAC's main goal was to make more terms into indeterminates. The agreement that PSAC asks me to conclude that it would have reached (to change the eligibility date) does not solve or deal with the broader concern about the precarity of term employment. Therefore, it is less likely that PSAC would have proposed it.

3. What would the parties have agreed to?

[214] The second question is this: if PSAC had proposed changing the eligibility date to the date of the tentative agreement, would the CRA have agreed?

[215] The only evidence I have to indicate that the answer might have been "yes" is that the CRA did its costing of the tentative agreement on the basis of the workforce employed as of the date of that agreement. The cost ended up being lower because of those job losses; however, this is some evidence that the CRA would not have balked at the higher costs of using the date of the tentative agreement as the eligibility date.

[216] However, PSAC pushed for the date of ratification as the eligibility date right up until the final agreement was reached, and the CRA always refused. The CRA was following the pattern set by PSAC and the Treasury Board a few days earlier, as well as

the pattern set by PSAC and the CRA in the two previous rounds of bargaining in 2016 and 2021. That pattern was that eligibility was as of the date of signature.

[217] Mr. Bellavance was never asked directly whether the CRA would have agreed to use the signature date as the eligibility date. However, he did testify that the eligibility date was always the date of signature because that is when the rest of the collective agreement changes come into force. Mr. Gay testified that Mr. Bellavance was adamant about keeping the date of signature as the eligibility date and that the CRA was not moving on the issue.

[218] Mr. Gay and Mr. Jackson were also not asked whether they would push this issue to impasse. They both testified that going on strike was challenging, particularly given that the strike lasted longer at the CRA than at the Treasury Board.

[219] In light of the testimony, particularly that of PSAC's negotiator and bargaining team member, I have concluded that there is a low probability that PSAC would have proposed changing the eligibility date to the date of signature. Even if it had, there was a low probability that the CRA would have agreed. Finally, I am not convinced that PSAC would have pushed the issue to impasse. I am not convinced that it would have been prepared to extend the strike over the eligibility date for the lump-sum payment.

[220] In essence, I have reached the same result as the OLRB did in *Elementary Teachers' Federation of Ontario,* 2022 CanLII 51963 and *Canadian Pacific Forest Products Limited*. The likelihood that PSAC would have negotiated a different eligibility date is too small to justify an award of damages in this complaint.

4. Remedial issues not considered

[221] In reaching this conclusion, I have not considered some of the consequences of concluding that the parties would have reached a different collective agreement. These consequences lead to a number of questions. For example, would the $2500 be payable to employees outside the call centre who left their employment between May 4 and June 27, 2023? Should or can the Board claw back the $2500 paid to employees who became eligible after May 4? Both parties made thoughtful submissions about these and other questions raised by PSAC's proposed remedy. In light of my conclusion, I do not need to answer these questions.

[222] PSAC has not asked for nominal damages in this case, even in the alternative. I have decided to respect their choice and not consider nominal damages.

[223] Similarly, PSAC did not request an order that this decision be posted in workplaces (as was the case in *PSAC v. CSIS*), so I have not considered whether to grant such an order.

[224] For these reasons, the remedy in this case is a declaration.

[225] I want to thank the parties' representatives for their able submissions, both in writing and orally during the hearing. The parties admitted all the documents in this matter on consent, which saved time. The representatives were extremely focussed, both in their examinations of witnesses and in their submissions. They made the hearing a pleasure to participate in.

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

(The Order appears on the next page)

VI. Order

[227] The complaint is allowed.

[228] I declare that the Canada Revenue Agency violated s. 106 of the *Act*.

June 19, 2025

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board