Date: 20251001

File: 560-02-52213

Citation: 2025 FPSLREB 127

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

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

BETWEEN

KALEY HOGAN

Complainant

and

TREASURY BOARD
(Department of Employment and Social Development)

Respondent

Indexed as
Hogan v. Treasury Board (Department of Employment and Social Development)

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

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

For the Complainant: Herself

For the Respondent: Peter Doherty, counsel

Decided on the basis of written submissions, filed June 18, 22, and 30 and July 1, 2025.

REASONS FOR DECISION

I. Overview

[1] This decision is about a request for interim relief.

[2] Kaley Hogan ("the complainant") made a work refusal under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). The respondent, its Occupational Health and Safety Committee ("the OHS Committee"), and the Head of Compliance and Enforcement ("the Head") all concluded that there was no danger. The complainant made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that the employer retaliated against her by, among other things, refusing to pay her for the roughly two-month period it took until the Head made its decision and refusing to continue to pay her.

[3] The complainant then asked the Board for an interim order requiring the respondent to pay her wages, among other things, pending a full hearing about her complaint.

[4] The complainant's request for an interim order raises two issues: whether the Board has the jurisdiction to grant a complainant interim relief, and whether it should do so in this case.

[5] I have concluded that the Board does not have the jurisdiction to grant interim relief. The Board does not have the express jurisdiction to do so, and it also does not have such jurisdiction by necessary implication. The broader legislative context discloses that Parliament decided against conferring the power to grant interim relief on the Board.

[6] Out of an abundance of caution, I also considered whether the Board should grant the requested interim relief in this case if it had the jurisdiction to do so. I have concluded that it should not. The complainant has not made out a serious issue to be tried that she is entitled to be paid her wages until the dispute over her work refusal has concluded. She has raised a serious issue about an alleged overpayment. However, she has not presented clear evidence that she would suffer irreparable harm if the interim relief is not granted.

[7] Therefore, I have denied the complainant's request for interim relief. My detailed reasons follow.

II. Outline of the complainant's request for interim relief

A. Factual background

[8] The complainant is employed at the Department of Employment and Social Development (ESDC) and has been working there for approximately five years. She has medical conditions that require accommodation and was away on sick leave without pay from April 2024 to January 2025. She has provided emails describing her frustration with what she states is a failure to properly accommodate her disabilities before and after her return to work.

[9] On March 13, 2025, the complainant left work and was placed on paid sick leave for that day. In an email that she sent that day, she stated that she could not continue working. In March 2025, the complainant informed the employer of a work refusal on health-and-safety grounds. The parties dispute the precise date on which the complainant made her work refusal. The complainant says that she made it on March 14 but that she no longer has a copy of that written work refusal. The respondent filed a copy of an email dated March 22, in which the complainant states that she is invoking her right to refuse unsafe work. In that email, she states that her work condition is unsafe because of the respondent's refusal to accommodate her disabilities, systemic mismanagement, and the involvement of three employees against whom she has filed a human rights complaint. The complainant was on unpaid sick leave when she sent that email.

[10] The respondent's management investigated the work refusal and concluded that there was no danger on April 7, 2025. The complainant referred her work refusal to the OHS Committee, which also concluded that there was no danger. The complainant referred her work refusal to the Head, which dismissed this matter on either May 15 or 20 (the complainant uses both dates at different times in the documents that she has filed). The complainant has filed an application for judicial review in the Federal Court against that decision.

[11] The complainant has remained on unpaid sick leave through the end of the written submission process for her request for interim relief.

[12] In addition to these events, the respondent says that it discovered an alleged overpayment made to the complainant in 2020 or 2021 of approximately $5000. It sent her a letter dated April 2, 2025, to collect that overpayment and then further correspondence on May 26 and June 17 about the same or other overpayments. The respondent has also made administrative changes to the complainant's Phoenix pay file; the complainant says that these changes were made in bad faith.

B. Complaint of a breach of s. 147 of the *Code*

[13] The complainant made a complaint under s. 133 of the *Code*, alleging that the respondent violated s. 147 of the *Code*. Her complaint alleges that the respondent took four steps that violated s. 147 of the *Code*: it placed her on sick leave without pay, it issued her the overpayment letter, it sent her long-term disability forms, and it did not pay her after she left work on March 13. Her complaint form states that her wages were suspended on or about April 2, but both parties agree that she has been on unpaid sick leave since March 14, 2025. The respondent denies any breach of s. 147 of the *Code*. The respondent also says that it offered the complainant alternative work after her March 22 work refusal but that the complainant refuses to accept it. The complainant states that the alternative work that she has been offered is inappropriate.

C. Application for interim relief

[14] On May 21, 2025, the complainant applied to the Board for interim relief, pending the hearing of her complaint. Specifically, she asked that the Board order three things: that the respondent pay her wages from March 14 to May 15, that the Board make an acknowledgement that "… this period as covered by Section 129(6) protections", and that the Board "[c]onfirm that continued withholding of these wages constitutes ongoing reprisal". In her reply submissions, she expanded her request to include the reinstatement of her wages from March 14 until the final resolution of this matter, a suspension of overpayment activities, an order that the respondent "… cease all forced contact with named respondents and respect trauma-informed accommodation", and to preserve all payroll and leave records for "independent forensic review."

[15] Upon reviewing the complainant's initial request, I set out a timetable for submissions. I also drew the complainant's attention to some cases that indicated that

the Board does not have the jurisdiction to grant interim relief. I asked the parties for submissions on the issue of the Board's jurisdiction to grant interim relief, as well as what the legal test is to grant this relief and whether the complainant has made out that test. The parties were permitted to file documents in support of their submissions, and the complainant included something she called a "Personal Statement", which, while not affirmed under oath, I have treated as if it were. In her initial submissions, the complainant referred to other documents that she said proved her case. I invited her to file them. She claimed that they were confidential and, therefore, could not be provided to the respondent. I granted an interim confidentiality order and directed that the documents be provided only to the respondent's counsel, so that he could prepare a response.

D. The complainant's submissions

[16] I will address the parties' respective positions on each issue later in these reasons. However, I first want to address the complainant's submissions.

[17] The complainant's case rests on her belief that s. 129(6) of the *Code* states that a person who makes a work refusal on health-and-safety grounds is entitled to be paid their regular rate of wages while the work refusal is being investigated. In her correspondence with the respondent before making this complaint, and in her initial submissions to the Board, the complainant stated repeatedly that s. 129(6) of the *Code* reads: "While the matter is being investigated, the employee shall continue to be paid at the regular rate of wages …".

[18] Subsection 129(6) of the *Code* does not say anything remotely like that. It reads:

129(6) *If the Head makes a decision referred to in paragraph 128(13)(a), the Head shall issue the directions under subsection 145(2) that the Head considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.*	***129(6)*** *S'il prend la décision visée à l'alinéa 128(13)a), le chef donne, en application du paragraphe 145(2), les instructions qu'il juge indiquées. L'employé peut maintenir son refus jusqu'à l'exécution des instructions ou leur modification ou annulation dans le cadre de la présente partie.*

[19] The Head never made any directions in this case, so s. 129(6) has no bearing on this complaint.

[20] In an email on April 24, 2025, the respondent pointed this out to the complainant and provided the complainant with the actual wording of s. 129(6). The complainant replied to the respondent that evening to state that it "distorts federal law" and "[d]eliberately [m]isrepresented [s]ection 129(6)" of the *Code*, accusing the respondent of substituting an entirely unrelated clause. The complainant then repeated her invented wording of s. 129(6) of the *Code*.

[21] The complainant repeated this invented statutory provision in her submissions to the Board. I wrote to draw her attention to the fact that s. 129(6) of the *Code* is not worded the way she says. Finally, the complainant admitted that she misstated s. 129(6) of the *Code*; however, she says that she just "imprecisely paraphrased this provision." She maintains that the obligation to continue her wages is found in s. 129(6) of the *Code*. Then, in later correspondence with the Board, she repeated her invented quotation of s. 129(6) of the *Code*.

[22] In support of the position that s. 129(6) of the *Code* requires the respondent to continue paying wages to her, the complainant cited *Merriweather v. Canada (Attorney General)*, 2012 FC 109, and something called the "H&S Officer Training Module - Labour Program", 2018 edition. The *Merriweather* decision does not exist, and I have been unable to find this alleged training module.

[23] In her submissions, the complainant cites other statutes and case law that do not exist. Importantly, she states that ss. 22 and 44 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) empower the Board to (according to her) make "… any order … to remedy or counteract any act or omission that constitutes a contravention" and that this includes the power to grant interim relief. Sections 22 and 44 of the *FPSLRA* were repealed in 2013. Before their repeal, they said no such thing: s. 22 was about the appointment of members of the Board, and s. 44 was about the role of the Chairperson of the Board. Those sections were repealed and then re-enacted with different wording in ss. 8 and 25 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365). Neither statute ever said that the Board has the power to make any order "… to remedy or counteract any act or omission that constitutes a contravention." She also cites a case called *Fanning v.*

Treasury Board, 2023 FPSLREB 12, and states that it is an example of the Board ordering interim wages in a dispute involving a wage stoppage. That case does not exist. She cites two other cases that do not exist (namely, *Vancouver v. CUPE*, 2006 SCC 27, and *Canadian Human Rights Commission v. Canada (AG)*, 2018 FCA 12).

[24] The complainant accuses the respondent of ignoring statute and precedent to evade accountability because the respondent does not recognize the cases or statutes that she has invented.

[25] Finally, the complainant lists other cases and states that they stand for propositions that are completely unrelated to their subject matter. Specifically, she says that *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, and *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, stand for the proposition that administrative tribunals have the authority to grant interim relief (they do not discuss interim relief in any way) and that the Board ordered interim relief in nearly identical circumstances to hers in *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52 (it did not order interim relief).

[26] Referring to non-existent statutes and cases, and referring to existing cases for propositions that are unrelated to those cases, are common features of submissions generated or researched by artificial intelligence. I have assumed that this is the case here and that the complainant has been misled by the artificial intelligence tools that she has used to generate or research her submissions — rather than assume that she has deliberately misled the Board. However, I agree with the Canada Industrial Relations Board in *Choi v. Lloyd's Register Canada Limited*, 2024 CIRB 1146 at para. 79 when it stated:

> *[79] … Parties should use caution when using AI to generate submissions, particularly where the submissions include references to legal authorities. If parties use AI to prepare submissions or other documents, it is imperative that they verify all AI-created content to ensure its accuracy and reliability.*

[27] Since the complainant has not cited any real statutes or case law that support her arguments, I focussed on the principles that she articulates instead. I examined closely whether those principles were supported in statute or case law. In other words, I considered the propositions or principles argued by the complainant despite the fact

that the statutes and case law that she cites either do not exist or do not say what she has been led to believe they say.

III. The Board does not have the jurisdiction to grant interim relief

[28] The complainant submits that the Board has the jurisdiction to grant interim relief. There is no express statutory provision permitting the Board to grant interim relief. Instead, the complainant submits that the Board has the jurisdiction to grant interim relief by necessary implication. The respondent submits that the Board does not have this power.

[29] I have concluded that the Board does not have the power to grant interim relief by necessary implication. My reasons for this conclusion are divided into four parts. First, I will explain what I mean by "interim relief" in this decision. Second, I will outline the Board's previous decisions about its power to grant interim relief (some for, some against) and explain why I do not feel bound by them. Third, I will outline the conditions for jurisdiction by necessary implication. Finally, I will explain why I have concluded that Parliament has addressed its mind to the issue and decided against conferring this power on the Board.

A. What is meant by "interim relief"

[30] Before examining the Board's jurisdiction in detail, I want to briefly define what I mean by interim relief.

[31] Different tribunals and courts use different terms to describe what the complainant is asking for in this case. For example, in *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25, the Federal Court of Appeal differentiated between "interlocutory" relief (which it stated meant relief pending a decision on the merits of the substantive dispute before a court) and "interim" relief (which it stated was relief pending a decision on a request for interlocutory relief). The Nova Scotia Labour Board refers to cease-and-desist orders as "interim orders" (see, for example, *International Union of Bricklayers & Allied Craftworkers, Local Union 1 v. Nova Scotia Construction Labour Relations Association Ltd.*, 2018 NSLB 177). This Board has used the term "interim order" or "interim decision" to describe a partial decision made when the Board reserves jurisdiction to resolve the rest of the dispute (as in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 13).

There are also so-called interim or interlocutory orders that deal with procedural and pre-hearing issues such as summonses and the disclosure of documents.

[32] This case is about granting a substantive remedy to a party in advance of hearing the complaint. When I am referring to interim relief in the rest of this case, I am referring to an interim order conferring a substantive benefit on a party pending a hearing on the substance of the case. I am not referring to a procedural order or the first decision in a case divided into parts.

[33] I have already described the interim relief requested by the complainant.

B. Previous Board decisions, and why I do not feel bound by them

[34] The Board has considered its jurisdiction to grant interim relief under the *FPSLRA* and its predecessor, the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35). Its decisions have gone both ways.

[35] The Board has granted interim relief in *Canadian Air Traffic Control Association v. Treasury Board (Transport Canada)*, [1997] C.P.S.S.R.B. No. 73 (QL). The Board granted an interim order that two employers pay certain outstanding union dues to a bargaining agent before making a decision on the merits of whether those employers owed those dues to the bargaining agent. However, the Board provided no reasons for deciding it had this jurisdiction. Additionally, from reading the decision, it may not be interim relief but instead an order rendered with reasons to follow; further, there is no indication that the employers opposed granting interim relief in that case. Therefore, this decision is unhelpful and of doubtful precedential authority.

[36] In *Public Service Alliance of Canada v. Treasury Board*, [1999] C.P.S.S.R.B. No. 98 (QL), the Board decided that it had the jurisdiction to grant interim relief but decided not to grant it in that case. The Board's reasons for concluding that it had this jurisdiction were brief. It stated:

> *[17] Under section 21 of the PSSRA, "The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act…". In fulfilling its mandate, the PSSRB must hold the necessary tools to ensure that the staff relations system set out in the PSSRA is administered in an effective and timely manner. The broad scope of the provisions contained in section 21 indicates to me that the legislator intended to give the Board the necessary authority to deal with the various*

> *situations that may arise in carrying out its mandate. Accordingly, I conclude that the Board has the authority, in the appropriate circumstances, to make an interim order.*

[37] The Board did not cite, and appears not to have considered, any of the case law I discuss later about the conditions for jurisdiction by necessary implication — some of which was decided after the Board made this decision.

[38] On the other hand, in *Marchand v. Deputy Head (Canada School of Public Service)*, 2015 PSLREB 63, the Board, sitting as an adjudicator, ruled that it did not have the jurisdiction to grant an interim order (which it called a "provisional execution"). The Board's reasons are set out at paragraphs 27 and 28 as follows:

> *27 With respect to the first question, I agree with the employer's position that a Board adjudicator does not have the power to grant the grievor's requested provisional execution. The Board's powers are listed in section 36 of the* Act. *Those of an adjudicator are listed in section 226 of the* Act. *The legislative provision that applies, section 226, does not refer to an interim power or to granting interim relief. In my opinion, a Board adjudicator must exercise only the powers assigned to him or her through the enabling statute, not more (*Ordon Estate*).*
>
> *28 I cannot ignore the fact that in the* Act, *the legislator did not explicitly express the intention to assign such a power to the Board or to one of its adjudicators. In my opinion, it is reasonable to deduce that that silence was intentional as the legislator assigned that power when it was deemed appropriate (see section 18.2 of the* Federal Courts Act *and paragraph 60(1)(a.2) of the* Canada Labour Code*).*

[39] The Board relied on that case and came to the same conclusion in *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48, in which it reproduced an earlier, informal decision as follows:

> …
>
> *The Board is a creature of statute. It is not a Superior Court of inherent jurisdiction. Its mandate and powers are circumscribed by its enabling legislation.*
>
> *In Division 13 of the* Act *Parliament sets out the jurisdiction of the Board with respect to complaints. Section 192(1) states that if the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of.*

> *Section 192(1) of the* Act *clearly sets, as a pre-condition of the Board granting relief, that the Board determine if the complaint made is well founded. From the material set out by the parties, it appears that there are issues in dispute, which cannot be addressed without a hearing by the Board. As such, at this time the Board cannot, based on the very limited material before it, determine if the complaint is well founded.*
>
> *The Board has addressed the issue of interim relief in* Marchand v. Deputy Head (Canada School of the Public Service), *2015 PSLREB 63, wherein it held at paragraphs 27 and 28 that the Board's powers are as they are explicitly set out in the legislation. The powers of the Board are set out in s. 20 of the* Federal Public Sector Labour Relations and Employment Board Act, *S.C. 2013, c. 40, s. 365. Those powers are limited to pre-hearing procedural processes and do not authorize the interim relief that the complainant is seeking.*
>
> …

[40] Both cases focussed on what is now s. 20 of the *Federal Public Sector Labour Relations and Employment Board Act* (what used to be s. 36 of the *FPSLRA* when *Marchand* was decided). That provision sets out some of the procedural powers of the Board. The Board did not consider the doctrine of jurisdiction by necessary implication. The statutory anchor for that jurisdiction is s. 12 of the *FPSLRA*, which the Board did not consider in those two cases. The Board also did not consider its previous decision in *Public Service Alliance of Canada v. Treasury Board* that I outlined earlier.

[41] Finally, the Board granted an interim order in *Senate Protective Service Employees Association v. Parliamentary Protective Service*, 2019 FPSLREB 39. However, that case was decided under different legislation (the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd supp.)), and the parties do not appear to have argued over whether the Board has the jurisdiction to grant interim relief.

[42] I have decided that I cannot simply follow any of these decisions. None of them comprehensively address the key issue in this case — namely, whether the Board has the jurisdiction to grant interim relief by necessary implication. As I will explain, I end up agreeing with the Board in *Marchand* that Parliament's silence about interim relief was intentional and crucial in this case. However, unlike the Board in *Marchand*, I cannot agree that it is simply "reasonable to deduce" that this omission was intentional. Instead, as I will explain, I reach the same conclusion only after considering the broader statutory context, both federally and in provincial jurisdictions.

C. Test for jurisdiction by necessary implication

[43] The complainant submits that the Board has the power to grant interim relief by necessary implication. Section 12 of the *FPSLRA* grants the Board the power to exercise powers "… incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act …". As I said earlier, s. 12 is the statutory anchor for the Board's jurisdiction by necessary implication.

[44] The leading authority about jurisdiction by necessary implication remains *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4. In that case, the Supreme Court of Canada concluded that the Alberta Energy and Utilities Board did not have the jurisdiction (either expressly or by necessary implication) to allocate the proceeds of the sale of a utility's assets to consumers. In reaching this conclusion, the Supreme Court adopted these five circumstances for adopting jurisdiction by necessary implication, at paragraph 73:

> - *[when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;*
> - *[when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;*
> - *[when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;*
> - *[when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and*
> - *[when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.*

[45] The Federal Court of Appeal recently summarized these conditions as follows: "The doctrine may be applied in circumstances where the Court is satisfied that the jurisdiction sought is essential to the administrative body fulfilling its statutory mandate **and is not one to which the legislature has clearly addressed its mind** …" [emphasis added] (see *Hershkovitz v. Canada (Attorney General)*, 2021 FCA 38 at para. 9).

[46] I have decided this case on the basis of that last question.

D. Parliament has decided not to grant the Board the power to grant interim relief

[47] I have concluded that Parliament has addressed its mind to the question of whether the Board has the power to grant interim relief and that it has decided not to grant it this power. I have reached this conclusion for two reasons.

1. A proposed amendment to grant the Board interim relief was not adopted

[48] First, Parliament decided not to adopt an amendment that would have given the Board the express power to grant interim relief. The current *FPSLRA* was introduced at first and second reading in 2003. After passing second reading, it was referred to the Standing Committee on Government Operations and Estimates. At the committee stage, a member proposed an amendment that would have given the Board the power to grant an "interim order". His rationale for the proposal was that it would give the Board the same power as the Canada Industrial Relations Board to issue interim orders; see House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 37-2, No. 34 (May 1, 2003) at 1050 (Mr. Robert Lanctôt). The committee voted against recommending that amendment; see House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 37-2, No. 38 (May 8, 2003) at 1045.

[49] As the Supreme Court of Canada explained in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 ("*Mowat*") at para. 44, "… there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation." The issue in *Mowat* was whether the Canadian Human Rights Tribunal had the jurisdiction to award legal costs in favour of a successful complainant. Part of the reason the Supreme Court concluded that it did not was that there had been a proposed amendment to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) to give the tribunal this jurisdiction, but the amendment did not pass.

[50] This case is very similar in that there was a proposed amendment to give the Board the power to grant interim relief, but this amendment did not pass. The failed amendment is direct evidence that Parliament addressed its mind to the issue and decided against conferring the power to grant interim relief upon the Board.

[51] I acknowledge that the Federal Court of Appeal recently stated that "… the statements of witnesses (other than departmental officials) and committee votes

on amendments do not provide authoritative statements of Parliament's intent …" (see *Westjet v. Lareau*, 2025 FCA 149 at para. 107). I have decided that the committee vote is relevant in this case, unlike in *Westjet*.

[52] *Westjet* was about the interpretation of s. 86.11(1)(b)(ii) of the *Canada Transportation Act*, (S.C. 1996, c. 10) and s. 11 of the *Air Passenger Protection Regulations* (SOR/2019-150). In brief, the statute authorized the creation of the regulations about an air carrier's obligations to passengers in the case of flight delay, cancellation, or denial of boarding. The regulations enacted under that power provide compensation for disruptions that are within a carrier's control and not required for safety purposes. *Westjet* was an appeal from a decision of the Canadian Transportation Agency holding that a crew shortage (when a first officer called in sick) was within the carrier's control because the carrier did not show that it was unavoidable despite proper planning.

[53] The appellant argued that the Canadian Transportation Agency misinterpreted the regulations, in particular the phrase "required for safety purposes." The appellant argued that a broader interpretation of that term was consistent with the purpose of the legislation. The appellant buttressed its argument by pointing out that the House of Commons Committee studying the statute refused to adopt a proposed amendment to the effect that compensation would not be required only where a flight cancellation resulted from extraordinary circumstances that could not be avoided despite the taking of reasonable measures.

[54] I have come to a different conclusion from the Federal Court of Appeal about the relevance of committee amendments in this case.

[55] The nature of the issue is different in the two cases. The issue in *Westjet* was about the interpretation of the regulation. The Federal Court of Appeal concluded that the failed amendment to the legislation was not helpful in assessing the purpose of the regulation. The Federal Court of Appeal characterized the failed amendment as extrinsic evidence because that is was it was — a failed amendment to legislation says very little about the purpose behind a regulation enacted years later.

[56] By contrast, the issue before me is whether the power to grant interim relief is necessarily implied into legislation. I am not using the failed amendment in an effort to ascertain the purpose behind the legislation. Instead, I am using it to discover

whether this power is "one to which the legislature has clearly addressed its mind." Even if a failed amendment does not provide an authoritative statement of Parliament's intent as stated in *Westjet*, it still shows that the issue or power is one to which Parliament has addressed its mind.

[57] The Federal Court of Appeal cited *R. v. Sharma*, 2022 SCC 39 at para. 90 in support of its statement of law. However, *Sharma* was about statements of purpose in the legislative record. The Supreme Court of Canada cautioned against using statements by members of Parliament as indicators of Parliament's purpose, but stated that legislative history can be useful in determining legislative purpose. It went on to state at paragraph 90 that "two stages in the legislative process are of particular assistance …": a Minister's introduction of the legislation at second reading, and explanations provided to the committee by the Minister, Parliamentary Secretary, or departmental officials.

[58] *Sharma* says nothing about amendments to legislation voted down at committee. Also, *Sharma* does not suggest that those two stages of the legislative process are the only parts that can be of assistance. The Federal Court of Appeal went further than the Supreme Court of Canada did in *Sharma*. Given the different issue before me, I am not obligated to do the same.

2. The broader legal environment in labour relations is that the power to grant interim relief is provided expressly

[59] Second, the broader legal environment is that when legislatures grant a labour tribunal the power to grant interim relief, they do so expressly.

[60] The pattern in labour relations statutes is to give labour boards the power to grant interim relief expressly. As mentioned in *Marchand*, the *Code* gives the CIRB the express power to grant interim relief. Parliament added s. 19.1 to the *Code* (which gives it this power) in 1998. In 2017, Parliament amended s. 19.1 so that it applied to the CIRB's power under the entire *Code*; before that, it applied only to the CIRB's powers in Part I of the *Code*, which deals with labour relations and not health and safety. It is telling that Parliament expressly set out this power for the CIRB and then expanded this power to deal with health-and-safety matters but that it did not do so for the Board.

[61] This pattern of expressly conferring jurisdiction to grant interim relief is repeated in provincial jurisdictions. Legislatures in Alberta (*Labour Relations Code*, RSA 2000, c L-1, s. 12(2)(e)), British Columbia (*Labour Relations Code*, RSBC 1996, c 244, s. 133(5)), Manitoba (*The Labour Relations Act*, CCSM c L10, s. 31(2)), New Brunswick (*Industrial Relations Act*, RSNB 1973, c I-4, ss. 106(9) and (11)), Nova Scotia (*Trade Union Act*, RSNS 1989, c 475, ss. 51(2) and 52(3)), Ontario (*Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s. 98(1)), Prince Edward Island (*Labour Act*, RSPEI 1988, c. L-1, ss. 34.2(3) and 38(4)), Quebec (*Act to establish the Administrative Labour Tribunal*, CQLR c T-15.1, s. 9(3)), and Saskatchewan (*The Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 6-103(2)(d)) have codified their labour boards' power to grant interim relief. The express powers in Nova Scotia and Prince Edward Island are limited to certain circumstances.

[62] As the Supreme Court of Canada stated at paragraph 57 of *Mowat*, "… cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive …". It is important that so many legislatures have included express language giving labour boards the jurisdiction to grant interim relief; if interim relief was necessarily implied for labour boards to do their work, there would have been no need for so many legislatures to provide express power. Additionally, Parliament was aware of this pattern (as seen by the way it drafted the *Code*). The absence of similar express power in the *FPSLRA* is telling.

[63] I found the Ontario legislation particularly instructive. In 1993, Ontario amended the *Labour Relations Act* (R.S.O. 1990, c. L. 2) to expressly grant the Ontario Labour Relations Board (OLRB) the power to grant interim relief (S.O. 1992, c. 21, s. 37). In 1995, Ontario repealed the *Labour Relations Act* and replaced it with legislation of the same name that I cited earlier. That legislation repealed the 1993 provisions about interim orders and retained only the OLRB's power to make interim orders with respect to procedural matters. In *Ontario Public Service Employees Union v. Ontario (Management Board of Cabinet),* 1996 CanLII 11200 (ON LRB), the OLRB concluded that it still had the express power to grant interim relief under s. 16.1 of the *Statutory Powers Procedure Act* (R.S.O. 1990, c. S. 22). In 1998, Ontario amended the *Labour Relations Act* again to close that loophole by stating that the power to grant interim relief under the *Statutory Powers Procedure Act* did not apply to the OLRB (S.O. 1998, c. 8, s. 10). Ontario restored some limited power to grant interim relief in 2005 (S.O.

2005, c. 15, s. 7) and then full authority to grant interim relief in 2017 (S.O. 2017, c. 22, Sched. 2, s. 10).

[64] The debate in Ontario over the OLRB's ability to grant interim relief was notorious and contentious in the labour relations field, particularly in the 1990s (see, for example, M. Cornish, H. Simand, and S. Turkington, *Ontario's Interim Order Power - How a Procedural Reform Brought Substantive Change*, (1996) Canadian Labour & Employment Law Journal 4). Parliament showed its own answer to that controversy by giving the CIRB the power to grant interim relief in 1998 (in legislation introduced in 1996).

[65] This legal context helps convince me that the absence of an express power to grant interim relief in the *FPSLRA* was not an oversight. The drafters of that legislation, introduced in 2003, would have been well aware of the debate over whether labour relations boards should have the power to grant interim relief. This helps show that Parliament's exclusion of this express power in the *FPSLRA* was deliberate. To put this another way, "… a review of related statutory schemes reveals that the legislature [in this case, Parliament] has turned its mind …" (from *Kosicki v. Toronto (City)*, 2025 SCC 28 at para. 52) to the issue of interim power and decided not to grant this power to the Board.

[66] Finally, the Supreme Court of Canada, in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626, concluded at paragraphs 16-18 that the *Canadian Human Rights Act* does not set out an implied power to grant interim relief. The complainant points out that this case was about different legislation and, therefore, is not binding in this case. I agree. However, this decision was still a warning to Parliament that it could not blithely assume that a tribunal's power to grant interim relief could be implied. If anything, it was a warning that such power needed to be express. Parliament's decision not to include express power in the face of this warning is telling.

[67] For these reasons, I have concluded that Parliament turned its mind to this issue and that it decided against the Board having the power to grant interim relief. Parliament rejected a proposed amendment to the *FPSLRA* to give the Board this power, while having earlier granted this power expressly to the CIRB. It did this in the context of a common pattern of labour relations legislation that gave this power

expressly, shortly after a period when this issue was notorious and contentious in Ontario. Parliament deliberately chose not to grant the Board this power; therefore, I cannot conclude that the Board has this power impliedly.

E. The power to grant interim relief is not grounded in the text of the *FPSLRA*

[68] My decision so far addresses the complainant's submission that the Board has the power to grant interim relief by necessary implication. However, I acknowledge that the existence of power by necessary implication is controversial. Professor Paul Daly, for one, suggests in "Against *ATCO*: Text, Purpose & Context, not 'Implied' and 'Express' Powers", (2024) 54 Advoc. Q. 315 that the *ATCO* test is unhelpful and that issues like the one raised in this case should be resolved by using the standard tools of statutory interpretation. The usual approach to statutory interpretation would lead me to the same result that the Board does not have the power to grant interim relief.

[69] Statutory interpretation requires that I consider the text, context, and purpose of the statute. Of the three, the text of the legislation takes precedence, as it is the "anchor of the interpretive exercise" (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24).

[70] As I mentioned earlier, the statutory anchor of the Board's implied powers is s. 12 of the *FPSLRA*. That section states that the Board "… may exercise the powers … as are incidental to the attainment of the objects of this Act …". On its face, this appears to be a very broad grant of jurisdiction that could include interim relief. However, broadly worded basket clauses like s. 12 cannot be read in isolation and must be read in context with the legislation as a whole; see *Kennedy v. Deputy Head (Department of Citizenship and Immigration)*, 2023 FPSLREB 118 at paras. 53 and 54. One way in which s. 12 must be interpreted is by examining the rest of the statute to ensure that the implied powers are not broader than those expressly provided for elsewhere.

[71] There are other provisions in the *FPSLRA* that point away from the Board having the power to order interim relief.

[72] Section 194 of the *FPSLRA* deals with illegal strikes and sets out a number of preconditions to a strike. Those preconditions include that various applications about essential services be "finally disposed of by the Board" (see ss. 194(1)(g)(ii),

194(1)(h)(ii), and 194(1)(i)(ii)). This is an indication that the Board cannot grant an interim essential services order that would permit a strike.

[73] Subsection 192(1) of the *FPSLRA* grants the Board the power to grant remedies in response to unfair labour practices. It states that the Board may make any order it considers necessary in the circumstances "If the Board determines that a complaint … is well founded …". The *FPSLRA* requires the Board to determine the complaint before issuing an order — not that it can issue an order after considering the equitable issues that go into granting interim orders. The Board made this same point in *Abi-Mansour*, which I quoted from earlier.

[74] Similarly, s. 228(2) of the *FPSLRA* deals with the power of the Board when adjudicating a grievance. It permits the Board to make an order "after considering the grievance." Like s. 192(1), it requires the Board to consider the grievance before granting an order, not that it consider the equitable issues that go into granting interim orders.

[75] Finally, this case involves Part II of the *Code*. The Board's jurisdiction to deal with the *Code* is in s. 240 of the *FPSLRA*. Paragraph 240(a)(ii) states that the term "Board" in ss. 133 and 134 of the *Code* is to be read as a reference to the Board. Notably, it does **not** say that the Board is exercising the powers of, or stepping into the shoes of, the CIRB. Instead, s. 240(c) states that "the provisions of this Act [i.e. the *FPSLRA*] apply, with any necessary modifications, in respect of matters brought before the [Board]." This means that the Board cannot take advantage of the powers of the Canada Industrial Relations Board, in particular its power to grant interim relief under the *Code*.

[76] For these reasons, the text of the legislation does not support the Board having the power to grant interim relief.

[77] In respect of context, in his paper Professor Daly points out that the more coercive or consequential a power is, the more clear the statutory authority must be. For example, in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724 the Supreme Court of Canada concluded that the Canada Labour Relations Board did not have the implied power to order the pre-hearing production of documents in part because of the "coercive" nature of that power (see page 747); in other words, the more coercive the power, the more expressly it needs to

be stated. This context leads away from the conclusion that the Board has the power to grant interim relief, as such an order is coercive by its nature and typically requires express language. This context is especially relevant in this case in light of the pattern of legislation expressly granting the power to grant interim relief, which I already set out in detail earlier: Parliament and provincial legislatures have been careful to expressly grant labour boards the power to grant interim relief and have also limited that power when they felt it appropriate.

[78] Turning to purpose, it is of little assistance here. The purposes of the *FPSLRA* are set out in its preamble. The closest those purpose-statements come to the issue of interim relief is that of "… fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment" — it is at least arguable that the power to grant interim relief may contribute to the "efficient" resolution of matters. However, as I wrote in *Kennedy* at para. 76, "… The Board does not have jurisdiction over a matter solely because there are good policy reasons for it or because taking jurisdiction is consistent with the purposes of the *Act* …". The *FPSLRA*'s purposes are further away from the issue of interim relief than they were in *Kennedy* about the enforcement of settlement agreements (which more closely touched on various purposes of the *FPSLRA*).

[79] In conclusion, I prefer to follow the approach in *ATCO* until directed to do otherwise by an appellate court. That approach includes examining legislative history and the surrounding context of legislation to determine whether there are indications that Parliament turned its mind to a particular power and decided not to grant it to a tribunal. In this case, Parliament did turn its mind to the issue of interim relief and decided not to grant such power to the Board. However, even were I to follow a more classic approach to statutory interpretation, I would reach the same result in light of the text, context, and purpose of the *FPSLRA*.

IV. Even if the Board had the jurisdiction to grant interim relief, I would not exercise it in this case

[80] Out of an abundance of caution, I have considered whether I would have granted the request for interim relief if the Board had the jurisdiction to grant it. For the reasons set out as follows, I would not have granted this relief.

A. The approach to interim relief

[81] In issuing directions to the parties with a timetable for written submissions, I directed them to the seminal test for interim relief in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"), namely, whether the applicant has demonstrated a serious issue to be tried, whether the applicant would suffer irreparable harm in the absence of interim relief, and whether the balance of convenience favours granting interim relief. I also drew the parties' attention to *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 15, where the Supreme Court of Canada identified that the threshold for a mandatory injunction (i.e., an interim order that directs a party to undertake a positive course of action) is a strong *prima facie* case instead of a serious issue to be tried. The parties made submissions about those three elements accordingly.

[82] However, labour boards with the jurisdiction to grant interim relief have identified other factors. The OLRB has identified the test as being "… does the making of an interim order, of whatever kind, make labour relations sense in all of the circumstances" (from *The Society of Energy Professionals, IFPTE Local 160 v. National Judicial Institute*, 2018 CanLII 51312 (ON LRB) at para. 38). It listed these nine factors to consider, not all of which are relevant in every case:

> …
>
> *i) The purposes of the Act;*
>
> *ii) The nature of the interim order sought;*
>
> *iii) The urgency of the matter;*
>
> *iv) The apparent strength of the applicant's case and defence that the responding party may have;*
>
> *v) The balance of convenience/inconvenience;*
>
> *vi) The balance of labour relations and other harm;*
>
> *vii) Whether the alleged damage is irreparable or not;*
>
> *viii) Delay;*
>
> *ix) Any other labour relations considerations.*

[83] The British Columbia Labour Relations Board considers these five criteria when deciding whether to grant interim relief (see *White Spot Restaurants Limited*, IRC No. C274/88, [1988] B.C.L.R.B.D. No. 274 at para. 10):

> *1) Whether an adequate remedy would be unavailable to the applicant at the final hearing without an interim order;*
>
> *2) The existence of a strong link between an alleged breach of the Code, the consequences of the breach and the interim relief sought;*
>
> *3) The claim must not be frivolous or vexatious and must usually be based on a prima facie case;*
>
> *4) An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits;*
>
> *5) An interim order must be consistent with the purposes and objects of the Code. The discretion to grant an interim order will not be exercised absent a critical labour relations purpose or if the granting of the interim order would grant the entire remedy sought or otherwise tilt the balance in favour of one party.*

[84] Other labour boards hew more closely to the common law test articulated in *RJR-MacDonald*.

[85] The Saskatchewan Labour Relations Board applies a simpler test: "… (1) whether the main application raises an arguable case of a potential violation under the *Act*; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application" (from *Saskatchewan Government and General Employees' Union v. Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) at para. 30).

[86] The Alberta Labour Relations Board uses the three-step approach from *RJR-MacDonald*, although it has also acknowledged that it does not need to follow that approach and that it must remain mindful of the labour relations context; see *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 212 v. Camel Entertainment, Redemption Alberta Inc.*, 2015 CanLII 18514 (AB LRB) at paras. 20, 21, and 40.

[87] Finally, the CIRB also follows the three-stage test in *RJR-MacDonald* but has also pointed out that it is not required to do so and that when assessing those factors, it must ensure that it is guaranteeing the "… fulfilment of the objectives of the *Code*" (see *Syndicat des employées et employés de MusiquePlus (CSQ) v. V INTERACTIONS Inc. and MusiquePlus Inc.*, 2017 CIRB 851 at para. 48).

[88] In my opinion, there are two common themes across labour boards. First, the approach in *RJR-MacDonald* remains sound. Even the lengthier tests or lists of factors adopted in Ontario and British Columbia contain, at their core, the elements of the strength of the case and the harm to each party — i.e., the *RJR-MacDonald* approach. Second, the assessment of those factors must take into account the labour relations context surrounding the application.

[89] If the Board had the jurisdiction to grant interim relief, I would apply the three-part test in *RJR-MacDonald*, while being mindful of the labour relations context of the application.

B. Serious issue to be tried

[90] It is difficult to assess whether there is a serious issue to be tried in this complaint, for two reasons. First, as I stated earlier, the complainant is basing her argument on AI hallucinations. This makes it difficult to determine whether she has raised a serious case.

[91] Second, the burden of proof in this complaint rests on the respondent; see s. 133(6) of the *Code*. In *National Judicial Institute*, the OLRB pointed out that the strong *prima facie* case threshold was inappropriate "… particularly in areas where at the hearing of the main application a reverse onus applies" (see para. 37). I would go further and suggest that when the reverse onus applies, the issue is whether the complainant has raised a serious issue that the respondent has not discharged its burden of proof. This is a low threshold for a complainant to meet.

[92] In assessing this issue, I have divided the complainant's request for interim relief into two main parts.

[93] First, there is the request that the respondent continue her wages from the date of her work refusal. Initially she requested an order continuing her wages to May 15 (which, in one of her submissions, is the date of the Head's decision); she later expanded her request to an order to pay her wages indefinitely. I have concluded that there is no serious issue to be tried on that issue.

[94] Section 147 of the *Code* reads as follows:

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee,* ***or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked****, or take any disciplinary action against or threaten to take any such action against an employee because the employee*	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied* ***ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé*** *s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*
(a) *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*	***a)*** *soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*
(b) *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*	***b)*** *soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*
(c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*	***c)*** *soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

[Emphasis added]

[95] The emphasized portion of s. 147 of the *Code* shows that an allegation about a refusal to pay a complainant falls within its ambit.

[96] The complainant's position is that in essence, she is entitled to be paid while this dispute is unfolding. While she cited the wrong provision of the *Code*, she is right in a very small part. Employees who are affected by a stoppage of work arising from a health-and-safety issue are entitled to be paid their wages despite not working, until the end of the shift or work period. The *Code* reads as follows:

128.1(1) *Unless otherwise provided in a collective agreement or other agreement, employees who are*	***128.1(1)*** *Sous réserve des dispositions de toute convention collective ou de tout autre accord*

affected by a stoppage of work arising from the application of section 127.1, 128 or 129 or subsection 145(2) are deemed, for the purpose of calculating wages and benefits, to be at work during the stoppage until work resumes or until the end of the scheduled work period or shift, whichever period is shorter.	*applicable, en cas d'arrêt du travail découlant de l'application des articles 127.1, 128 ou 129 ou du paragraphe 145(2), les employés touchés sont réputés, pour le calcul de leur salaire et des avantages qui y sont rattachés, être au travail jusqu'à l'expiration de leur quart normal de travail ou, si elle survient avant, la reprise du travail.*

[97] This means that there is a serious issue to be tried that the complainant may be entitled to be paid through the end of the scheduled work period (i.e., her workday) on the day she made the work refusal, but not after that day.

[98] The respondent argues that it offered her alternative work under s. 128.1(3) of the *Code* and that she was on unpaid sick leave on that day anyway, so that her wages were nil. However, as I stated earlier, the respondent bears the burden of proof in this complaint. While the respondent may ultimately be right, there is at least a serious issue to be decided about the alternative work and the remainder of her day after her work refusal.

[99] The complainant goes further and asserts an absolute legal entitlement to be paid until the Board has resolved her complaint. There is no support for that entitlement in the *Code*. The *Code* says that an employee may continue to refuse to work during the course of the investigation into the work refusal by management (s. 128(1)), the OHS Committee (s. 128(9)), and the Head (s. 129(1.3)). If the Head makes a direction for the respondent to take some step to eliminate a danger, the employee may continue to refuse to work until the respondent has implemented that direction (s. 129(6)). Once the Head decides that the danger does not exist, the employee must return to work and is not entitled to continue their work refusal (s. 129(7)).

[100] However, the *Code* says nothing about a requirement by the respondent to pay an employee their wages beyond the shift or scheduled workday in which the danger is identified. Subsection 128.1(1) is very clear that the obligation to pay an employee runs during the period in which the employee was supposed "… to be at work during the stoppage until work resumes or until the end of the scheduled work period or shift, **whichever period is shorter**" [emphasis added]. Subsection 128.1(2) goes on to provide that an employee due to work on the next shift impacted by a stoppage of

work is entitled to be paid for their shift unless they have been given at least one hour's notice not to attend work. Therefore, there is no serious issue to be tried on this part of the complaint; the *Code* does not require that complainant be paid her wages, except arguably for the rest of the day on which she made the work refusal.

[101] Second, there is the issue of the alleged overpayment. The respondent states that this was a *bona fide* overpayment that it happened to process almost immediately after the complainant's work refusal. The complainant denies the overpayment and alleges that it is a retaliatory financial penalty. As I said earlier, the respondent bears the burden of proof to show that the overpayment is not retaliatory or a financial penalty — in other words, that there is a *bona fide* overpayment to recover and that the timing of this recovery is unrelated to the complainant's work refusal.

[102] I do not have enough information or evidence at this stage to rule on this issue. In light of the burden of proof resting on the respondent, this means that there is at least a serious issue to be tried about the overpayment issue.

C. Irreparable harm

[103] The second element of the *RJC-MacDonald* test is that a party seeking an interim order must show that they would suffer irreparable harm if the interim order were not granted.

[104] Irreparable harm refers to the nature of the harm, not the magnitude. It is harm that "… cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (from *RJR-MacDonald*, at 341). As the Board put it in *Public Service Alliance of Canada v. Treasury Board*, at para. 18, after concluding that it had the jurisdiction to grant interim relief), "… financial harm is not sufficient in itself to warrant an interim order." In addition, the party seeking interim relief must adduce clear evidence that irreparable harm will follow if interim relief is denied. While a court may infer the existence of irreparable harm to social interests such as reputation, "[w]here the harm apprehended is financial, clear and compelling evidence is required …" (see *Newbould v. Canada*, 2017 FCA 106 at para. 29).

[105] The complainant is seeking interim relief that is about money: that she be paid and that the respondent be prevented from recovering an alleged overpayment. On its

face, this is not irreparable harm because she could recover the money she claims is owing to her if she is successful in the ultimate hearing of this complaint. The respondent argues that the complainant has not shown irreparable harm for this reason.

[106] However, a complete loss of income can, depending on the circumstances, constitute irreparable harm. As the Federal Cout put it in *Simon v. Canada (Attorney General)*, 2012 FC 387 at para. 79 (upheld in 2012 FCA 312, at para. 37):

> *[79] In my view, the estimated decline in income assistance rates under the Policy and the potential for ineligibility will cause emotional and psychological stress amounting to irreparable harm for some Recipients. Individuals who are reliant on income assistance are especially vulnerable even to small changes in the resources available to meet their basic needs and, for this reason, I have concluded that the Applicants have demonstrated irreparable harm.*

[107] A loss of income alone is not irreparable harm. However, there can be consequences flowing from that loss of income that constitute irreparable harm because the loss of income causes emotional or psychological stress that cannot be compensated for in damages after a later hearing.

[108] In this case, the complainant's personal statement says that as a result of being without income for (at that point) over three months, she has exhausted her personal savings, liquidated her home equity, incurred debt, and is at risk of defaulting on mortgage payments. She has provided no details about her finances, including whether she has other sources of income (such as social assistance) or family members who are supporting her.

[109] Additionally, the complainant stated in her personal statement that she has deferred critical medical treatment because she cannot afford it. In her reply submissions, the complainant identified two medical treatments that she is not undertaking because of financial strain.

[110] In her submissions, the complainant stated that she has documents supporting the claims made in her personal statement. I issued a direction advising her that I cannot consider any documents unless they are actually filed with the Board, and invited her to do so. In response, the complainant stated that she had over 100

exhibits but that she would file them only if she could do so without giving a copy to the respondent. I refused but directed that the complainant's documents would be subject to a temporary sealing order (pending later submissions about which of the documents, if any, should be sealed) and that the documents must be provided to the respondent's lawyer on a "counsel's eyes only" basis. The complainant sent a link to a Google drive that contained 44 documents (not over 100). The documents comprise correspondence between the complainant, the respondent, her union, and health-and-safety officials as well as screenshots of her pay file.

[111] Importantly, the complainant has filed no documents about her financial or medical circumstances. The only evidence I have about her medical circumstances are emails that she wrote arguing that she should not have to provide more medical information to the respondent. I do not have any evidence indicating whether or why she requires the medical treatments that she describes. I have no evidence explaining why those treatments are not covered by the healthcare plan covering employees who are on leave without pay.

[112] Finally, the complainant has not provided any information specifically about the alleged overpayment. I have no evidence that the respondent has taken any steps to collect the alleged overpayment beyond making a demand for its repayment.

[113] In conclusion, I conclude that the type of harm alleged by the complainant is capable of constituting irreparable harm. However, the complainant has not provided clear and compelling evidence to substantiate the existence of irreparable harm.

D. Balance of prejudice

[114] In light of my conclusions that the complainant has not demonstrated a serious issue to be tried (except for the overpayment issue) and has not demonstrated irreparable harm, it is unnecessary for me to consider the extent of the prejudice on the respondent if I were to grant the interim relief.

V. Procedural fairness

[115] On several occasions, the complainant expressed concern about the procedural fairness of the way the Board has addressed her claim for interim relief. I will address two of those concerns in particular.

[116] First, the complainant expressed concern when I drew the parties' attention to the Board's previous decisions concluding that it does not have the power to grant interim relief. I went so far as to say that, taking those cases at face value, my preliminary view was that the Board did not have this power. The complainant wrote to ask for assurance that this did not mean that I had pre-judged her application. I trust that my reasons make it clear that I had not and, in fact, the complainant convinced me that I could not simply follow those previous Board decisions and that I needed to look at this issue afresh.

[117] Second, the Board's mediation services attempted to help the parties resolve this complaint, unsuccessfully. The complainant has applied for judicial review of that mediation process. In addition, the complainant pointed out that the Board's mediator gave her own opinion on the likelihood of success in her complaint.

[118] The Board's mediation services are distinct from my role to decide this case. The complainant asked for "… new panel members free from the bias demonstrated during mediation." I was not aware of the mediator's opinion until the complainant disclosed it to me by writing to the Board and filing for judicial review of the mediation. The Board's mediators played no role in my decision-making.

VI. Request to preserve documents

[119] As set out earlier, one of the complainant's requests was for an order to "[p]reserve all payroll and leave records for independent forensic review." This request — unlike the other requests — is for an interim procedural order. However, the complainant made this request in her reply submissions, so the employer did not have an opportunity to address it. The complainant states that this order is necessary because of what she calls "tampering" with pay records.

[120] The Board has the express jurisdiction to grant an order that a party "… produce the documents and things that may be relevant" (see *Federal Public Sector Labour Relations and Employment Board Act*, s. 20(f)). Looked at broadly, the complainant's request could be considered to be part of a production order.

[121] I have decided not to grant this order in this case. I have reviewed the documents that the complainant says constitute "tampering" with evidence. I am not able to agree with her characterization at this time. Pay files are routinely amended to

include current information. The Board would need to hear evidence from the employer before concluding that it had "tampered" with evidence.

[122] With that said, I will remind the parties of their obligation to preserve arguably relevant evidence once a proceeding has begun. I will also remind the parties that, if they do not preserve this evidence, that may lead to a finding that the party has obstructed the administration of justice (see *Marston v. Deputy Head (Correctional Service of Canada)*, 2024 FPSLREB 158 at para. 335). However, it would be premature of me to make any conclusions about that issue at this time.

VII. Conclusion

[123] In summary, I have concluded that the Board does not have the jurisdiction to grant interim relief of the type requested by the complainant. Parliament addressed its mind to that issue and expressly decided not to grant the Board this power. Therefore, the Board cannot have such power by necessary implication.

[124] I also concluded that the complainant has not satisfied me that I should grant interim relief even if I had the power to do so. The complainant has not demonstrated a serious issue to be tried that she is entitled to be paid after her work refusal (except for the day of her work refusal). While the complainant has demonstrated a serious issue that the demand to repay an alleged overpayment contravenes s. 147 of the *Code*, she has not demonstrated that she would suffer irreparable harm if the interim relief was not granted.

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

(The Order appears on the next page)

VIII. Order

[126] The complainant's application for interim relief is denied.

[127] The complaint will be scheduled for a hearing in due course.

October 1, 2025

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